

To
Mr. David Lewis
Executive Secretary – FATF Secretariat
2, rue André Pascal
75775 Paris Cedex 16 FRANCE

Dear Mr. Secretary,

SINDIFISCO NATIONAL UNION (National Union of Internal Revenue Auditors of Brazil), an entity representing the Internal Revenue Auditors of Brazil, present **information** regarding the set of decisions taken by Brazilian authorities, which restricts the ability of the national financial intelligence agency - COAF - and the Brazilian Internal Revenue Service to cooperate, independently and effectively, with the bodies charged with pursuing the crimes of corruption, money laundering and terrorist financing.

I. The structuring of the anti-corruption, money laundering and terrorist financing system in Brazil.

Since the end of the 1980s, Brazilian legislation has been improved through the adoption of appropriate instruments to fighting corruption, money laundering and terrorism.

The main international conventions to combat these crimes were formally incorporated into the Brazilian legal system. The *Convention on the Fight against Corruption of Foreign Public Officials in International Business Transactions* was determined through Decree no. 3678, on 11.30.2000. The *United Nations Convention against Corruption* was determined with the issuance of Decree no. 5687, as of January 31, 2006. The *Inter-American Convention against Corruption* was specified by Decree

no. 4410, dated 10.07.2002. The Palermo Convention (United Nations Convention against Transnational Organized Crime) was incorporated through Decree No. 5.015 / 2004.

Moreover, Brazil has been a member of the Financial Action Task Force against Money Laundering and Terrorist Financing (GAFI / FATF) and the financial intelligence units of the Egmont Group since 1998. Since 2000, it has part of the South American Financial Action Group against Money Laundering and Terrorist Financing (GAFISUD), now called the Latin American Financial Action Group (GAFILAT).

Brazil, through Law No. 9.613/1998, defines the crime of money laundering. Subsequent changes promoted by Laws nº 10.467/2002, 10.467 / 2002, 10,701/2003 and nº. 12.683/2012, improved the legislation regarding the subject, including the provision of new previously commented offenses, highlighting those committed by individuals against foreign public administration and terrorism financing.

The Law No. 9613/1998 also provides the creation of an Intelligence Financial Unit, in accordance with Recommendation 26 of the FATF. In Brazil this unit is known as COAF - Financial Activities Control Council, an institution that, since its inception, has been contributing, in a remarkable way, to the fight against the above-mentioned crimes. From January to June 2019 alone, the agency issued 4,450 Financial Intelligence Reports (RIF), consolidating communications for 198,217 operations.¹[1]

According to international guidelines, the Law nº 9613/1998, it provides to individuals and legal entities operating with financial resources, exchange and securities - detailed relationships are established in Article 9 of Law - the duty to identify clients and, subject to certain conditions, report their operations to COAF. This can be seen in Article 10 and 11 of Law no. 9.613/1998:

Art. 10. The persons referred to in art. 9th:

I - identify their clients and keep their register updated, in accordance with instructions issued by the competent authorities;

II - keep a record of all transactions in domestic or foreign currency, securities, credit securities, metals, or any asset that may be converted into cash, which exceeds the limit set by the competent authority and in accordance with the instructions issued by it;

¹ <https://siscoaf.discovery.fazenda.gov.br>.

III - shall adopt policies, procedures and internal controls, compatible with their size and volume of operations, allowing them to comply with the provisions of this article and art. 11, in a disciplined manner by the competent bodies;

IV - shall register and keep their register updated with the regulatory or supervisory body and, failing this, the Financial Activities Control Council (COAF), in the form and conditions established by them;

V - shall comply with the requests formulated by COAF in the periodicity, form and conditions established by it, and shall preserve, under the law, the confidentiality of the information provided.

(...)

Art. 11. The persons referred to in art. 9:

I - they shall pay special attention to operations which, according to instructions issued by the competent authorities, may constitute serious evidence of, or relate to, the crimes provided for in this Law;

II - shall communicate to COAF, refraining from informing such act to any person, including the one to whom the information refers, within 24 (twenty-four) hours, the proposal or realization: a) of all transactions referred to in item II of art. 10, accompanied by the identification referred to in item I of said article; and b) the operations referred to in item I;

III - shall communicate to the regulatory or supervisory body of their activity or, in their absence, to COAF, in the periodicity, form and conditions established by them, the non-occurrence of proposals, transactions or operations that may be communicated under the terms of item II.

(...)

Today, COAF's duties are regulated by Decree No. 9663, January 1, 2019, and the resolution /COAF No.31 of June 7, 2019. In addition such regulations include the procedures to be followed by individuals and subjected to COAF regulations in the form of §1 art. 14 of Law No. 9.613/1998 ; on the sanctions imposed by Law No. 13.810, of March 8, 2019; and on the communications referred to in art. 11 of Law No. 9613 of March 3, 1998, related to terrorism and the financing.

