CAPITAL MARKETS

CLIENT ALERT

MAY/2019

THE SO-CALLED "ECONOMIC FREEDOM PROVISIONAL MEASURE" (MP 881/2019)

The current Brazilian federal government, through a liberal initiative, enacted Provisional Measure nº 881/2019 (nicknamed as the "Economic Freedom MP"). Such legal text was published in the Union´s Official Gazette of April 30, 2019 and establishes a Declaration of Economic Freedom Rights as well as lays down general rules of economic law, provides for regulatory impact analysis and brings legislative changes to civil, business, economic, tax, urban and labor laws.

The de-bureaucratization and simplification of procedures pertaining to the exploration of economic activities are the main pillars of the Economic Freedom MP. In this sense, its article 2 defines three basic principles: (i) presumption of freedom when exercising economic activities (working, producing and contracting); (ii) presumption of the individual´s good faith; and (iii) minimal intervention of the government when dealing with private economic activities.

In addition, article 3 has folded into the Brazilian legal system, ten paragraphs which create essential rights of economic freedom, of which the following stand out: (i) exemption from governmental prior authorization to explore low risk economic activities; (ii) freedom in defining product and service prices (provided market behavior is observed); (iii) presumption of good faith and the preservation of the autonomy of the will in private relations; (iv) incentives for product and service innovation, permitting such products and services to be offered, tested and implemented to private groups; (v) stipulating that the agreement among private entities shall prevail over the rules of business law; (vi) the obligation for public entities to set deadlines when issuing approvals (in case the deadline is not observed, the approval will be deemed approved); and (vii) acceptance of certain documentation in digital format.

Such rights may only be restricted in cases where there is the need to protect national security, public safety or health circumstances.

In addition to establishing principles regarding economic freedom and encouraging the country's economic development, the Economic Freedom MP amended important legal provisions and private law institutes, such as the Civil Code, Bankruptcy Law (Law 11,101/05) and the Brazilian Corporate Law (Law 6404/76).

PRACTICE AREA
Capital Markets

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I. Corporate Law

In Corporate Law, the major innovation was the creation of the limited sole proprietorship, representing great progress to reflect the reality of most of the limited companies, who end up having one equity holder concentrating capital and another equity holder with a very limited percentage of equity, only to satisfy the requirement of plurality of partners imposed by the Civil Code.

In the legal text which regulates EIRELIs (Individual Limited Liability Company), the recognition of the independence and autonomy of the company versus its shareholder has been soiled, making little room for court interpretations on the unification of the company and the shareholder´s assets.

Article 50 of the Civil Code, which deals with the disregard of the legal entity in civil and business relations, has received more objective parameters, which must be respected by the courts. In this sense, the Civil Code now defines the concepts of "misuse of purpose" and "asset confusion", and, in order to characterize a situation of misuse of purpose, the deceitfulness of the agent must be proven.

In addition, only those shareholders or administrators who benefit directly or indirectly from the act of abuse may have their assets induced by the disregard of the legal entity theory. Another innovation brought by the MP is the acceptance of the inverse disregard of legal entity (already recognized by the Code of Civil Procedure of 2015, in article 133, §2), besides the recognition that the mere formation of an economic group, by itself, does not authorize the effects of the disregard of the legal entity.

The Bankruptcy Law (Law 11.101 / 05) was also amended with the introduction of article 82-A, which restricts the effects of bankruptcy to limited liability partners, controllers and administrators of the bankrupt company to those circumstances which meet the requirements of the disregard of the legal entity, as per article 50 of the Civil Code.

One hopes that the courts will become more parsimonious when applying the institute of the disregard doctrine and that consequently, the shareholders will be able to maintain their autonomy of assets when creating a legal entity, thus fomenting the culture of entrepreneurship in the country.

