The New Foreign Exchange Framework Comes into Effect, and the Central Bank Issues New Regulations on Foreign Capital

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On December 31, 2022, Law 14.286/21, known as the "New Foreign Exchange Framework", came into effect, consolidating and simplifying Brazilian foreign exchange legislation. The new legislation is concise, uses current language, and modernizes our regulatory and foreign exchange framework, which is crucial to our economy and its interaction with international economies and foreign investors.

Among the new regulations under regulate Law 14.286/21, the Central Bank issued BCB Resolution BCB 278 on December 32, 2022, providing new treatment for foreign capital in the country and the dynamics of reporting information to the Central Bank.

The main changes made by BCB Resolution 278 are highlighted below.

Foreign Credit

BCB Resolution 278 introduces a new definition of "Foreign Credit" (Crédito Externo), which refers to any financial commitment (even when the funds do not enter the country) assumed by a resident under which a non-resident is creditor by reason of a (a) direct loan; (b) issuance of securities in the international market; (c) issuance of privately placed securities in the domestic market; (d) financing; (e) financed importation of goods or services; (f) advance payment on exports; or (g) financial leasing.

As can be inferred from the above, the Central Bank now expressly allows funds under foreign credit transactions to be disbursed directly abroad (i.e. without actual inflow of funds into Brazil), which has always been a fundamental requirement for foreign credit transactions. Furthermore, the new rule expands the range of transactions subject to registration to include other privately placed securities in the domestic market (under the previous regulations, registration was limited to debentures).

Foreign Direct Investment

The definition of "Foreign Direct Investment" now includes not only interests held directly by non-residents in the capital of a Brazilian company, but also ownership of any other economic rights by non-residents under any instrument or contract whenever the return on their investment depends on business results.

Thus, any entity incorporated or organized under Brazilian law, whether for profit or not, and whether or not it has legal personality, including any corporation, partnership, individual entrepreneur, consortium, and partnership by contract, is now treated as a "recipient" of foreign direct investment. This represents another significant regulatory advance since until now only actual equity interests were subject to registration with the Central Bank, which is the only lawful channel for the inflow and outflow of funds.

Foreign Capital Reporting Requirements

Central Bank reporting requirements on foreign credit and foreign investment now covers a limited range of transactions, defined by the amount involved and the terms and conditions of the transaction.

For foreign credit transactions, the following registration criteria apply: (i) direct loans, issuance of securities in the international market, issuance of privately placed securities in the domestic market, and financing: transactions for amounts equal to or greater than USD 1,000,000.00; (ii) financed import of goods or services with payment terms exceeding 180 days: transactions for amounts equal to or greater than USD 500,000.00; and (iii) advance payment for exports and foreign financial leasing with payment terms exceeding 360 days: transactions for amounts equal to or greater than USD 1,000,000.00.

Contracts for royalties, technical services, similar services, operating lease contracts made abroad, ordinary leases, and charters are exempt from registration.

As for foreign direct investment, registration will only be required when (i) there is a financial transfer related to a non-resident investor equal to or greater than USD 100,000.00; (ii) there is movement of funds (e.g. capitalization of tangible or intangible assets, conversion of investment, assignment, reinvestment, etc.) equal to or greater than USD 100,000.00 (effective as of November 1, 2023); or (iii) recipients are subject to periodic reporting requirements (as described below).

Recipients of foreign direct investment must file periodic reports (i) quarterly for recipients with total assets equal to or greater than BRL 300,000,000.00 on the reporting date; (ii) annually for recipients with total assets equal to or greater than BRL 100,000,000.00 on the reporting date of December 31 of the previous year (effective as of November 1, 2023); and (iii) every five years, with the reporting date being December 31 of calendar years ending in 0 or 5, for recipients with total assets equal to or greater than BRL 100,000.00 on the reporting date of December 31 of the previous year.

Transitional Provisions

The Central Bank has also issued transitional provisions under BCB Resolution 281, which apply in conjunction with BCB Resolution 278. BCB Resolution 281 replicates the mechanism provided in the previous regulations by requiring simultaneous foreign exchange transactions in cases of (i) conversion of non-residents' assets in Brazil into foreign capital subject to Central Bank reporting requirements, (ii) transfer between types of foreign capital subject to Central Bank reporting requirements, (iii) renegotiation and assumption of direct foreign lending transactions and issuance of securities abroad subject to Central Bank reporting requirements, and (iv) investments made through international contributions to capital of shares or other assets.

However, in line with the position taken by the Central Bank during the public hearings on the new regulations, BCB Resolution 281 provides that the requirement for simultaneous foreign exchange transactions or international transfers in Brazilian reais will come to an end on October 31, 2023. After that date, simultaneous foreign exchange transactions or international transfers in Brazilian reais should no longer be required with respect to foreign capital.

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