# DOING BUSINESS IN BRAZIL

# ADTECHS

BAPTISTALUZ ADV

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# ABOUT
# **this guide**

This is a guide for international companies interested in operating in the Brazilian adtech industry. Here, you will find a fast and introductory summary with indispensable information that must be taken into consideration when starting or investing in a company in Brazil.

We will begin by presenting legal insights regarding the Brazilian adtech sector, addressing topics like regulatory challenges and marketing strategies. Later, in the second chapter, we will present a short overview on the legal and political structure of the country, then an introduction to the Brazilian industry, presenting some specific legal matters on Commercial, Tax, Labor, Data Protection Law and Foreign Investment.

# ABOUT
# **us**

Founded in 2004, Baptista Luz Advogados is a full-serce legal boutique that covers all areas of Corporate Law, with prominent practices in diverse sectors of the economy, such as technology, internet, financial institutions, advertising, entertainment, real estate, transportation, retail, and agribusiness, among others. We have extensive experience with cross-border negotiations, and our branches are present in four different Brazilian cities: São Paulo, Florianopolis, Porto Alegre, and Londrina.

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CHAPTER 1

# Everything you need to know to invest in the Brazilian AdTech Industry

In a study published in 2019, “Digital AdSpend Research”, the Brazilian Interactive Advertising Bureau (IAB-Brasil) estimated that the total investment in digital media in Brazil was R$ 16,118,374,000.00. In the global scenario, it is estimated that investment in digital media, compared to investment in offline media, is around 39% (USA), 52% (UK), 30% (MX), and 55% (CAN). In Brazil, this average is 33%, with a relevant growth projected for the coming years. Also, there is a large amount of investment in mobile media, when compared to desktop and tablets: this average is 67%, exceeding the USA’s investments in mobile media, for example.

Another topic worth mentioning is the intensive use of programmatic media in Brazil, in which purchases via Facebook Self Served were the most significant, representing 26% of the investments, followed by the Google AdWords platform with 25%. The percentage of direct purchases (22%), Open RTB (10%), Ad Networks (6%), private auctions (4%), Bing Self Served (3%), and guaranteed programmatic (2%) also stand out. These data indicates that most digital media purchases in 2018 were performed in an automated way. As for the LatAm market, it is relevant to point out that the growth of programmatic media has increased, as the use of mobile becomes more significant: mobile accounted for 63% of LatAm programmatic digital display ad spend in 2019. According to a study published in 2020 by the IAB: *“as internet usage increases, video content is growing in prominence. Brazil, one of the largest markets for programmatic video ad spend, is projected to be the 6th largest programmatic video ad market in the world this year”.*

To help understanding the current Brazilian scenario and the potential of the adtech market, it is also important to highlight that 45% of agencies and advertisers declare to run monthly influential marketing campaigns; Brazil is the second in the ranking of countries that spend more time on social networks; and 74% of Brazilians have access to the internet, with 58% using the web only with cell phone. Also, the Brazilian Micro and Small Business Support Service (SEBRAE) published research that indicates that small businesses represent a heavy use of social networks and digital advertising. Together, these data illustrate the potential that the Brazilian market presents for investments in the adtech industry.

The **"Doing Business in Brazil: AdTech Industry"** presents the specificities of the functioning of this market in Brazil to enable an efficient and safe investment. If you want to get deeper into any of the subjects, please contact us:

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**Enjoy your reading!**

# REGULATORY

## *What is the legal framework for digital advertising and marketing in Brazil?*

*Currently there is no specific regulation on this subject in Brazil. As a rule, the general legal framework for advertising is also applicable to digital advertising and marketing.*

**You can find the most relevant rules below**

**i. Brazilian Constitution;**
*It provides the principles that may be associated to advertising, such as freedom of speech, free enterprise and free competition.*

**ii. "CDC" - Consumer Protection Code (Federal Law n. 8,078/1990);**
*The CDC sets forth consumer protection and defense standards.*

**iii. "LGPD" – General Data Protection Law (Federal Law n. 13,709/2018);**
*It regulates the activities related to processing personal data of a natural person. Any processing of personal data must be supported by a valid, legitimate, and adequate legal basis for the purpose(s) of the processing in question.*

**iv. Brazilian Internet Civil Rights Framework (Law n. 12.965/2014)**
*It has relevant provisions (among others) applicable to activities carried out on the internet regarding free enterprise, free competition, consumer protection, and liability of service providers (setting forth the judicial notice and takedown system).*

### v. General Provisions for Advertising (Law n. 4,680/1965) and Decree n. 57,690/66;

*Law n. 4,680/1965 regulates advertiser and advertising agent's activities, among other provisions. Decree n. 57,690/1966 regulates Law n. 4,680/1965.*

### vi. Brazilian Code of Self-Regulation on Advertising of CONAR;

*The National Council of Self-Regulation of Advertising ("CONAR") is a self-regulatory organization for the ad-vertising sector (both for the online and the offline seg-ments) in Brazil. Its members comprehend advertisers' representatives, media companies and communication platforms, advertising agencies, among others.*

### vii. Advertising Standard Rules;

*The Standard Norms Executive Council ("CENP") is a self-regulatory entity, which acts on the advertising market (but does not regulate advertising content, as CONAR does). It has published the Standard Norms for Advertising Activities, which regulate the financial and the operational aspects of the relationships between advertisers, agencies, and publishers. It is not mandatory to join CENP and to follow its Standard Norms. While CENP is highly respected among the "offline media", the online sector has rarely adopted its rules.*

### viii. "ECA" - Statute of the Children and Adolescent (Federal Law n. 8,069/1990);

*ECA stablishes rules for the protection of children up to 12 years old and adolescents, aged from 12 to 18 years old. It does not provide for specific regulations on ad-vertising, however, ECA and other statutes stablish rules that can limit the advertising content for some audiences*[1].

### ix. Federal Law n. 5,768/71, Decree n. 70,951/1972 and Ordinance n. 41/2008;

*These statutes regulate the free distribution of prizes for advertising purposes carried out through sweepstakes, gift certificates, contests or similar modalities.*

[1] *Publicidade infantil e influen-ciadores mirins no Brasil Availa-ble at <https://baptistaluz.com.br/institucional/consideracoes-ju-ridicas-sobre-pu-blicidade-infantil--no-brasil/> Access on 10/28/2020 (free translation).*

**x. Specific Regulation on Advertising.**
*E.g. ANVISA's Regulation on advertisement of drugs; the Central Bank's Regulation on advertisement of banks etc.*

## *Is there a required certification for agencies to work with digital advertising?*

***No.* Any agency can work with digital advertising in Brazil.** *However, CENP may grant a specific certification for digital advertising agencies that comply with the Standard Norms on Advertising. In this case, the certified agency shall be entitled to "standard agency discount" of not less than 20% on the value of the media placement purchased by the agency on behalf of its client (Standard Norms, item 2.5.1).*

*Nonetheless, agencies that do not have this certification can still work with digital advertising and be entitled to standard agency discount (the amount of at least 20% is not guaranteed in this case).*

## *Is there a duty to achieve a specific result in advertising? Or it is a duty of best efforts?*

*It depends on what was negotiated between the client and the service provider. Legally, the purpose of advertising activities is to "promote the sale of products and services, spread ideas or inform the public about organizations or institutions placed at the service of this public" (Art. 3, Law N. 4,680/1965). Thus, the law does not determine the obligation of a specific result.*

*Given the purporse of these activities and the principle of good faith (art. 422 of the Civil Code),* **there is a duty of best efforts.** *Therefore, the agency must make all reasonable efforts to, e.g., increase the advertiser's sales – which could indicate the quality of the agency's work, but could also not occur due to several external factors. If the service provider has performed all the obligations set forth in the agreement, it will not be legally liable if the advertiser does not achieve the result it intended to.*

*Nevertheless, it is recommended that the services agreement expressly provides for the absence of the obligation of results, so it cannot be presumed of generic provisions in the agreement.*

*An obligation to achieve a certain result, however, can be negotiated between the client and the service provider. In this case, the agreement must set forth all the conditions of the expected result. On the client side, this procedure is necessary for claiming those results; and for the service provider, it is a safeguard for any future requirement of results that were not negotiated.*