II. Contractual Matters

In private contractual matters, the Economic Freedom MP aimed at reducing contractual government control. Articles 421 and 423 of the Civil Code (Law No. 10,406/02) have been amended and articles 480-A and 480-B have been included, basically determining that:

(i) the principle of the autonomy of the will (article 421 of the Civil Code) will be governed by the principles and guidelines of the Economic Freedom MP, which values the agreement among the parties and provides for a supplementary application of the legislation;
(ii) contractual revision must be an exceptional measure, under the minimum intervention prism of the government, and the parties may establish the rules and objective principles to guide the review and termination of a contract;
(iii) except for adhesion agreements, clauses that create interpretation doubts should be read favorably to the party that has not drafted said clause;
(iv) in intercompany relations, the symmetry of the parties shall be presumed, and the risk allocation defined by the parties shall necessarily be respected.

III. De-bureaucratization for the exploitation of economic activities

The main disincentives when dealing in Brazil are bureaucracy, lengthy timing and high costs when exploiting economic activity. Sensitive to this obstacle, the Economic Freedom MP admits that the exploitation of activities considered to be low risk (the definition of “low risk” to be defined by the Executive Branch Act, and in its absence, state, district or municipal legislation) should be carried out independent of licenses and licenses, merely through a self-declaration of a low risk classification by the private entity. The supervision of said classification will be carried out “a posteriori”, assuming the good faith of the private entity, in line with international practice.

As for public release acts, the Economic Freedom MP also provides that, except for certain exceptions listed in the MP itself, the individual will receive, from the competent governmental authority, immediately upon request, a deadline stipulating the maximum timeframe for the request analysis. After the deadline has expired, and in case the government has not issued it approval thereof, the application will be considered approved (except for certain cases expressly prohibited by law).

Freedom in the stipulation of prices, according to the market demand (except for cases of artificial price adjustment to circumvent taxation or the defense of competition, consumers and other legal protections) was also introduced by the new MP.

In order to reduce bureaucracy, the Economic Freedom MP introduces the principal that digital documents, for all legal purposes and proof, have the same probative value as the original physical document and the same legal effect as the microfilmed document, authorizing the digital storage and archiving of private documents. Thus, the public records law (Law no. 6.015/73) has also been changed, allowing for the registration, publication and preservation of public records in digital form.

IV. Capital Markets

With regard to the changes affecting access to the capital market, the Brazilian Corporation Law (Law No. 6404/76) was also amended, namely: (i) no need to use subscription lists and bulletins in cases of constitution of legal entities through public offerings, as well as in equity offerings carried out through public distributions, provided that the settlement of said transactions is carried out through a system administered by an entity that manages organized securities markets and (ii) authorization for the Brazilian Securities and Exchange Commission to grant flexibility on requirements imposed to small and medium-sized companies when accessing the capital markets. Such changes, although small, have the ability to bring agility to fundraising transactions by companies of all sizes, whether in terms of document economy or regulatory procedural requirements.

V. Investment Funds

In relation to investment funds, the Economic Freedom MP instituted "Chapter X - Of the Investment Fund" in Book III (Right of Things) in the Civil Code, which defines the nature of the funds, in line with article 3 of CVM Instruction 555 ("communion of resources, constituted in the form of a condominium, for financial investment"). In addition, the Economic Freedom MP introduces the concept of limitation of liability for quotaholders and clarifies the segregation of liability among fiduciary service providers, stating that such limitation will only cover facts that have occurred after the amendment of the fund´s regulation.

Such a move is intended to meet a long-standing demand from the investment fund industry, which has suffered from unfavorable court decisions.

VI. Conclusion

The Economic Freedom MP came into force on the date of its publication and still lacks approval of the National Congress for final transformation into law (as per the Brazilian legislative system). Such approval may be issued within the maximum timeframe of 120 days. Members of Congress may propose amendments to the MP and several of its articles are still subject to regulation.

With these new rules, adjustments to contractual instruments, bylaws and shareholders/quotaholders agreements and investment fund regulations will need to be carried out.

It will also be important to observe whether the legislative change - if approved by Congress - will cause the desired cultural change in law and public administration operators, to allow Brazil to finally have an environment that encourages enterprise, risk and entrepreneurship, without the massive, and sometimes, suffocative presence of the government.

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