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SUMMARY

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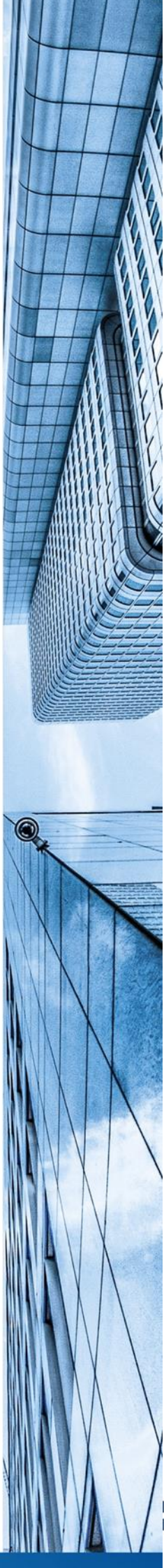

CVM ISSUES NEW REGULATORY FRAMEWORK FOR CROWDFUNDING

On April 27th, 2022, the Brazilian Securities Commission (CVM) issued Resolution 88/2022, which contains regulations on public offerings of securities issued by small businesses with waiver of registration, by means of electronic crowdfunding platforms, revoking CVM Instruction 588/2017 ("CVM Resolution 88/2022").

The new regulations are the result of Public Hearing 02/2020, promoted by the Superintendency of Market Development (SDM) of the CVM, as described in our Newsletter no. 67 (April 2020). This public hearing received comments from 37 interested parties.

CVM Resolution 88/2022 establishes the new regulatory framework for crowdfunding in Brazil, disciplining the relationship of participative investment platforms, small business enterprises issuing securities and investors.

The following are the most relevant innovations introduced by CVM Resolution 88/2022 in comparison to the previous regime:

(i) expansion of limits: Crowdfunding must be carried out by means of a participative investment platform registered with the CVM and must observe three main limits, related to the following aspects: (a) maximum amount raised per financial year; (b) maximum gross revenue of the issuer; and (c) maximum individual investment by investors defined as non-qualified (according to the terms of CVM Resolution 30/2021).

As of the entry into force of CVM Resolution 88/2022: (a) the maximum amount raised via crowdfunding will be BRL 15,000,000.00 (currently, the maximum figure is BRL 5,000,000.00); (b) the maximum yearly gross revenue of the issuer will be increased to BRL 40,000,000.00 (from the present value of BRL 10,000,000.00); and (c) the annual limit of investment by an individual will be BRL 20,000.00 (with consequent elevation to BRL 200,000.00 of the annual income as of which an investor can exceed the general limit).

(ii) possibility of subsequent trading: The new Resolution will allow participative electronic investment platforms to act as intermediaries in the buying and selling of securities already issued in at least one public offering via the platform in question. With this innovation, the CVM has permitted the creation of a type of "secondary market" for the securities issued by means of crowdfunding.

To intermediate this modality of trading, the platform must assure that the seller of the securities and the potential buyers are active investors (defined as investors

enrolled with the platform, with their enrollment updated, that have invested in at least one public offering conducted by the platform in the preceding two years).

The rule also establishes that the platforms cannot constitute and administer regulated markets for securities, cannot make available a centralized and multilateral trading system for matching and interaction of potential buyers and sellers and formation of prices, or execute transactions in which the counterparty is a market former that assumes the obligation of placing firm buy and sell offers.

It will also be forbidden to use language regarding the existence or operation of a regulated market for securities, such as an "exchange", "securities exchange", "over-the-counter market" or "secondary market", among others, which can potentially mislead investors.

(iii) expansion of the possibilities for disclosure of offerings: The CVM will allow the ample promotion of public offerings via crowdfunding, including the use of publicity material, in any communication vehicles and social media, provided there is respect for the limits on disclosure established in the Resolution itself.

Previously, the disclosure of information about offerings through this modality was restricted to the websites of the issuer and the lead investor.

(iv) record keeping of the ownership of securities: CVM Resolution 88/2022 also has introduced innovations related to greater protection of investors via crowdfunding. Among these are the obligations that: (a) the securities offered must be booked, which can be accomplished by a depositary institution registered with the CVM; or (b) ownership of the securities and the respective equity stake must be recorded, which can be accomplished by the electronic crowdfunding platforms.

For a platform to render the services indicated in item (b) above, the rules established in CVM Resolution 88/2022 must be observed, such as the existence of computerized processes and systems that are adequate to inform the issuing company of the securities trading accounts and transfer of securities, and internal rules for compliance with the CVM Resolution 88/2022.

Additionally, the platform can only render the services for record keeping of the ownership of securities and equity interest for issuers that have carried out public offerings in its environment.

(v) improvement of the requirements related to the participative investment platforms: With the objective of mitigating worries about the possible lack of structure for the platforms to exercise their regulated activity as gatekeepers, CVM Resolution 88/2022

has increased the minimum capital stock of such platforms to register with the CVM, from BRL 100,000.00 to BRL 200,000.00.

It will also be necessary for the platforms to hire a professional to oversee the internal controls (compliance) as of the financial year when the sum of the funding raised via the platform reaches BRL 30,000,000.00.