# DIGITAL ADVERTISING content

## *Are there any restrictions or limitations on the types of products and services that can be advertised online?*

*Yes, the advertisement of some products or categories are limited or even prohibited in Brazil. See some examples below:*

→ **Drugs:** *Anvisa RDC 96/08 and the Brazilian Advertising Self-Regulation Code instituted by CONAR ("CONAR Code"), appendix "I", include provisions on drugs' ads. Only drugs that do not need medical prescription can be addressed to the general public – ads of prescribed drugs are prohibited in this context. Nevertheless, drugs advertising has some additional limitations, such as:*

- *Indirect advertising is not allowed.*
- *Advertising cannot suggest diagnostics or include images of people consuming the drug.*
- *Media should contain mandatory warnings, and*
- *The ads cannot be directed to children – which also means they are not allowed during commercial breaks in chendren's programs.*

→ **Alcohol:** *according to CONAR Code, appendix "A", and Federal Law N.10,167, as alcohol is a product which consumption is largely restricted to specific public and situations, its advertising must be socially responsible, therefore:*

- *They cannot be directed to children.*
- *They cannot cast people under 25 years old.*
- *They cannot encourage irresponsible or harmful consumption.*
- *They has a limited broadcasting schedule, and*
- *The media must contain mandatory warnings.*

→ **Smoke:** *according to Federal Law N.10,167, smoking ads can only be displayed inside places that can sell it – outside, they are prohibited. There are also other limitations, including:*

- *They cannot be promoted online;*
- *They cannot be associated with sports – nor sponsor cultural or sport activities;*
- *They cannot recommend consumption in dangerous locals or situations.*
- *Indirect advertising is not allowed.*
- *They cannot be sold in educational and health establishments.*
- *Ads cannot include children, and*
- *The package must contain mandatory warnings.*

→ **Firearms:** *according to Federal Law n. 10,826, firearms ads are only allowed within specialized publications. Encouraging the indiscriminate use of firearms is punishable by a fine.*

→ **Soft Drinks, Chocolate, Juices, and similar drinks:** *CONAR Code, appendix "H", states the rules on ads regarding such beverages, including:*

- *They cannot induce children to their consumption.*
- *They must adopt the official terminology, such as "diet", "light", "does not contain sugar", "does not contain gluten", and*
- *They must correctly present the characteristics of taste, size, content/weight and nutritional benefits.*

## *Is children-targeted advertising allowed in Brazil?*

### GENERAL RULES

*B*razilian Advertising Self-Regulation Code instituted by CONAR (the National Council of Self-Regulation of Advertising) and the Brazilian Consumer Protection Code (CDC) provide some rules applicable to advertising to children ("child" and "teenager" will be jointly referred to as "Children". The definition "Children" contains "teenagers")

Most restrictions generally refer to child - according to art. 2nd of the Statute of Child and Adolescent (Law n. 8.069/90), child means the person up to 12 years of age and adolescent means the person between 12 and 18 years of age - but some of them are also applicable to teenagers (12 ≤ 18 years old), **such as:**

**(i)** In segmented content (created, produced, or programmed specifically for Children), the advertising of products and services must be restricted to breaks and commercial spaces, by providing a clear distinction between content and advertising formats (Section 11, art. 37, item 4, CONAR Code);

**(ii)** The principle of advertising disclosure (CDC, art. 36) requires advertising to be easily and immediately identifiable by consumers as such. Indirect advertising, such as merchandising action by digital influencers, mainly without any reference about the content being sponsored, is not allowed (art. 37, III, CONAR Code);

**(iii)** Media planning must consider that Children must have their attention especially focused on the advertising of products and services that are intended to their consumption. Thus, Children advertising shall reflect the technically and ethically recommended restrictions (Section 11, art. 37, second paragraph, CONAR Code).

**(iv)** Ads should reflect special care to safety and good manners. E.g., advertising targeted to Children cannot (Section 11, art. 37, Self-Regulation Rules):

**a.** demerit positive social values or cause any type of discrimination;

**b.** associate Children with situations incompatible with their condition (illegal, dangerous, or socially objectionable actions);

**c.** enforce the notion that consumption of the product/service will provide superiority or, by not consuming it, inferiority;

**d.** adopt a native journalistic format, which can be mistaken for real news;

**e.** include mentions of inappropriate products for Children, such as alcoholic beverages and weapons;

**(v)** Also, Children advertising cannot encourage violence, explore fear or superstition, disrespect environmental values, or induce harmful or dangerous behaviors to their health or safety (arts. 24 to 26, Self-Regulation Rules).

### TARGETED ADVERTISING AND DATA PROTECTION IMPACTS

→ The legal representative's consent is expressly required for processing children's personal data (Brazilian General Data Protection Law - LGPD, Art. 14, first paragraph), but it is not mandatory for processing teenagers data;

→ The processing of personal data shall be carried out in the Children's best interest (LGPD, art. 14, head provision);

→ Information shall be provided in a clear, simple, and accessible manner, considering the user's comprehension capacity - using audiovisual resources whenever appropriate (LGPD, art. 14, sixth paragraph).

## *Intellectual Property and Personality Rights' best practices*

### PERSONALITY RIGHTS

→ Elements which distinguish an individual, such as name, physical image and voice sound are considered personal rights and cannot be used without the individual's personal consent, preferably written and specific.

→ Using a person's image for commercial or economic purposes, without previous authorization, results in obligation to indemnify. Thus, a person using a non-authorized image needs to pay him/her a compensation - being unnecessary to prove any specific damage (Precedent n. 403 from Superior Court of Justice).

→ Programs presenting personal rights from actors, celebrities, among other individuals can only be made with the subject's authorization. This authorization must antecipate all the circunstances in which the authorized person/entity intends to use the subject's distinctive elements - including the

modalities of use, the media formats, geographic coverage and the period of use, among other conditions, as applicable.

→ The participation of children in artistic activities (advertisements or otherwise) must be previously authorized by the relevant judicial authority, and a work permit for the child must be obtained, according to well-stablished interpretation of the Brazilian Courts concerning Articles 149 and 258 of the Statute of Children and Adolescent (Law n. 8.069/1990).

## INTELLECTUAL PROPERTY RIGHTS

→ The publication of any content produced by third parties requires an authorization from its authors or from the author-rights owners (art. 4° of Law n. 9,609/98). In other words, it is necessary to obtain a license specifically authorizing the use of the content in all intended forms (reproduction, edition, synchronization, distribution etc.), and that anticipates the other use conditions, such as period, geographic coverage, media formats, among others negotiated aspects.

→ Deals involving author rights are restrictively interpreted by Brazilian Courts. Therefore, questions from the author-right owners may arise from an "incomplete" agreement, impairing a future use of the content by the licensee.

→ The rights of (i) performers or executors (regarding their interpretations and performances), (ii) record producers (regarding their produced records) and (iii) broadcasting companies (regarding their programs) are also protected by Law n. 9,610/98. They are called "related rights", and their use also requires a previous authorization by their owners.

→ Reproducing or synchronizing a phonogram (music recording) in a certain program requires a license by the record producer, and an authorization by the composition's author, performers (singers and main musicians) and the players (other musicians).

→ It is possible to previously provide in an agreement that the person contracted to participate in the program is responsible for ensuring that every applicable authorization from the third-party's rights were obtained, therefore anticipating the right of recourse in case of a future discussion.

