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## LEGAL LETTER/ JULY 2017

### MP 784: INCREASE IN THE VALUE OF FINES APPLICABLE TO THE INFRINGEMENT OF LAWS RELATED TO FOREIGN CAPITAL AND CURRENCY EXCHANGE

*Renata A. Pisaneschi and Victor B. Martinelli<sup>1</sup>*

1. On June 8, 2017, Provisional Measure 784 (“MP 784”) was published to govern the instruments of supervision and imposition of penalties by the Brazilian Central Bank (“BACEN”) and the Brazilian Securities Exchange Commission. Since then, several discussions have arisen about MP 784, which is currently being examined by the Legislative Branch, and there are many proposals for amendments, which may result in changes to its text.
2. It is important to stress that the scope of supervision of BACEN is quite wide and reaches all financial institutions, as well as other institutions that are part of the Brazilian Financial System and the Brazilian Payment System. Additionally, it is incumbent on BACEN to control foreign capital. The present letter has the purpose to briefly discuss the rules of MP 784 about penalties applicable to infringement of laws related to foreign capital and currency exchange.
3. Law 4131/62, which governs the investment of foreign capital in Brazil, provided for the imposition of penalties for the breach of its rules, including those relating to the registration of foreign capital, remittances of funds overseas, and currency exchange procedures.
4. The maximum amount of such penalties, since Provisional Measure 2224/2001 came into force, was R\$ 250,000.00.
5. This same limit also applied to the penalties imposed by BACEN for the breach of the registration of foreign capital in domestic currency<sup>2</sup>, and violations to the obligation to declare to BACEN goods, values and assets held abroad<sup>3</sup>.

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<sup>2</sup> Governed by Law 11371/ 2006.

<sup>3</sup> Originally established by Decree-Law 1060/69.

- 6.** Resolution 4104/2012 of the National Monetary Council consolidated the fines applying to breaches to said rules and established in any case the application of the lowest value between two criteria, namely, (i) a given percentage of the value of R\$ 250,000.00, and (ii) a given percentage of the value to be declared to BACEN, which percentages vary according to the infringement.
- 7.** In addition to the rules about foreign capital, in other cases, in particular in cases of violations typified as private international credit offsetting<sup>4</sup> or illegitimate exchange transactions<sup>5</sup>, the maximum amount of fines corresponded, since 2006, to the overall transaction value.
- 8.** With the publication of MP 784, infringements to the legislation on foreign capital and currency exchange were expressly included in the list of violations subject to the rules of this provisional measure, as applicable.
- 9.** Firstly, it is clear in MP 784 that such infringements will be punished with a fine (rather than other forms of penalty). However, a new limit for fines was established for the BACEN punitive proceedings, which corresponds to the highest of two values: (i) 0.5 percent on the revenue for services and financial products calculated in the year preceding the violation (or, in the case of continuation, preceding the last violation); and (ii) R\$ 2 billion.
- 10.** It can be immediately noted that the increase of the limit of fines is substantial, from R\$ 250 thousand to at least R\$ 2 billion.
- 11.** Considering the likely low relevance of the previous value in the present scenario, a real increase of the fine should be appropriate to disincentive illegal acts; however, the amount brought by MP 784, if applied in full, seems manifestly excessive and disproportionate in many cases, including in case of infringements of the foreign capital legislation.
- 12.** Anyway, if the MP 784 is converted into law and this amount is maintained, the National Monetary Council should regulate the application of such penalties, replacing the mentioned Resolution 4104, when lower limits for these infringements might be defined.
- 13.** Notwithstanding the above, MP 784 establishes that BACEN should observe certain criteria to apply the penalties, including the seriousness and duration of the infringement, the degree of the damage caused, the benefit earned or intended, the offender's financial capacity, the transaction value, the recidivism, and possible collaboration of the offender to clarify the infringement. However, these criteria, if taken alone, allow some degree of subjectivity in the analysis of the case and are not a guarantee of reasonableness in determining the value of fines to be imposed.

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<sup>4</sup> Set forth in Decree-Law 9025/46.

<sup>5</sup> Provided for in Decree 23258/33.



**14.** Among other new procedures, MP 784 provides for the possibility of signing a term of commitment with BACEN so that a punitive proceeding is not initiated or is suspended. In these cases, the offender must cease the conduct or its harmful effects, correct irregularities and indemnify losses, when applicable, and comply with other conditions that may be agreed.

**15.** Another possibility at the discretion of BACEN is not to file a punitive proceeding when the level of harm is low and BACEN has more effective instruments, observed the principles of purpose, reasonability, and efficiency.

**16.** Finally, MP 784 also establishes the leniency agreements between BACEN and individuals or legal entities that declare the practice of infringements, resulting in the extinction of the punitive action or reduction of the penalty applicable, by means of effective collaboration for finding the facts.

**17.** In conclusion, it must be considered that the procedures for registration of foreign capital and foreign exchange transactions have been greatly simplified in recent decades; the remaining obligations refer essentially to the provision of true and complete information on the electronic systems, meeting deadlines and keeping documentary support. Thus, one expects that the regulations on the application of fines to infringements related to these matters be appropriate and reasonable.

São Paulo, July/2017



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This legal letter contains information and general comments on the matter. In specific cases, it is advisable to rely on proper legal assistance before adopting any concrete actions relating to the matters dealt with herein.