With regard to this last point, Brazil is also in compliance with its international commitments, through Law no. 13.260 / 2016, article 6, incorporates the conduct of receiving, providing, offering, obtaining, storing, keeping in deposit, soliciting, investing, in any way, directly or indirectly, resources, assets, goods, rights, values or services of any kind for the planning, preparation or execution of conduct that is classified as terrorism . This precept is one of the strictest penalties of the Brazilian penal system: imprisonment, from fifteen to thirty years.

The duty to share data with the Public Prosecution Service and the police authorities which are related to possible illicit acts is also attributed to the Internal Revenue Auditors, either by the general provision of art. 116, VI, of Law no. 8112/1990, or by specific requirements of art. 198 of the National Tax Code, of art. 83 of Law 9.430/96 and Decree 2.730/1998, which concerns tax representation for criminal purposes. This type of representation is further regulated by Ordinance no. 1.750 / 2018, from the “Secretaria Especial da Receita Federal do Brasil” (Federal Revenue Services of Brazil).

Examination of these precepts shows that representation should occur when tax authorities identify the practice of (a) crimes against the tax order, against Social Security and contraband or embezzlement; (b) crimes against the Federal Public Administration, to the detriment of the National Treasury or against foreign public administration, the falsification of public titles, papers and documents and the “laundering” or concealment of assets, rights and values; and (c) illicit acts that in theory constitute acts of administrative misconduct. After a long period of regulatory and institutional improvement, Brazil has structured a robust system in coping with crimes related to money laundering, corruption and terrorist financing. National legislation is fully in line with Brazil's international commitments. In particular, they have been widely implemented the FATF Recommendations.

However, in recent months, this system has become unstructured, as shown in the following section. The disruption is so widespread and confusing that today the Brazilian state no longer meets effective conditions to fulfill its international commitments to curb corruption, money laundering and the financing of terrorism.

II. The disruption of the anti-corruption, money laundering and terrorist financing system in Brazil.

There is major disruption underway in the system to combat corruption, money laundering and terrorism in Brazil. This de-structuring indicate: a) recent changes in the composition and supervisory power of COAF; b) the decisions of the Supreme Court that has limited the actions of COAF and the Brazilian Internal Revenue Service; c) the

pressures made by the Federal Court of Accounts on agents of the federal tax administration; and d) changes to the Tax Representation for criminal purposes.

This will be clarified in the following topics.

a. The recent changes in COAF's structure.

In its original composition, established in art. 16 of Law No. 9,613 / 1998, COAF, brought together representatives from the Central Bank of Brazil, the Securities Commission, the oversight of Private Insurance, the Attorney General's Office of the National Treasury, the Federal Revenue Secretariat, an intelligence agency of the Executive Power, Federal Police Department and the Ministry of Foreign Affairs. In the last three cases, the appointment of the Council member would be made by the respective Ministers of State.

The Provisional Measure No. 893, issued on August 19, 2019, in addition to binding the body to the Central Bank, changed its composition and became composed of *“Brazilian citizens with unblemished reputation and recognized knowledge in the area and appointed by the President of the Brazilian central bank”*. The attachment of COAF members to the bodies responsible for conducting state policies, previously required, was eliminated, leaving room for political appointments, without objective requirements.

b. The decisions of the Supreme Court that limit the performance of COAF.

In July 16, 2019, the Federal Supreme Court President, Minister Dias Toffoli, suspended all lawsuits filed from data shared by the supervisory and control bodies, without judicial authorization. The decision was issued under RE 1.055.941. The decision severely restricted the use of data originally gathered by COAF and *“Receita Federal do Brasil”* (Federal Revenue Services of Brazil). From the Minister's decision, evidence produced based on these data would only be valid if preceded by a court decision.

The suspension of such criminal investigations responded to the request of the defense of Senator Flávio Bolsonaro (PSL-RJ), son of the current President of the Republic, who was being investigated as a result of financial movements carried out by his advisers in the Legislative Assembly of Rio de Janeiro.