# MARKETING strategies

## *Is there any specific regulation on digital influencers and influencer marketing?*

*Digital influencer ads are legal in Brazil. However, there are* **some legal transparency obligations and sectorial provisions that must be complied with.**

*In Brazil, advertising must be carried out in a way that consumers can rapidly and easily identify them as such. This duty of transparency is known as the advertising disclosure principle, set forth in the CDC (main section of Art. 36) and in the Brazilian Code of Self-Regulation on Advertising of CONAR (Section 6).*

*This principle is especially relevant in the influence marketing context. As influencers create and post their content in an organic way, the content's advertising feature is, therefore, usually unrecognizable. This is often noticed by CONAR, whose role is, among others, to supervise the Brazilian advertising content. Besides responding to complaints from consumers, authorities, associates, or members of the board of directors, CONAR rules out cases through its Ethics Council. If the council finds the advertising irregular, it recommends the modification of the campaign by the advertiser or the suspension of the advertisement placement*

*In addition to CDC and CONAR provisions, it is also necessary to respect third party rights related to the content produced and posted by influencers and advertisers - such as* **intellectual property rights** *and* **personality rights** *(name, image, and voice sound of a natural person).*

*These legal and self-regulatory obligations are often*

*combined with the* **platform' s terms of use** *and specific policies, such as advertising policies, prohibited practices, and contents.*

*These statutory obligations and rules are not restricted only to influencers, but they also apply to the advertiser and, contractually, to the agency hiring the influencer on behalf of the advertiser. The best way to ensure that the parties will comply with these rules and limit each party's liability is through a* **well-structured agreement.**

## *Contests & Sweepstakes regulation*

**REGULATION**

*In Brazil, free prize distribution for advertising purposes, when carried out by way of sweepstakes, gift certificates, contests, or similar modalities, can only be performed by obtaining a prior authorization from the Ministry of Economy. The entity that currently supervises these operations is SECAP - Secretariat for Evaluation, Planning, Energy and Lottery.*

*The rules regarding it are provided for Law No. 5,768/1971 and in Decree No. 70,95/1972, in addition to Ordinance n. 41/2008.*

i. **Procedure:** *the procedure for the approval's request is entirely digital. SECAP can take up to 40 days to analyze and decide upon a request.*

ii. **Inspection Fee:** *to submit a contest or sweepstake for SECAP's evaluation, it is necessary to pay an inspection fee proportional to the total value of the prizes to be distributed. It can range from R$ 27.00 (referring to prizes up to R$ 1,000.00) to R$ 66,667.00 (referring to prizes above R$ 1,667,000.01).*

iii. **Income Tax:** *depending on the prize distribution modality, it may also be necessary to collect 20% of income tax on the prize value.*

**iv. Accountability:** *after the execution of the contest or sweepstake the company must account to SECAP. This procedure is also done through its digital system.*

**v. Penalties:** *running a commercial promotion without prior authorization from SECAP may result in:*

**a)** *a fine of up to 100% of the total amount of the goods promised as prizes; and*

**b)** *a prohibition to carry out such operations for a period of up to two years.*

## EXCEPTIONS

*Some types of promotions, in general, do not require authorization. Some examples are:*

i. *internal campaigns restricted for employees;*

ii. *reward programs;*

iii. *cultural contests ;*

iv. *promotions which, cumulatively, do not have advertising purposes, elements of luck and inventory limitation;*

v. *discount coupons.*

*However, it is always advisable to conduct a legal analysis before implementing a promotion activity without a previous authorization, since SECAP tends to frequently change its understanding of what constitutes a commercial promotion.*

## SOCIAL NETWORKS

*Social networks such as Facebook and Instagram have specific rules on how commercial contests and sweepstakes can be advertised and conducted in those platforms. For promotions conducted and/or promoted on social media, it is necessary to abide by these rules in addition to obtaining SECAP's authorization.*

# MISCELLANEOUS

## *Search Advertising & Trademarks*

*The use of other companies trademarks (especially "competitors") is quite restricted in Brazil, including in the advertising context. One of the few scenarios in which it is accepted, is in comparative advertising, only insofar as the ethics and transparency rules (such as the ones provided in the CONAR Advertising Self-Regulation Code) are followed.*

*However, one practice is particularly disapproved by Brazilian courts:* **the use of competing brands as part of a company's search advertising strategy.** *It has become very common for advertisers to select competitors' trademarks as keywords when configuring sponsored links services such as Google Ads.*

**According to the Brazilian Superior Court of Justice:**

**i.** *this conduct is abusive, since it allows the advertiser to* **divert the clientele** *that is specifically looking for products sold by the competitor, therefore unfairly profiting from such brand's prestige in the market,*

**ii.** *it is also considered a* **"parasitic activity"**, *as the search result can transmit the mistaken idea that both companies are in some way related or maintain some kind of partnership;*

**iii.** *the damage suffered by the competitor whose trademark has been used is* **presumed** *to be a natural consequence of the offense perpetrated by the advertiser (the improper association between the brands).*

*In conclusion, it is now advisable not to use trademarks from other companies when configuring keywords in search advertising tools, which may lead to the obligation to pay damages to the owners of such trademarks.*

## *Ad Fraud in Digital Advertising*

*There are two most common forms of fraud in digital advertising:*

**i.** *fraud in relation to the content of the ad; and*

**ii.** *fraud in relation to the advertisement delivery.*

### CONTENT FRAUD

*The first case occurs when the consumer is deceived by a false offer. The consumer is navigating a website and sees a sponsored ad for a product of a well-known brand. However, when he/she clicks on the ad and purchases the product, the delivered product is not authentic or it isn't delivered at all. This practice, known as misleading advertising, is expressly prohibited by the CDC.*

*The Superior Court of Justice has already established the understanding that, in these cases, the website will not be held responsible for the fraudulent advertisement or for the damages caused, as it did not take part in the ad preparation. Most Brazilian judges understand that an online publishers' activity is limited to advertising the ads, without any responsibility for the offer or for its conditions. In addition, according to article 19 of the Brazilian Internet Civil Rights Framework (Law n. 12,965/2014), platforms are not responsible for damages arising from content generated by third parties unless they violate a court order that orders the removal of such content.*

*The courts also tend to release the frauded vendor from liabily in cases of virtual scams under the justification that there was a lack of diligence on the part of the*

*consumer, in the face of several clear signs of fraud, such as prices much lower than those commonly offered and lack of security identifying signs on the website. Nonetheless, some courts have decided in favor of the consumer, considering that consumers do not have the technical knowledge to identify fake ads, and, in some cases, understanding that the frauded vendors have not made sufficient efforts to communicate with the consumers or to take precautions against the occurrence of a fraud.*

### DELIVERY FRAUD

*In recent times, advertising market concerns have grown in relation to the second topic: frauds related to ads delivery. It consists of any activity that prevents sending ads to the correct addressee or that alters in any way how an ad will be delivered, therefore harming the possible revenues, its performance or its metrics.*

*According to a survey published by the Brazilian Interactive Advertising Bureau (IAB), 78% of the ads published on the internet between February and April 2019 were made through some type of media platform. As the programmatic media ecosystem grew, so did the system defrauding methods with the purpose to divert the resources invested. According to a study by the IAB and by Ernst & Young published in 2015, fraud costs to the U.S. digital marketing, advertising and media industry $8.2 billion annually.*

*Ad fraud is often referred to as invalid traffic (IVT), which is a broad term used to describe online activity that does not always come from a real user. Therefore, the impressions do not represent legitimate advertising consumption. As explained by IAS – Integral Ad Science, there are two main categories of invalid traffic:*

### i. General Invalid Traffic – GIVT

*It is easier to identify. It can be located through routine means of filtration, executed by using lists, together*

*with standardized checks. Some examples are:*

**a)** *Datacenter traffic;*

**b)** *Spiders and crawlers pretending to be legitimate users;*

**c)** *QA, testing, preview, or audit traffic; and*

**d)** *Bots detected through simple activity-based metrics like impossibly high impression volumes.*

### ii. Sophisticated Invalid Traffic – SIVT

*It is more technical and harder to identify, often requiring advanced analytics and significant human intervention to identify, analyze, and prevent. Some examples are:*

**a)** *Falsely represented sites or impressions;*

**b)** *Incentivized browsing;*

**c)** *Hijacked devices;*

**d)** *Hidden ads;*

**e)** *Falsified performance measurement or outcomes such as viewability measurement, app installs, and location; and*

**f)** *Sophisticated bots*

### But who is responsible for preventing ad fraud?

*There is no clear answer to this question, as there is no significant case law or doctrinal definition in Brazil concerning the attribution of such responsibility to online publishers, advertisers, or media platforms.*

### So what can be done?

*The consensus in the industry is that all parties must work together to build a safer and trust worthier market. This commitment has been showing some results, as solutions for tracking invalid traffic keep*