(vi) independent auditing of issuers: The Resolution also has introduced new obligations applicable to issuers, such as the need to audit the financial statements in two cases: (a) when the issuer reaches gross annual revenue of BRL 10,000,000.00 or (b) when the public offering intends to raise more than BRL 10,000,000.00.

(vii) utilization of the capital raised: The issuers of securities by crowdfunding cannot use the money raised to acquire an equity stake in other companies or grant credit to other companies.

(viii) additional lot: There has been modification of the maximum percentage for distribution of additional lots in the public offering without need for registration, which has been increased from 20% to 25% of the maximum target value.

(ix) secondary offerings: According to CVM Resolution 88/2022, a secondary offering through crowdfunding is allowed, provided that the total value of the secondary offering does not exceed 20% of the maximum target value.

(x) alteration of the essential information about the offering: The platform can alter the essential information about the offering after the start of distribution in the event of a substantial and unforeseeable subsequent change in the factual circumstances existing at the start of the offering, until its closing. In such case, the investors that have already adhered to the offering can revoke their reservations within five days of receipt of the communication in this sense.

CVM Resolution 88/2022 will take effect on July 1st, 2022.

More information, including the full text of CVM Resolution 88/2022, can be obtained at the CVM's website (www.gov.br/cvm).

STJ JUDGES CASE INVOLVING DISREGARD OF LEGAL ENTITY AND RESTRAINT OF ASSETS OF INVESTMENT FUNDS

On April 5, 2022, the Third Panel of the Superior Tribunal of Justice (STJ, the highest court for non-constitutional matters) unanimously denied Special Appeal no. 1.965.982/SP ("Special Appeal"), in

a suit involving the stock investment fund Pinheiros Fundo de Investimento em Participações (current name of Bertin Fundo de Investimento em Participações – "FIP Bertin") and BASF S.A. ("BASF").

This case originated from a third-party intervention motion filed by FIP Bertin in a suit to enforce an extrajudicial instrument ("Collection Suit") filed by BASF against Xinguleder Couros Ltda. and it guarantors. In that case, the court determined the inverse disregard of legal entity of Bracol Holding Ltda. ("Bracol Holding"), leading to the inclusion of FIP Bertin as a defendant in the Collection Suit and the freezing of the financial assets held in its bank account.

According to FIP Bertin, the financial assets deposited in an investment fund belong to each of the investors in a joint-ownership, or condominium, arrangement, in proportion to their investment, so the money cannot be used to satisfy a debt of a company integrating the same business group as one of the investors.

The decision by the Third Panel of the STJ addressed some important aspects related to the legal nature of investment funds, including establishing the impossibility of attaching a fund's assets due to debts of the investors and the possibility of disregarding the legal entity to reach the assets of investment funds.

According to the leading opinion of the reporting justice assigned to the case, Justice Ricardo Villas Bôas Cueva, investment funds are constituted in the form of condominiums (as established in various laws and other normative acts, such as Art. 50 of Law 4,728/1965; Art. 1 of Circular 2,616/1995 from the Central Bank of Brazil; Arts. 3 and 4 of CVM Instruction 555/2014; and Art. 1368-C of the Civil Code (added by Law 13,874/2019).

Justice Cueva, however, held that not all legal provisions governing civil condominiums are applicable to investment funds. Therefore, although not having legal personality, investment funds have rights and duties, both in their internal and external relations. In other words, although they engage in activities through the intermediation of their administrator and/or portfolio manager, investment funds can hold rights and be subject to obligations in their own name.

Therefore, the fact that investment funds have the legal nature of a condominium and do not have legal personality is not able to prevent, by itself, the application of the mechanism of disregard of legal entity in cases of proven abuse of rights due to deviation of purpose or commingling of assets.

In this sense, the reporting justice stated that the investors in investment funds do not have the prerogatives of Art. 1314 of the Civil Code,[1] since the investors do not fully enjoy the rights over the underlying assets of the fund; but only the rights related to the notional fractions representing their proportional participation in the investment fund (i.e., their shares).

Therefore, Justice Cueva indicated that in theory, the assets of investment funds belong, in a condominium arrangement, to all the investors, so that the fund cannot be held liable for the debt of a single investor. Only the respective shares can be attached to satisfy the debt of one of the investors.

For the same reasons, in an inverse sense, the shares of investment funds cannot be attached to satisfy debts of the fund.

Notwithstanding the interpretations of the rules described above, which must be observed in normal circumstances, Justice Cueva held that they must yield in face of unequivocal proof that the investment fund was constituted fraudulently, as a way to evade the law and conceal assets of companies belonging to the same business group, "always exercising caution not to affect the shares owned by investors that had no relationship with the debtor".

In the Collection Suit at issue here, the inverse disregard of legal entity of Bracol Holding to reach the assets of FIP Bertin was declared by the lower court judge, based on the presence of the requirements of deviation of purpose and commingling of assets, as set forth in Art. 50 of the Civil Code. For this reason, the investment fund – holder of rights and obligations – was included as a defendant in the Collection Suit, as one of the members of the business group of Bracol Holding.