Minister Dias Toffoli's decision was issued as follows:

“Viewed. Through a petition filed in the case file (Petition / STF No. 41.615 / 19), the defense of Flávio Nantes Bolsonaro pleads his entry into the case (CPC, art. 1.038, I). To this end, it points to the existence of a criminal investigative proceeding against the applicant, based on the illegal breach of banking and tax secrecy by the Public Prosecutor of the State of Rio de Janeiro. According to his statement, “D. MPRJ used the COAF to create a 'shortcut' and to evade the control of the judiciary. Without authorization from the judiciary, more than one decade ago, the applicant's bank and financial movements were violently performed in violation of the constitutional rules guaranteeing bank and tax secrecy. There was an extrapolation of the authorization to share information between MPRJ and COAF, and even regarding the type and form of data collection by the COAF itself. ”(...) Once this record is made, I note that the written reasons brought to the process by applicant shake relevant grounds, which draw attention to the situation that is repeated in the multiple demands that convey material related to Theme 990 of the General Repercussion, namely, the objective beacons that administrative supervisory and control bodies, such as the Tax Authorities, COAF and BACEN, shall observe when automatically transferring to the Public Prosecution Service, for criminal purposes, information on taxpayers' bank and tax movement in general, without compromising the constitutional integrity of data privacy and confidentiality (art. 5, items X and XII, CF). This is because, the judgment of the direct actions of unconstitutionality by the Plenary in which constitutionality was recognized LC No. 105/2001 (ADI's nos. 2,386 2,390 2,397 and 2,859, all of my rapporteurs, Judgment 24/2/16, DJe 21/10/10 16), was emphatic in the sense that access to banking operations is limited to the identification of the holders of the transactions and of the global monthly amounts moved, that is, generic and cadastral data of the account holders, forbidding the inclusion of any element that allows the identification of their origin. or [the] nature of the expenses incurred from them, as provided by LC No. 105/2001 itself. Therefore, depending on what is decided in the controversy paradigm, the risk of criminal prosecution based on the sharing of bank and fiscal data of the supervisory and control administrative bodies with the Public Prosecution Service, without proper marking of the limits of information transferred, may result in in future overdue nullity judgments for offending the constitutional matrices of privacy and data confidentiality (art. 5, items X and XII of the SC). It is therefore not appropriate to maintain the cyclical action of the judiciary with respect to such claims that convey similar matter, until the Court has given a final ruling on the matter, which, as recorded, has already been defined by the Plenary for

judgment. calendar of the Court, 21/11/19. These arguments lead me to conclude by the need to apply the provisions of art. 1.035, § 5º, of the CPC, in order to suspend the processing of all legal proceedings in progress, which are in the national territory and deal with the matter discussed in these records. (...) It should be noted, however, that this decision does not affect the criminal actions and / or investigative procedures (Investigations or PIC's), in which the data shared by the administrative inspection and control bodies, which went beyond the identification of the holders. of banking operations and overall amounts, occurred with the proper supervision of the judiciary and with its prior authorization. In view of the above and observing the caveat highlighted above: 1) determination, pursuant to art. 1.035, § 5º, of the CPC, the suspension of the processing of all legal proceedings in progress, which are in the national territory and deal with Theme 990 of Management by Themes of General Repercussion; 2) determine, based on the general power of caution, the suspension of the processing of all investigations and criminal investigation proceedings (PIC's), pertaining to the federal and state prosecutors, in the national territory, which were instituted to the minimum of supervision of the Judiciary Power and its prior authorization on the data shared by the supervisory and control bodies (Tax Authorities, COAF and BACEN), which go beyond the identification of the holders of banking operations and the global amounts, as decided by the Court (eg ADI's no. 2,386 2,390, 2,397 and 2,859, Plenary, all of my rapporteur, Judgment 24/2/16, DJe 21/10/16); (...)" (RE 1055941, Rapporteur Min. Dias Toffoli, tried on 07/15/2019, published on DJe-167 08/01/2019).

This General Repercussion Theme 990 is scheduled for trial on 21.11.2019. In this case, the possibility of “*sharing with the Public Prosecution Service, for criminal purposes, taxpayer's bank and tax data obtained by “Receita Federal do Brasil” (Federal Revenue Services of Brazil) in the legitimate exercise of its duty to supervise, without prior authorization from the Judiciary*”, is discussed. The decision rendered in the judgment of the Extraordinary Appeal shall be replicated in all proceedings brought in Brazil. The impact of any decision prohibiting the sharing of information without prior judicial authorization can be gauged by the effects already provoked by the injunction to suspend proceedings already granted by Minister Dias Toffóli, which has significantly reduced COAF's activities in recent months, practically stopping production the of new reports.²

On September 27, 2019, Federal Supreme Court judge, Minister Gilmar Mendes, based on the decision of Min. Dias Toffóli, ordered the suspension of all proceedings

² <https://www1.folha.uol.com.br/power/2019/09/coaf-esempia-production-of-reports-and-faces-paralysis-apos-decisiono-de-toffoli.shtml> >.

involving the breach of the secrecy of Senator Flávio Bolsonaro (PSL-RJ), concerning the financial movements carried out by his advisors at the Rio de Janeiro Legislative Assembly. 36,679 / RJ. See his position below:

This is a complaint filed by Flávio Nantes Bolsonaro against an act of Judge of the Court of Justice of the State of Rio de Janeiro, rapporteur of HC 014980-83.2019.8.19.0000 and HC 0028203-06.2019.8.19.0000. The complainant submits that, after the Minister President, Dias Toffoli, issued the decision on item 990 of the general repercussion system, on 15.7.2019, he arranged for the aforementioned decision to be attached to the PIC 2018.00452470, which is pending before the MPRJ, as well as to the mentioned Habeas Corpus case 014980-83.2019.8.19.0000 and 0028203-06.2019.8.19.0000, requesting the suspension of the deeds. It narrates that, although the Criminal Investigation Procedure and the referred Judicial Proceedings deal with theme 990 of the general repercussion system and fall under the assumption of the decision of Minister Dias Toffoli, they were not properly suspended, leaving the paradigm decision non-compliant. , (...) The decision issued by the eminent Minister Dias Toffoli in the records of RE 1,055,941, based on art. 1.035, § 5, of the Code of Civil Procedure, determined that the national suspension would operate, in general, on the multiple demands in which the form of transfer, for criminal purposes, of data obtained by administrative inspection and control - including "Receita Federal do Brasil" (Federal Revenue Services of Brazil), COAF and BACEN. (...) The decision paradigm, therefore, ordered the suspension of the processing of "all legal proceedings in progress, which are currently being dealt with in the national territory and on Theme 990 of Management by Themes of the General Repercussion" and "all investigations and criminal investigation procedures (PIC's), pertaining to the Federal and state prosecutors, in the national territory, which were instituted under the supervision of the judiciary and its prior authorization on the data shared by the supervisory and control bodies (Tax Authorities, COAF and BACEN), which go beyond the identification of the holders of banking operations and the overall amounts, as decided by the Court. " In the case of the case, the complainant intends to suspend the progress of PIC 2018.00452470, pending in the MPRJ, as well as Habeas Corpus 014980-83.2019.8.19.0000 and 0028203-06.2019.8.19.0000, which are pending in the TJRJ. Considering the parameters set in the paradigm decision, for the national suspension to reach such administrative and judicial procedures, it is sufficient to show (1) that the establishment of PIC 2018.00452470 and Habeas Corpus 014980-83.2019.8.19.0000 and 0028203-06.2019.8.19 .0000 deals with data sharing between COAF and the Public Prosecution Service; (2) that the sharing of data took place without judicial authorization of breach of fiscal, banking and financial secrecy; and (3) that such sharing exceeded the identification of the holders of banking transactions and the overall amounts. In the case of the case, I understand that all three requirements are met. The argument of the defendant does not thrive that, because the information initially provided by the COAF to the MPRJ, without proper judicial authorization, concerns another person, there should be no

question of similarity with the paradigm decision. Having been the opening of the criminal investigation procedure by the MPRJ, provoked and based on data sharing with the COAF, without proper judicial control, should focus the effects of the decision paradigm. In addition, it is worth noting that such sharing directly affected the legal sphere of the claimant's person. Furthermore, it appears that, in the present claim, the COAF Financial Intelligence Fiscal Report shared with the Rio de Janeiro Public Prosecution Service, before judicial authorization, contained elements that exceeded the objective guidelines established by the STF in the judgment of ADIs 2,386, 2,390 2,397 and 2,859, namely (i) the indication of the holders of the operations and (ii) the indication of the overall amounts moved. The need to comply with objective beacons was explicitly mentioned in the decision of the RE 1.055.941 rapporteur, when he pointed out that: “The judgment of direct actions of unconstitutionality by the Plenary in which constitutionality LC No. 105/2001 (ADI's no. 2,386 2,390) was recognized. 2,397 and 2,859, all of my rapporteurs, Judgment 24/2/16, DJe 21/10/16), were emphatic in that access to banking operations is limited to the identification of the holders of the transactions and the overall monthly amounts , that is, generic and registration data of account holders, the inclusion of any element that allows identifying their origin or [the] nature of the expenses made from them is prohibited, as provided by LC 105/2001 itself. Therefore, depending on what is decided in the controversy paradigm, the risk of criminal prosecution based on the sharing of bank and fiscal data of the supervisory and control administrative bodies with the Public Prosecution Service, without proper marking of the limits of information transferred, may result in in future overdue nullity judgments for offense to the constitutional matrices of privacy and data confidentiality (art. 5, items X and XII of the SC) ”. (STF, RE 1.055.941 / SP, Min. Dias Toffoli Rel., J. 15.7.2019) In the case of the case, it is observed that the RIF 38.484 presents, besides the bank details, information on the origin, nature and the destination of the operations performed by the investigated. Also noteworthy is the presence in the records of an email sent by the MPRJ, dated 14.12.2018, in which the MPRJ requested from COAF, from the initial sharing of RIF 27.746, the expansion of the information provided, the which was promptly carried out by COAF and gave rise to RIF 38,484, also shared with the MPRJ on 12.18.2018, without prior judicial authorization. In this regard, it is worth mentioning the MPRJ's internal email, dated 18.12.2018, which confirms the above (e-DOC 11, p. 30): “Dear Dr. Claudio, good morning. Please find attached RIF no. 38,484 and DOI sent by COAF and received by this CSI / DLAB as of today, concerning the complementation of RIF 27.746. I point out that this Division is preparing RIF Complementary Information containing searches of the partner databases and analysis of links between people and information contained in the Intelligence Report. Also, regarding the questions made at the meeting on December 13, regarding possible inconsistencies in RIF 27.746, I clarify that, after contact with COAF, it was said that: 1) COAF will contact the Bank for clarification. about the amount of credit described in item 81.1.1, which does not match the sum of all credit entries reported in the communication (...) With respect to transfers, the first one refers to EFTs and the second is related to TBIs. However, the COAF