*evolving, and institutions such as IAB are providing free and useful information on how to prevent ad fraud (see "Fighting fraud - Guide for Publishers"). There are also initiatives such as TAG's Certified Against Fraud Program, dedicated to demonstrate compliance with the best practices in this field.*

*Furthermore, the lack of transparency is what provides an enabling environment for fraudsters to abuse the market. In this sense, all players should come together to build trust in each other and find blind spots to prevent the continuity of such malicious practices, preserving the legitimacy of the digital advertising industry ecosystem.*

## How does a foreign ad network get paid for services provided to Brazilian customers?

*Brazilian authorities carry out controls and inspections to prevent money laundering and the avoidance of foreign exchange, therefore, any transaction that involves sending or receiving values from abroad must observe the rules instituted by the Central Bank of Brazil ("BCB"). Thus, depending on the details involved in the transaction, the foreign company will need to observe specific regulatory rules for its activity.*

*In this material, we do not intend to exhaust Brazilian rules in this field, but to bring an overview of how this transaction can be performed.*

*As a rule, foreign companies that provide services to Brazilian users may be remunerated in three different ways, described below:*

- *Brazilian users can pay directly with an international credit card. In this case, the Tax on Financial Transactions ("IOF") will be levied at the rate of 6.38%. Generally, this option is used by individual users when contracting services with lower prices, through SaaS platforms.*

→ *The foreign company can hire an international payments facilitator, who will be responsible for receiving payments from Brazilian users and remitting the amounts to the foreign company. In this transaction, the IOF tax will be levied at the rate of 0.38%. Generally, the international payments facilitator is responsible for (i) having relationships with credit card companies and (ii) complying with obligations imposed by BCB to remit the amounts abroad.*

→ *Brazilian Users can remit amounts to the foreign company through an exchange contract, carried out with an accredited bank. In this case, the IOF will be levied at the rate of 0.38%. This transaction model requires a series of formalities and is usually carried out by companies only for transactions involving larger amounts.*

## *Is there any spamming regulation in Brazil?*

*The activity of sending e-mail messages to a database is not prohibited in Brazil. However, there are regulations that must be observed: The Consumer Protection Code (CDC) and the Brazilian General Data Protection Law (LGPD). It is also important to mention CAPEM (Code of Self-Regulation for the Practice of E-mail Marketing) which, despite not having its mandatory application, brings important guidelines for sending messages to customers.*

*The CDC has articles that protect the consumer by establishing that the sending of product offers must be carried out clearly, without abuse, aggressiveness and / or containing misleading content. Regarding LGPD, we recommend that you access the specific topic on the subject in this Doing Business: "Data Protection."*

**As for CAPEM, we highlight the following points:**

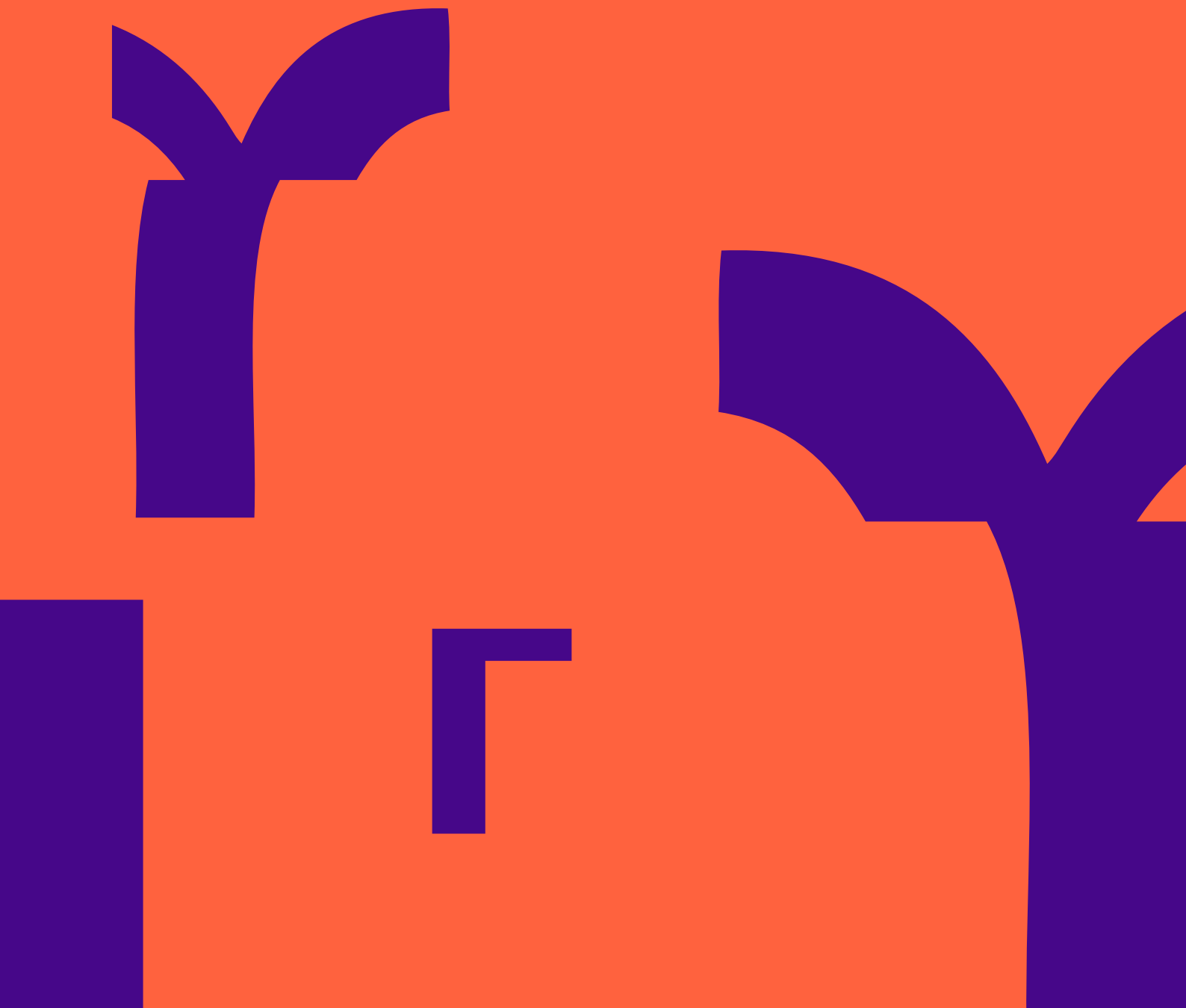
- *It is recommended that the recipients have requested to receive the messages (opt-in), or the sender must have some prior relationship, commercial or social, with the recipient (soft opt-in);*

- *Opt-out is the recipients' request to unsubscribe. The sender must provide the recipient with the conditions to opt-out and inform the deadline for removing his/her contact from the database. It is recommended that the deadline for unsubscribing is not more than 2 working days upon direct request through the e-mail marketing's link to cancel a subscription, and 5 working days upon request by other means;*

- *When there is a contract between the sender and the recipient, messages sent exclusively to ensure compliance with the contract (example: transaction slips, order ticket) do not require the opt-out feature.*

CHAPTER 2

# Brazil: an overview



The Federative Republic of Brazil is formed by states, municipalities and by the Federal District. The federate states are entitled to adopt their own Constitutions and laws according to the autonomy established by the Federal Constitution. Different from other federations, Brazilian municipalities also have restricted autonomy, with their own executive and legislative powers.

The Union (defined by the Constitution) is divided into the Executive, the Legislative and the Judiciary branches, which are independent powers. The head of the Executive is the President of the Republic, which is both the Chief of State and the Head of Government, being directly elected by the citizens. The Legislative is formed by the National Congress consisting of two houses: The House of Representatives and the Senate, also directly elected by the citizens. The Judiciary involves the Federal and State courts, with two higher Courts: The Federal Supreme Court (for constitutional matters) and the Superior Court of Justice (for non-constitutional matters). There are also other specialized Courts which handle electoral, labor, and military cases.

Since Brazil follows Civil Law, all regulations must necessarily abide by the Constitution and must follow a hierarchal organization. The Constitution addresses several different topics such as people's rights and guarantees, principles for public administration, a framework for penal, labor, tax, and others. Other specific regulations are established by the legislative power of the union, states, and municipalities. The Constitution defines their legislation topics and limits.