In this respect, the reporting justice also took into consideration that at the moment of the constraint, the investment fund had only two investors, which also were members of the business group of Bracol Holding. Thus, the restraint of the assets of FIP Bertin did not pose a risk of affecting the assets of third parties.

Hence, the following conclusions can be drawn from the decision in Special Appeal no. 1.965.982/SP:

(i) investment funds can be holders, in their own name, of rights and obligations;

(ii) as a general rule, the shares held by the investors in investment funds cannot be attached to satisfy the personal debts of another investor;

[1] Art. 1314. Each joint owner can use the object according to its purpose, exercising over it all the rights compatible with inseparability, claims against third parties, defense of possession and alienation of the notional interest, or encumbrance of it.
Sole paragraph. None of the joint owners can alter the purpose of the common object, or give possession, use or enjoyment of it to outside parties, without the consensus of the others.

(iii) only the shares owned by the debtor can be attached to satisfy its creditors; and

(iv) in exceptional conditions, of abuse of rights, the mechanism of disregard of legal entity can be applied to reach the assets of the investment fund itself, but with the need to safeguard the rights of third parties (i.e., the investors not subject to the disregard).

More information, including the full text of the decision rendered in Special Appeal no.1.965.982/SP, can be found at the website of the STJ (www.stj.jus.br/sites/portalp/Inicio).

STJ JUDGES CASE ON THE LIABILITY OF PARTNERS OF MICRO AND SMALL BUSINESSES FOR TAX DEBTS MATERIALIZED AFTER CLOSURE OF COMPANY

On May 3, 2022, the Second Panel of the Superior Tribunal of Justice (STJ, the highest court for non-constitutional matters) granted Special Appeal no. 1.876.549/RS ("Special Appeal 1.876.549/RS"), filed by the National Revenue Prosecution Service (PGFN) against the decision of the Federal Court of Appeals for the 4th Region that had denied the redirection of a tax enforcement suit against the partners of a taxpayer classified as a micro-enterprise.

According to the appealed decision, the tax enforcement action filed against the company involved generating events that occurred during the effective period of Art. 9, §§ 3 and 5, of Complementary Law 123/2006 (now revoked), which established the joint and several liability of the partners and managers for the tax debts of the company in case of cancellation of its registrations while it has outstanding tax, social security or labor debts.

However, further according to the terms of the appealed decision, the responsibility of the partners should not be recognized since there was no proof of the existence of any of the hypotheses of Art. 135, numeral III, of the National Tax Code (CTN)[2] (acts of managing partners in excess of powers or infraction of the law, articles of association or bylaws).

In the Special Appeal 1.876.549/RS, the PGFN sought reformation of the decision based on the following grounds:

(i) in carrying out the simplified cancellation of the company with the control bodies without proof of fiscal regularity, the partners became jointly and severally liable for the pending fiscal debts, pursuant to Art. 9, §§ 3 and 5 of Complementary Law 123/2006, according to the wording in force at the time;

2 "Art. 135. Personal liability for debts corresponding to tax obligations in cases of acts committed in excess of powers or infraction of the law, articles of association or bylaws, applies to: I – the persons referred to in the preceding article; II – the attorneys-in-fact, agents and employees; III – the officers, managers or representatives of private companies."

(ii) the case does not involve irregular dissolution, so the interpretations of the doctrine from legal scholars and jurisprudence from the courts regarding Art. 135 of the CTN do not apply, therefore there was no need to verify the possible occurrence of illicit acts of the partners (acts with excess of powers or infraction of the law, articles of association or bylaws); and

(iii) the responsibility in the case should be deemed joint and several and was independent of any illicit act that could be equated with the situations of arts. 134, VII, and 135, III, of the CTN.

The Second Panel of the STJ granted Special Appeal 1.876.549/RS, recognizing the possibility of redirecting the enforcement action to the partners.

As interpreted by the Second Panel, the case in question could not be classified as irregular dissolution (art. 135 of the CTN), since there is a rule applicable to micro and small businesses allowing the possibility of regular dissolution even when there are outstanding tax, social security and/or labor debts. That provision had been included in the Brazilian legal system to facilitate the closure of such enterprises, not to permit default of tax obligations.

According to the leading opinion of the reporting justice assigned to the case, Justice Mauro Campbell Marques, both the original wording of art. 9 of Complementary Law 123/2006 and the wording given by Complementary Law 147/2014 must be interpreted in the sense that in regards to micro and small businesses, it is possible to hold the partners liable for default of tax obligations, based on art. 134, VII, of the CTN, when the company is extinguished.[3]

However, the partners have the opportunity to demonstrate insufficiency of equity of the company upon liquidation, to escape from responsibility for the debts, in line with the jurisprudence from the STJ.

More information, as well as the full text of the decision rendered in Special Appeal 1.876.549/RS, can be found at the website of the STJ (www.stj.jus.br).

[3] Art. 134. In cases when it is impossible to demand compliance with the principal obligation by the taxpayer, the following persons are jointly and severally liable with it for acts in which they intervene or omissions for which they are responsible: [...] VII – the partners, in the case of liquidation of a commercial partnership.