will contact the Bank to determine if the same person has actually made these transfers at different times and values (...). "It is emphasized that, instead of requesting judicial authorization to break the fiscal and banking secrets of the complainant, the state Parquet directly requested from COAF, by e-mail, confidential information, without proper judicial authorization, so as to clearly exceed the objective markers determined in the paradigm decision, as can be seen from a careful analysis of RIF 38,484. (...) For all these reasons, it is clear that the decision of this Court has not been complied with, so that the present complaint must be granted. In the light of the foregoing, I consider the present complaint to determine, solely in relation to the complainant, the suspension of the progress of PIC 2018.00452470, pending in the MPRJ, as well as Habeas Corpus 014980-83.2019.8.19.0000 and 0028203-06.2019.8.19.0000, pending before the TJRJ, until the final judgment by the Supreme Court of Item 990 of the general repercussion, scheduled for November 21, 2019, under the terms decided by Minister Dias Toffoli, in Extraordinary Appeal 1,055,941 / SP. Given the seriousness of the facts, especially regarding the email exchanged between the Public Prosecutor of Rio de Janeiro and the COAF with the improper breach of the claimant's confidentiality, I order that it be officiated to the National Council of the Public Prosecutor (CNMP), to the verification of the functional responsibility of the MP / RJ members. Moreover, considering that the Federal Constitution establishes the rule of publicity of the procedural acts and judgments of the Judiciary, except for the preservation of the right to privacy of the interested party (article 93, item IX), I determine the full publication of this decision, maintaining confidentiality of the records restricted to the parties due to the existence of bank and tax data of the complainant covered by the protection of privacy. Intimate parties via DJe. Publish yourself. Brasilia, September 27, 2019. Minister Gilmar Mendes Rapporteur Digitally signed document. (Rcl 36679, Rapporteur Min. Gilmar Mendes, Judged September 27, 2019, DJe-215 October 3, 2019).

Regarding the inquiry N^o. 4,781, also filed within the Federal Supreme Court, restrictions were also placed on the possibility of COAF and "Receita Federal do Brasil" (Federal Revenue Services of Brazil) sharing information with law enforcement agencies. Inquiry No. 4.781 was filed, through Ordinance GP No. 69 of March 14, 2019, of the President of the Supreme Court, with the purpose of ascertaining the existence of "fake news, slanderous denunciations, threats and infringements tainted with "*animus caluniandi, diffamandi or injuriandi*", which affect the honor and security of the Federal Supreme Court, its members and family members." Among the alleged threats would be inspections on the financial movements of Ministers and their families. On August 1, 2019, Minister Alexandre de Moraes, rapporteur of Inquiry No. 4.781, decided to suspend such procedures:

Thus, there are clear indications of misuse of purpose in the determination of “Receita Federal do Brasil” (Federal Revenue Services of Brazil), which, without objective selection criteria, intended, obliquely and illegally to investigate various public agents, including authorities of the judiciary, including ministers of the Supreme Court, without, there is, repeat, any indication of irregularity on the part of these taxpayers.

For these grounds, there are serious indications of illegality in directing the investigations in progress at “Receita Federal do Brasil” (Federal Revenue Services of Brazil), with apparent breach of the principles of legality and impersonality,

1) IMMEDIATE SUSPENSION of all investigative procedures instituted by “Receita Federal do Brasil” (Federal Revenue Services of Brazil) or other agencies, based on Note Copes no. 48, of 2/3/2018, in relation to the 133 contributors;

2) The temporary removal of all functional activities of the Auditors WILSON NELSON DA SILVA (registration number 01169778) and LUCIANO FRANCISCO CASTRO (registration number 0065476), due to improper breach of confidentiality reported in PAD 14044.720005 / 2019-79, until the conclusion of the present investigation. , due to the existence of serious indications of the practice of functional infraction foreseen in art. 116, item II of law no. 8,112, 1990; as well as the practice of criminal offense and administrative misconduct.