# CORPORATE LAW

*Corporate Law in Brazil is generally regulated by the Law No. 10,406/2002 of January 10th, 2002 ("Brazilian Civil Code") and by Federal Law No. 6,404 of December 15th, 1976. The regulation to be applied will depend on the type of company. Therefore, we will present the commonly used company types and their important legal aspects.*

## COMPANY TYPES

*There are three main types of companies that are used in most business operations in Brazil: Empresa Individual de Responsabilidade Limitada (Limited Liability Sole Proprietorship) ("EIRELI"), Sociedade Anônima (Joint-Stock Company) ("S.A.") and Sociedade Limitada (Limited Liability Company) ("Limitada"). Depending on the company's characteristics, a different company type will be more suitable for its operation. The choice between each type should consider variables such as its corporate structure (e.g., number of partners and distribution of corporate power), its desire to access capital markets, its tax structure, among others. The following sections describe the main features and characteristics of EIRELI, Limitada and S.A. companies:*

## SOCIEDADE LIMITADA (LIMITED LIABILITY COMPANY)

- *The Limitadas are governed by the Brazilian Civil Code.*
- *They are constituted by a Contrato Social ("articles of association"), by one or more quota holders.*
- *Quota holders may be individuals or legal entities (Brazilian or otherwise)."*
- *The Limitada's capital stock is divided into "quotas"*

*(which are portions of the capital stock, similar to a share of a corporation).*

- *All quotas of a Limitada grant their owners a right to vote at the general quota holders meetings. Most decisions require the approval of quota holders representing at least 75% of the capital stock.*
- *The responsibility of each quota holder is limited to the value of their quotas, but the quota holders are all jointly liable for totality of the capital stock.*
- *The management of a Limitada is conducted by one or more officers residing in Brazil who can be quota holders or not. They must be appointed in the articles of association or in a quota holders' meeting, for a definite or indefinite term.*
- *A Limitada is a contract in its essence and therefore is primarily regulated by the terms and conditions of the articles of association. The Brazilian Civil Code provides the framework of the articles of association, but within those boundaries the quota holders are free to choose the rules that shall apply to their company.*
- *The articles of association may authorize a Limitada to distribute profits to its quota holders in a different proportion from their equity interest.*
- *The quota holders of a Limitada may execute a private Quota holders' Agreement to regulate matters such as profit distribution, assignment of quotas, non-competition obligations etc.*
- *In 2020, after the beginning of the COVID-19 pandemic, the Brazilian Civil Code was amended to allow quota holders meetings to take place entirely online.*

## EMPRESA INDIVIDUAL DE RESPONSABILIDADE LIMITADA (EIRELI)

- *EIRELI or Empresa Individual de Responsabilidade Limitada ("Limited Liability Sole Proprietorship) is a company type governed by the Brazilian Civil*

*Code, and subject to most of the rules applicable to Limitadas.*

- *It is constituted by a single person (private individual or legal entity) who owns the total capital of the company, which shall: (i) be fully paid-in at the time of its constitution; and (ii) be at least the amount of 100 times the highest minimum wage in Brazil.*

- *An individual can only participate in 1 EIRELI (though this restriction is not applicable to legal entities).*

- *Initially, the EIRELI was introduced as an alternative to Limitadas, since this company can be constituted by one single member (at the time, Limitadas had to have at least two quota holders). However, in 2019 the Brazilian Civil Code was amended, allowing the LImitadas to be constituted by a sole member. Therefore, the number of EIRELIs shall decrease in the future, since the formation of imitadas with one quota holder currently represents an easier alternative in respect to single-member structures.*

## SOCIEDADE ANÔNIMA (JOINT-STOCK COMPANIES)

- *Sociedades Anônimas or simply S.A. are governed by Federal Law n° 6,404 of December 15th, 1976.*

- *They are organized by the Estatuto Social (or "bylaws" in English).*

- *2 or more shareholders (individuals or legal entities, Brazilian or otherwise) are necessary for the incorporation of an S.A. The only exception to this rule is the wholly owned subsidiary ("Subsidiária Integral"), which is an S.A. that has another Brazilian company as sole shareholder. Wholly owned subsidiaries must be incorporated by public deed. Alternatively, an existing S.A. can be converted into a wholly owned subsidiary through the acquisition of all its shares by a Brazilian company.*

- *At least 10% of the capital stock must be paid-in at*

*the time of the incorporation of an S.A.*

- *The capital stock is divided into shares. There are three different types of shares, however the most commonly issued are: (i) common shares, which provide standard financial and voting rights; and (ii) preferred shares, which provide their owners political and economic privileges within the company, such as priority in profit distribution and capital stock repayment. Also, preferred shares may have restricted voting rights or even no voting rights at all.*

- *Preferred shares – and, exclusively in privately held S.A., common shares – can be divided into different classes, each providing different benefits and restrictions.*

- *Each shareholder must pay-in the total price of their shares (and their liability is limited to that amount). However, they are not liable for the payment of all the capital stock (unlike the members of Limitadas).*

- *Usually, decisions must be made by shareholders representing more than half of the shares with voting rights present at the shareholders' meeting. However, the bylaws and/or a shareholders' agreement may require supermajority for certain decisions.*

- *An S.A. can only distribute profits to its shareholders in the proportion to their equity capital.*

- *The management of an S.A. is performed by at least two officers residing in Brazil. They must be appointed in a shareholders' meeting for a maximum of a 3-year term of office.*

- *Shareholders of an S.A. may also decide to institute a Board of Directors ("Conselho de Administração") with powers to vote and decide on several corporate matters (in some cases, such as publicly held S.A., Board of Directors is mandatory).*

- *The "bylaws" must provide for an Audit Committee ("Conselho Fiscal"), which will supervise the administration of the company (namely the actions*

*taken by its officers and directors). The Audit Committee may operate permanently or only during specific fiscal years (at the shareholders' request).*

→ *An S.A. needs to publish the minutes of every general shareholders meeting, as well as its annual financial statements. Exceptionally, privately held S.A.s (i) with less than 20 shareholders and (ii) up to BRL 10 million in total equity do not need to publish their financial statements.*

→ *S.A. shareholders may hold a Shareholders' Agreement to regulate matters such as voting rights, transfer of shares, non-competition obligations etc.*

→ *An S.A. must keep and update corporate books to register information such as share ownership, share transfers, minutes of shareholders, officers and board meetings.*

→ *In 2020, after the beginning of the COVID-19 pandemic, the S.A. law was amended to allow shareholders meetings to take place entirely online.*

# LABOR LAW

*Employment in Brazil is regulated by different regulations, but the most important is the Labor Code (also known as "CLT"), which has recently been amended by Federal Law n° 13,467 of July 13th, 2017, commonly known as the "Labor Reform".*

## GENERAL COMMENTS

→ *Labor rights are considered a public interest in Brazil. As a rule, an employee cannot waive such rights. Although the Labor Reform provided more flexibility to this rule, an agreement enclosing such topic can be considered null and void, as it positions the employee in disadvantage.*

→ *When terminating an employment relationship, the employee can file a claim demanding his/her labor rights from the employment relationship up to two years after the termination. In any case, labor rights can only be claimed for a five-year period prior to the respective claim*

→ *Whenever a company undertakes the business of another company, the employment contracts (and the same labor rights) will continue valid and in force. As a rule, the company undertaking the business will assume the previous labor liabilities (if applicable).*

→ *The corporate veil can be lifted in some cases of fraud specially when it performed in order to defraud labor related debts. This only occurs by Court order; however, it still is a very sensitive topic. Investors usually take this into consideration before doing any kind of equity-based investment.*

→ *In addition to their salary, employees must be paid an extra 13th salary once a year, usually in December.*

→ *Employers must deposit 8% of employee's salaries into a separate bank account, as a compulsory pension saving, administered by the Government, referred to as FGTS or Fundo de Garantia do Tempo de Serviço in Portuguese. An employee can only withdraw the amount in cases provided by law or if dismissed without cause.*

## HIRING EMPLOYEES IN BRAZIL

→ *Records of a person's work status and past work experiences must be registered in a personal document, the Social Security Card (Carteira de Trabalho and Previdência Social, or CTPS).*

→ *As a rule, employment contracts must be executed for an undetermined term. Only in some specific cases provided by law, companies can hire for a determined term.*

→ *Companies can also hire temporary workers through licensed agencies which provide temporary workforce. This type of contract can be executed to temporarily replace a regular employee (e.g. maternity leave) or to fulfill complementary service demand, limited to 180 days, either consecutive or not, renewable for 90 days and under the same conditions.*

## WORKING HOURS

→ *The work time limit is 44 hours per week, being 8 hours per day and 2 possible overtime hours, as applicable.*

→ *Overtime must be increased at least by 50% over the usual hourly pay.*

→ *Companies can implement a "bank of hours" which is a programme to compensate overtime hours against days-off and avoid the payment of overtime*

*hours, as long as they follow some specific rules.*

*→ Night shifts have to be increased by at least 20% over daytime hour.*

## WORKING FROM HOME

*→ Labor law also allows some employees to work remotely, outside the company.*

*→ It is the company's duty to supply the work equipment and ensure the safety of the labor environment from an ergonomic point of view.*

*→ The remote work authorizes the company to evaluate its employees by their productivity rather than the time of their availability.*

## MAIN LABOR RIGHTS

*Mandatory labor rights in Brazil include (but are not limited to):*

- *30-day remunerated vacation period every 12 months of service, which may be granted in up to three periods, as long as one of the periods is of, at least, 14 days and none of them is lower than 5 days.*
- *vacation bonus equivalent to 1/3 of their base salary to be paid whenever the employees take vacation*
- *Christmas bonus of one monthly salary to be paid in December. If an employee worked less than a year, the "thirteenth salary" should be proportional to the months worked.*

*Prior notice of at least 30 days for the first year of employment plus 3 days per working year. The notice period is considered a working period for all legal purposes, even if the employer chooses to make the payment in lieu of the notice period.*

*Government Severance Indemnity Fund ("FGTS"): Under the FGTS system, the employer must deposit every month 8% of the previously worked month. FGTS payments are made to a blocked account on behalf of the employee. The employee will be allowed to withdraw such amount in certain specific situations provided by law, including in case of termination without cause. If an undetermined term employment agreement is terminated without cause, the employer must also pay a fine equal to 40% of the deposits made to the benefit of the employee under the FGTS.*

## TERMINATION OF EMPLOYMENT RELATION

→ *Programs of voluntary resignation can be implemented.*

→ *Severance pay needs to be made within 10 days of the contract termination, otherwise a fine will be applied in the amount of the employee's salary.*

→ *Pregnant employees are protected from work termination during pregnancy and 5 months after the child's delivery.*

→ *Employees who suffered labor accident are safeguarded for a 12-month period as of the time of discharge by the social security.*

→ *Employer is required to notify employee of the termination of his employment contract 30 days in advance, known as prior notice, otherwise the period will have to be indemnified.*

## NON-COMPETITION

→ *There is no specific legal provision governing non-competition arrangements in Brazil non-competition agreements are valid after termination of employment provided that (i) there is a limit on time and geographic area and (ii) the employee receives compensation suitable to the restriction imposed by such non-competition duty.*

→ *The amount of this compensation usually ranges from 50% to 100% of the employees' salaries for the period in which he/she would be prevented from working in certain activity/places.*

→ *The lower the indemnification and the broader the geographic area, the higher the risk of the non-compete arrangement being considered unenforceable by Brazilian courts.*

→ *During the employment contract, the employee is obliged not to compete with the employer under the penalty of dismissal for cause*

## SOCIAL SECURITY

→ *The social security system is financed with monthly employee contributions (11% of the employee's salary, limited to R$621.00) which is withheld by the employer, plus monthly employer contributions (up to 28%).*

## UNION

→ *In Brazil there are unions representing employees and unions representing employers*

→ *As a rule, union representation is determined based on the core business of the employer and the place where the employees work (i.e. employers and employees may not choose their unions). The parties cannot choose the union that will represent them*

→ *CBAs are entered into between (i) employer(s) and employees' unions (known as Company's CBA) or (ii) employees' union and employers' union (known as Collective Convention)*

→ *All companies and relevant employees shall observe the Collective Convention, even if they are not affiliated to the Union (including the mandatory salary increase).*

# TAX LAW

*The taxes in Brazil are levied upon by the three levels of entities of the federation: Federal Union, States and Municipalities. The Federal Constitution and the Brazilian Tax Code (Law n. 5,172 of 1966) provide the general rules for tax collection, and each entity is entitled to specifically regulate the taxes within its jurisdiction, observing the general rules.*

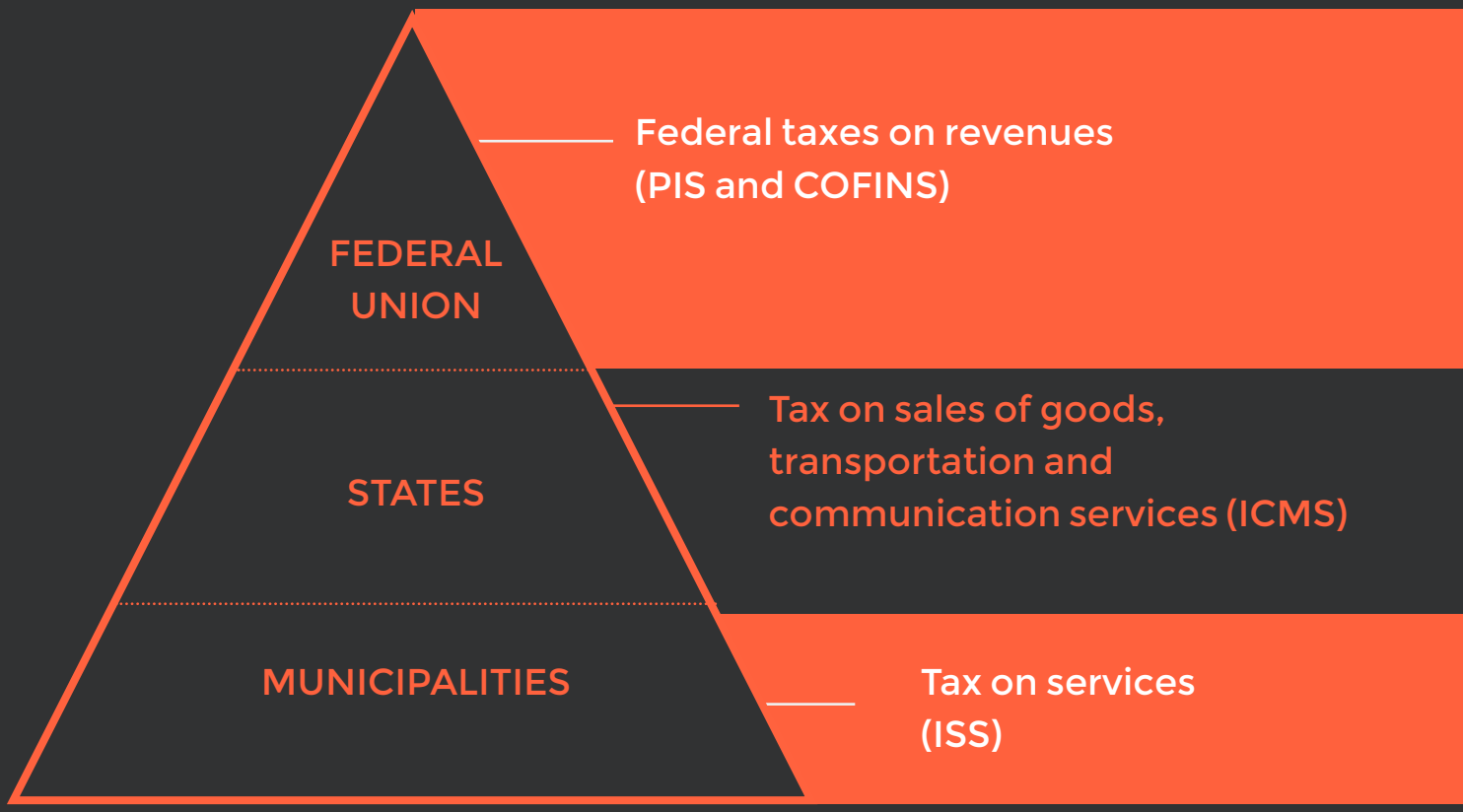
*This multiplicity of entities editing tax laws makes the Braziian tax system one of the most complex in the world, which is why several tax reform proposals are currently being analyzed by the National Congress.*