I also DETERMINE that the Federal Revenue Secretary, within a maximum period of 5 (five) days:

(a) Report in detail on the “CGU's finding of evidence of tax irregularities and the involvement of public officials in shady schemes”, as well as the “subsidies presented by the Federal Court of Auditors; also in 2016 (...) pointing to signs of incompatibility between the equity variation and the revenues reported by public agents in an annual declaration of assets and rents”, which led to the subjective choice of supervision of the 133 taxpayers;

(b) Point out whether this information was shared with other public agencies; indicating them;

(c) Submit a full copy of the proceedings initiated with COPES NOTE 48, as well as all 133 supervisory proceedings derived therefrom.

The audit by “Receita Federal do Brasil” (Federal Revenue Services of Brazil) of “politically exposed persons - PPE” is not unusual to international practice and is fully

internalized in Brazilian law.³ Inspection of PPEs is foreseen, especially in the United Nations Convention against Corruption, proscribed by Decree no. 5687/2006, as well as the FATF Recommendations, which, until now, had been followed by Brazil. The regulation of the concept of PPE is carried out through Coremec Resolution 2, of December 1, 2006; Circular No. 3.339, of December 22.2006, of the Central Bank of Brazil; MPS / SPC Instruction No. 26, of September 1, 2008, of the Secretariat of Supplementary Social Security of the Ministry of Social Security.

The Brazilian Internal Revenue Service, after issuing Complementary Law No. 105, of January 10, 2001, has the prerogative of requesting information directly from financial institutions protected by bank secrecy, without the need for a court order (art. 6). The Federal Supreme Court had ruled on this power of request by rejecting the Direct Unconstitutionality Actions, which challenged it, on the grounds that only a judicial act could preclude the guarantee of bank secrecy in any case (ADIs 2.390, 2.386, 2.397 and 2.859). At the time of the judgment, the Federal Supreme Court considered that the attribution of the requisition power to “Receita Federal do Brasil” (Federal Revenue Services of Brazil) was justified, considering the inherent needs for the prevention and repression of crimes such as drug trafficking, money laundering and terrorism. See below the content of the judgment:

Direct action of unconstitutionality. Joint Judgment of ADI 2,390, 2,386, 2,397 and 2,859. Federal rules regarding the confidentiality of the operations of financial institutions. (...) Expression “of the inquiry or”, contained in § 4 of art. 1 of Complementary Law No. 105/2001. Access to bank secrecy in the case of the police inquiry. Possibility. Precedents Articles 5 and 6 of Complementary Law No. 105/2001 and its regulatory decrees. No breach of secrecy and offense

³ In virtue of the fact that Brazil is a signatory to the United Nations Convention against Corruption, internalized by Decree No. 5.687 / 2006, financial institutions have special vigilance obligations towards “politically exposed persons” (PPPEs). ENCCLA Action No. 7, 2013 - National Strategy for the Fight against Corruption and Money Laundering, organized the register of PPEs. It was in this context that the edition of Note 48/2018 - RFB / Copes, of March 2, 2018, was issued, with the purpose of “presenting the result of the work developed by the Special Team for Programming and Combating Tax Fraud - EPP Fraud, created by Ordinance Copes No. 7/2017, which seeks to improve the selection methodology for identifying evidence of crimes against the tax order, corruption and laundering or concealment of assets, rights and values involving public agents”. The taxpayer's investigation and analysis procedures follow technical and impersonal motivations, with the purpose of verifying the existence of signs of tax non-compliance. Therefore, based on objective criteria and in line with the institutional mission of the “RECEITA FEDERAL DO BRASIL” (FEDERAL REVENUE SERVICES OF BRAZIL) to exercise tax administration, parameters were established for the selection and supervision of public agents, including PPPEs.

to fundamental rights. Confluence between the duties of the taxpayer (the fundamental duty to pay taxes) and the duties of the tax authorities (the duty of good taxation and supervision). International commitments made by Brazil regarding bank information sharing. Article 1 of Complementary Law No. 104/2001. No breach of confidentiality. Article 3, § 3, of LC 105/2001. Information required for the judicial defense of the tax authorities. Constitutionality of the contested precepts. ADI No. 2,859. An action which is known in part and known in part is dismissed. ADI No. 2,390, 2,386, 2,397. Actions known and dismissed. 1. Joint Judgment of ADI No. 2,390, 2,386, 2,397 and 2,859, which have as their common core of challenge rules relating to the provision, by financial institutions, of taxpayers' bank information to the tax administration. (...) 3. The expression "of the inquiry or", contained in § 4 of art. 1 of Complementary Law No. 105/2001, refers to the criminal investigation carried out in the police investigation, in which this Supreme Court admits access to the investigated bank secrecy, when evidence of criminal practice is present. Precedents: AC 3,872 / DF-AgR, Rapporteur Minister Teori Zavascki, Full Court, DJe of 13/11/15; HC 125.585 / PE-AgR, Rapporteur, Minister Carmen Carmen, Second Class, DJe of 12/19/14; Inq 897-AgR, Rapporteur, Minister Francisco Rezek, Full Court, DJ of 24/3/95. 4. Articles 5 and 6 of Complementary Law No. 105/2001 and its regulatory decrees (Decrees No. 3,724, of January 10, 2001, and No. 4,489, of November 28, 2009) expressly state the permanence of the confidentiality of bank information obtained with the command of them, with no authorization to expose or circulate such data. It is a transfer of confidential data from a particular bearer, who has the duty of confidentiality, to another, which maintains the obligation of confidentiality, while maintaining the privacy and privacy of the account holder, exactly as determined by art. 145, § 1, of the Federal Constitution. 5. The constitutional order established in 1988 established, among the objectives of the Federative Republic of Brazil, the construction of a free, just and solidary society, the eradication of poverty and the marginalization and reduction of social and regional inequalities. To this end, the Charter has been generous in providing for individual, social, economic and cultural rights for the citizen. It follows that, in connection with these rights, there are also duties, the fulfillment of which is also a sine qua non condition for the realization of the company project carved out in the Federal Charter. Among these duties is the fundamental duty to pay taxes, since they mainly finance state actions aimed at the realization of citizens' rights. In this context, it is necessary to adopt effective mechanisms to combat tax evasion, and the supervisory instrument established in arts. 5 and 6 of Complementary Law 105/2001 of extreme significance in this task. 6. Brazil undertook, before the G20 and the Global Forum on Transparency and Tax Information Exchange, to comply with international standards for transparency and exchange of bank information., established with the aim of preventing non-compliance with tax rules, as well as combating criminal practices. The Brazilian State should not dispense with automatic access to taxpayers' bank data by its tax administration, under penalty of non-compliance with its international commitments. 7. Art. 1 of Complementary Law 104/2001, at the point where it inserts § 1, item II, and § 2 to art. 198 of CTN, does not determine

breach of confidentiality, but transfer of confidential information within the Public Administration. Moreover, the forecast meets other legal commands already broadly consolidated in our legal system that allow the Public Administration access to the list of assets, income and assets of certain individuals. 8. The Attorney General's Office of the National Treasury, an organ of the Federal Attorney General's Office, shall be responsible for defending the tax authorities' actions in the judicial sphere, and, therefore, it is necessary to know the data and information underlying the act defended by it. It is therefore legitimate the provision in art. 3, § 3, of LC 105/2001. 9. Direct action of unconstitutionality No. 2,859 / DF partially known and, in the known part, dismissed. Direct actions of unconstitutionality No. 2390, 2397, and 2386 known and dismissed. Except for the states and municipalities, which can only obtain the information referred to in art. 6 of Complementary Law No. 105/2001 when the matter is properly regulated, in a manner analogous to Federal Decree No. 3.724 / 2001, in order to safeguard the procedural guarantees of the taxpayer, as provided for by Law No. 9,784 / 99, and the confidentiality of your bank details. (ADI 2859, Rapporteur Min. DIAS TOFFOLI, Full Court, Judged February 24, 2016, DJe-225 10-21-2016).

The above precautionary decisions, taken in cases of interest and Politically Exposed Persons, in relation to the precedent set in the judgment of ADIs 2,390, 2,386, 2,397 and 2,859, signify a huge setback in the fight against the crimes of corruption, laundering. money and terrorist financing.

c. The Federal Court of Accounts (TCU) and the undue pressure against the supervision of agents of the Federal Tax Administration.

The Federal Court of Accounts (TCU) has also adopted measures to constrain the fiscal auditors' supervisory activity. The Minister of the Federal Court of Accounts, Bruno Dantas, delivered, within the scope of TC no. 005.576 / 2019-9, in which it ordered the Special Secretariat of the Federal Revenue of Brazil to present the names and registrations of tax auditors who, in the last 5 years, have supervised members of federal power or public agents and their families. The decision, published on August 2, 2019, reads as follows:

TC 005.576 / 2019-9

Nature: Representation

Jurisdictional Unit: Special Secretariat of the Federal Revenue Services of Brazil

ORDER

The present case reports on the representation formulated by the MP / TCU with the purpose of ascertaining indications of irregularities practiced within the Federal Revenue of Brazil (RFB), which concern the possible deviation of purpose of agents involved, with expenditure of public resources...