*Due to the complexity of the Brazilian tax system, this material is not intended to exhaust all matters related to tax payment in Brazil, but to be a practical overview of relevant matters to the advertising and technology industry and serve as a guidebook for investors  culation may change according to the company's tax regime.*

*As a rule, legal entities can adopt two different taxation systems for calculating federal taxes, that can be changed every year: the Presumptive Profit Method or the Actual Profit Method.*

## PRESUMPTIVE PROFIT METHOD (LUCRO PRESUMIDO)

*If the company opts for the Presumptive Profit Method, the tax base of the IRPJ and of the CSLL will be determined by a fixed percentage, which is generally 32% for service providers and 8% for activities like retail, wholesale, manufacturing and sale of real estate, applied on the total gross revenue*




*(without possibility of deduction of any costs or expenses).*

## ACTUAL PROFIT METHOD (LUCRO REAL)

*This method is mandatory for companies with revenues exceeding BRL 78MM/year. If the company opts (or is required due to its annual revenue) for the Actual Profit Method, the calculation basis for the IRPJ and the CSLL will be determined based on the regular company's accounting profit, with certain adjustments provided for in Brazilian tax laws.*

**IMPORTANT**

*If a company has more deductible expenses, it will pay less IRPJ and CSLL taxes, under the Actual Profit Method. For this reason, when evaluating which method to choose, the company should verify whether it has deductible costs/expenses for IRPJ/CSLL purposes, or if it is preferable to apply the fixed percentage on the revenues as the basis for calculating IRPJ/CSLL (according to the Presumptive Profit Method rule).*

## FEDERAL TAXES ON REVENUES (PIS AND COFINS)

***PIS and COFINS are federal social contributions levied upon gross revenue ("PIS/COFINS"). These taxes are estimated, monthly, on the company's total gross revenue. The calculation method and the PIS/COFINS rates may vary according to the applicable tax regime. There are two possible tax regimes for PIS/COFINS: non-cumulative and cumulative.***

***As a rule, the cumulative PIS/COFINS regime, of a 3.65% rate, is applicable to companies taxed based on the Presumptive Profit Method. On the other hand, the non-cumulative PIS/COFINS regime, which a 9.25% rate, must be applied by companies taxed by the Actual Profit Method. The difference between these regimes (in addition to the rate) is that, while in the non-cumulative regime it is possible to discount certain costs/expenses stated by the law from the payable PIS/COFINS taxes, in the cumulative regime it is not allowed.***

***Despite the general rule, there are some revenues which are required, by the Brazilian law, to be taxed according to the cumulative PIS/COFINS regime, even if the company adopts the Actual Profit Method, such as the revenue deriving from national software licensing, IT services, telecommunication services, education services, the sale of newspapers, magazines or other periodicals, among other activities.***

*It is also important to mention that revenues resulting from the export of goods or services are not taxable by PIS and COFINS.*

## TAX ON SALES OF GOODS, TRANSPORTATION AND COMMUNICATION SERVICES (ICMS)

*ICMS is a non-cumulative state tax which is levied upon the sale of goods and upon the provision of transportation or communication services. It has a complex calculation and collection system. Their rates vary according to several factors (approximately 4% to 37%), such as the nature, origin, and destination of the transaction. In addition, the ICMS tax burden also varies due to tax benefits granted by states to specific sectors of the economy or companies.*

*Besides other controversies related to the ICMS, the concept of "communication service" generates discussions, since tax authorities usually extend this concept to charge the ICMS on activities that do not necessarily trigger such tax.*

*A crucial rule of the Brazilian tax system is that the same activity cannot be taxed by ICMS and ISS. In this scenario, several activities are in the middle of a "fiscal war" between states (ICMS) and municipalities (ISS), since they can be classified as selling merchandise, communication services or other services.*

*In the past years, some of the activities in this field of uncertainties have already been expressly removed from the concept of "communication service" and, consequently, from the levy of ICMS, either by the Judiciary, either by the legislation itself.*

*The on-line advertising used to be in the middle of the mentioned “fiscal war”, as tax authorities from states tried to classify it as a communication service. This controversy was over in 2016, when the “insertion of online advertising” was expressly classified by the law*

*as a service subject to ISS.*

*Faced with this problem, several tax reform proposals aim to unify the ICMS and ISS, since technological advances and modernization of commercial transactions do not always allow to clearly classify an activity as a "selling merchandise", a "communication service" or other services.*

## MUNICIPAL TAX ON SERVICES (ISS)

*ISS rates may vary from 2% to 5%, depending on the city where the Company will develop its activities and the nature of the service provided.*

*Brazilian law provides an exhaustive list of all services that are taxed by the ISS. In 2016, the "insertion of online advertising" was included as a service in this list and, since then, Brazilian companies that carry out this activity have to issue a Nota Fiscal de Serviço (an invoice provided for in the Brazilian legislation) and pay the ISS to the municipality where the company is headquartered.*

*In cases where the service is provided directly by foreign companies, the responsibility for issuing Nota Fiscal de Serviço (in the case of a legal entity) and collecting the ISS for the municipality is transferred to the service contractor in Brazil, as the service importer.*

*In cases where Brazilian companies provide services abroad, the transaction will be exempt from ISS only if the "result" of the service occurs abroad. Currently, is controversial the scope of the term "result" in relation to service exports and ISS exemption.*

# DATA PROTECTION

*The Brazilian General Data Protection Law nº 13,709 of August 14th, 2018, popularly known in Brazil as Lei Geral de Proteção de Dados (LGPD), was finally approved after eight years of debate. It is effective since September 18th, 2020 and the sanctions of the law will be enforceable as of August 2021. In this section we will present relevant information about this new regulation that profoundly impacts on how companies must adjust their practice in order to prevent penalties.*

## LGPD: THE BRAZILIAN GENERAL DATA PROTECTION LAW

→ *The LGPD was in great part inspired on the General Data Protection Regulation (GDPR) of the European Union. The objective is to regulate the processing of personal data both online and offline, in public and private sectors ensuring higher legal protection.*

→ *Brazil already has more than 40 regulations at the federal level that directly and indirectly deal with the protection of privacy and personal data in a sector-based system. The LGPD will set forth general principles and rules that will work as a guide of interpretation for those other regulations.*

→ *The LGPD focuses on empowering data subjects and requires that a processing activity must have a legal basis specified by the regulation, such as consent or legitimate interest of the data controller. This law also creates obligations and limits that should be applied to entities that process personal data.*

→ *Any foreign company with at least a branch in Brazil or that offers services to the Brazilian market and collects and processes personal data of data subjects located in the country (regardless of the nationality or residence) will be subject to the LGPD, even if it is not established in the country.*

→ The LGPD has a concept "sensitive personal data", which is defined as data on racial or ethnic origin, religious belief, political opinion, health, or sexual life data. Such "sensitive personal data" also could allow unequivocally and persistent identification of the data subject (for example: genetic data or biometric). This kind of data should be treated differently, with additional safeguards, and with different legal basis, especially the express consent of the data subject.

→ *The LGPD will be enforced by the National Data Protection Authority (Autoridade Nacional de Proteção de Dados – ANPD) which can request documents (e.g. data protection impact assessments), receive complains from data subjects, conduct investigations, receive notifications on data breaches, and impose administrative sanctions (e.g. fines, restrictions on data processing). A data subject which is also legally categorized as a consumer can request its rights to consumer protection authorities, like state prosecutors. The LGPD also sets forth rules to allow the international transfer of personal*

*data. The main rule is the adequacy level, when a third country is considered by the ANPD to have an adequate level of protection of personal data. If the data needs to be transferred to a country that is yet to be considered adequate, other legal instruments are necessary, such as standard clauses and binding corporate rules.*

→ *Administrative sanctions may be applied in cases of LGPD violation. Possible sanctions are notices and fines, that may vary from 2% of the company's, group's or conglomerate's turnover in Brazil of the last fiscal year, limited in total to R$ 50,000,000.00 (fifty million reais) per infraction. The infractions are applicable only to the Brazilian part of an economic group and to the turnover in Brazil, different from what happens in the European regulation.*

## ONLINE ADVERTISING AND DATA PROTECTION

*In 2014, the Internet Civil Framework (Law No. 12,968/2014) set forth that personal data processing activities carried out through the internet should rely only on the individual's consent. The Brazilian Data Protection Law, however, expressly authorizes the use of legitimate interest legal basis for the "support and promotion of the controller's activity", which includes marketing and advertising.*

*That means the advertising activities – including*

*online tracking – presently own a better regulatory framework to conduct their activities. Consent is not always required for those activities, including advertising cookies and other tracking technologies. Brazil does not have a specific regulation for cookies or online advertising.*

*However, general transparency and security principles apply, and controllers must have a privacy policy indicating the main processing activities conducted by the controller, including automatic data collection through tracking technologies and the purposes (security, analytics and advertising, for example). This may be included in the general privacy policy and there is no legal obligation to publish a separate document for cookies only – although it may be considered a good practice.*

→ "The legitimate interest will be a possible lawful basis for processing if (i) data subjects will be able to exercise their rights and no fundamental rights or freedoms will be affected; (ii) data subjects have a legitimate expectation about the processing activity; (iii) only the personal data which are strictly necessary for the intended purpose will be processed; (iv) transparency measures are in place; and (v) controller has assessed the impact of the processing activity on privacy and has documented it. When relying on legitimate interest for marketing and advertising purposes, controller should allow data subject to object (opt-out) to the processing activity. This may be implemented through links in e-mails, cookie notices and other communications.

→ If one of those requirements cannot be complied, controller must look for other legal basis for processing. Consent may be a possibility, although the requirements may be difficult to achieve. According to LGPD, consent must be: (i) freely given – meaning that the data subject must have the possibility of denying it and the consequence of denial should not affect other rights and freedoms; (ii) informed – data subject should understand the purpose for which consent is required; (iii) unambiguous – data subject should take an action to demonstrate its consent. In this scenario, broad, implicit, or general consents will not be considered valid under LGPD.

# FOREIGN INVESTMENTS

## FOREIGN EQUITY INVESTMENTS

*Foreign equity investments in Brazil is governed by the Federal Law n° 4,131 of September 3rd, 1962 ("Foreign Capital Law") and by the Federal Law n° 4,390 of August 29th, 1964. According to the Foreign Capital Law, foreign capital is considered to be: "any goods, machinery and equipment that enter Brazil with no initial disbursement of foreign exchange, intended for the production of goods or services, as well as any funds brought into the country to be used in economic activities, provided that they belong to individuals or companies resident or headquartered abroad".*

## REGISTRATION OF FOREIGN CAPITAL

→ *Registration of foreign equity investments must be made through the RDE-IED (Portuguese abbreviation for Registro Declaratório Eletrônico – Investimento Externo Direto) System. It is part of the Brazilian Central Bank Information System (Sistema de Informações do Banco Central – SISBACEN).*

→ *Foreign equity investments can be defined as ownership of equity interest in a Brazilian company by a nonresident investor. This nonresident investor can be either an individual or a legal entity and the equity interest can be shares*

*or quotas representing the capital stock of the Brazilian company.*

→ *In order to acquire equity from a Brazilian Company, the foreign investor must first obtain a taxpayer ID. For this purpose, if the foreign investor is an individual, the person must obtain a CPF (Cadastro de Pessoas Físicas) from the Brazilian Federal Revenue Office (Receita Federal do Brasil). If the foreign investor is a legal entity, however, the entity must enroll in SISBACEN, and obtain a CNPJ (Cadastro Nacional de Pessoa Jurídica). Following such registers, as applicable, the investee shall update the RDE- IED in order to record the foreign investment under a permanent number for that investor-investee case, and subsequent changes/ additions are made under the same case number.*

→ *Since 2000, the conclusion and register of foreign investments are not subject to preliminary review or verification by the Central Bank of Brazil. The RDE-IED compliance is thus declaratory, based on a statement of the investee, which means that the Brazilian investee and/or the representative of the foreign investor are responsible, themselves, for any information declared in the foreign investment registration.*

→ *All foreign investments must be registered with the Central Bank of Brazil. This registration*

*is essential for remittances of profits, capital repatriation and profit reinvestment.*

## CURRENCY INVESTMENTS

→ *No preliminary authorization is required for foreign investments in currency. Funds allocated for subscribing capital stock or to acquire equity of an existing Brazilian company can be remitted to Brazil through any bank establishment authorized to deal in foreign exchange. However, for closing the exchange transaction an RDE-IED, a registration number for the foreign investor and the Brazilian investee is required.*

→ *The registration of the investment must be made through the RDE-IED System by the Brazilian investee.*

## BASIC DOCUMENTATION FOR THE FOREIGN INVESTOR

*Although there may be practical differences between a foreign investment in a Limitada and in an Sociedade Anônima, the basic documentation the foreign investor may be required to present in Brazil is the following:*

→ *Basic corporate documents (Certificate of Incorporation) evidencing the existence of the foreign investor.*

→ *Corporate documents (certificates of incumbency, minutes of the meeting of the Board, resolutions etc.) demonstrating the powers of the foreign investor's authorized representative.*

→ *A Power of Attorney duly signed by the foreign investor's authorized representative(s) granting a Brazilian resident individual all the powers required by the Brazilian law to act on behalf of the foreign investor before the Brazilian authorities.*

→ *If you are a foreign individual, the documents required are: power of attorney for a person residing in Brazil and an identification document.*

**IMPORTANT**

*Usually, all foreign documents to be accepted by Brazilian authorities must be notarized and apostilled in the country where the foreign investor is domiciled and, after that, translated into Portuguese by a sworn translator and registered before a Brazilian notary.*

## FOREIGN DEBT INVESTMENTS: "MÚTUO CONVERSÍVEL"

→ *Foreign investors may also invest in Brazilian companies by celebrating convertible debt agreements with the investee. In Brazil, the most used debt legal agreement is called Mútuo Conversível and it is similar to a Note Purchase Agreement, provided however that no Convertible Promissory Note is issued to the investor.*

→ *As expected, a debt agreement does not infer an immediate equity acquisition. However, in*

*this investment structure, the foreign investor lends money to the investee expecting that upon a maturity date such debt will be paid by the delivery of Company equity to the investor;*

→ *Provided that a debt agreement does not imply in a foreign investor owning capital stock in Brazil, its registration procedure does not have as many bureaucracies as registering an equity investment.*

→ *Therefore, to invest in Brazilian companies under a debt agreement such as a Mútuo Conversível, foreign investors do not need to worry about registrations, granting power of attorneys or notarizing documents. In this debt scenario only the investee will need to formalize such relation with the investor with another Brazilian Central Bank System, the RDE-ROF (Portuguese abbreviation for Registro Declaratório Eletrônico - Registro de Operações Financeiras).*

## INVESTING IN A HOLDING COMPANY

→ *It's very common that foreign investors don't feel comfortable to invest directly in Brazil, either through equity or debt instruments, especially because Portuguese is not a very simple language to be understood by a foreigner and the Brazilian legal system is complex and is very different from the American legal system, the common-law.*

→ *When such situations occur, foreign investors require the Brazilian company to form a holding*

*company in an English-speaking country, such as the United States, the Cayman Islands or the British Virgin Islands, that will own 99.99% of the Brazilian operating company. With this structure, the foreign investor will be able to invest using agreements in English, translations being therefore unnecessary, as well as the documents in another language and the aforementioned procedures.*

→ *By requiring the investee to form a holding company, however, the foreign investor needs to bear in mind that such procedure will be more expensive for the investee, as the investee will need to constitute the offshore company and maintain such entity in compliance with the regulations of the respective country. Therefore, it's very important to verify which will be the best investment structure for the investor and for the investee in each specific case.*

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