2. At this moment, I am considering an addition to the representation made by the parquet (part 54), which proposes that the RFB be required to inform TCU “the numbers of the processes related to the supervision of federal public agents, as well as the respective registrations of all civil servants. referred body that accessed the information contained in these tax proceedings”.

3. Whereas, pursuant to art. 71, VI, of our Magna Carta, the external control, under the responsibility of the National Congress, will be exercised with the help of the Federal Court of Auditors, which is responsible, among others, for carrying out inspections and audits in the administrative units of the Legislative, Executive Powers. and judiciary; and that, under the terms of art. 2 of Federal Law No. 8.443 / 1992 (LO / TCU), for the performance of its competence the TCU will receive any documents or information it deems necessary, and may request the Minister of State supervising the area, or the authority of equivalent hierarchical level, indispensable elements for the exercise of its competence; and that, also according to LO / TCU, no process, document or information may be evaded from TCU in its inspections or audits, under any pretext, under penalty of the sanctions provided for in art. 58 of the same Law; decide to order the Federal Revenue Secretariat to report to this Court of Auditors:

3.1. Within 15 (fifteen) days, the number of proceedings filed in the last 5 (five) years related to inspections involving members and former members, as well as their spouses and dependents:

3.1.1. the Federal Executive Branch, specifically in the figure of the Chief Executive and the Ministers of State;

3.1.2. the Federal Legislature;

3.1.3. the Federal Judiciary, specifically the members of the Superior Courts, including the Supreme Federal Court, and the Regional Federal Courts;

3.2. Within 15 (fifteen) days, name and registration of all RFB servers formally designated to perform the inspection processes referred to in item 3.1;

3.3. *within 15 (fifteen) days, name and registration of all RFB's employees who, regardless of formalized ties to the inspection processes referred to in item 3.1, accessed information related to these same agents (listed in item 3.1);*

3.4. *within ninety (90) days, the number of lawsuits filed in the last five (5) years related to inspections involving federal public agents;*

3.5 *Within ninety (90) days, name and registration of all RFB servers formally designated to perform the inspection processes referred to in item 3.4;*

3.6. *Within ninety (90) days, name and registration of all RFB's employees who, regardless of the formalized link to the inspection processes referred to in item 3.4, accessed information regarding the agents indicated in item 3.4.*

Secex Previdência for the adoption of appropriate measures.

Brasilia, August 2, 2019.

Minister BRUNO DANTAS

Reporter

The scope of the procedure (TC 005.576/2019-9), of a correctional nature, is also contained in Judgment No. 2173, issued in TC 010.472 / 2016-9:

EEP Fraud Information Leak (TC 005.576 / 2019-9)

63. *As widely reported by the national media, "Receita Federal do Brasil" (Federal Revenue Services of Brazil)'s Special Tax Fraud Programming Team (EEP Fraud) was investigating 134 public officials with evidence of tax fraud, and documents concerning some public authorities were leaked.*

64. *Thus, in view of the possible misuse of purpose of EEP Fraud, the Public Prosecution Service before the Union Court of Auditors represented the TCU in order to investigate the case. The Rapporteur-Minister Bruno Dantas ordered the immediate inspection of the RFB to: verify the facts reported in the representation; evaluate the legality, legitimacy and efficiency of carrying out this type of investigative activity unrelated to the institutional role of the RFB; and evaluate the governance and control system related to this type of activity.*

This decision went beyond the jurisdiction of the Court of Accounts, since it does not give disciplinary or corrective duties. Disciplinary power is conferred on the Public Administration itself, which must punish, after the contradictory and broad defense, public agents who may have committed functional violations. This indiscriminate request for the name and registration of all the Fiscal Auditors, without

the existence of specific indications of irregularity, constitutes a serious violation of their independence, acting as a disincentive to the eventual future liability of people with great political and social power.⁴

d) Changes in the Tax Representation for criminal purposes.

Currently, upon completion of an investigation that encounters evidence of corruption, money laundering or terrorist financing, the Tax Auditor should formulate tax representation for criminal purposes, which is addressed directly to the Public Prosecution Service, upon completion of the administrative proceeding.

However, it is the object of deliberation in the National Congress, a proposal elaborated with the purpose of hindering the cooperation of the Fiscal Auditors with the organs responsible for the criminal prosecution. According to the substitute text of PL 6.064/2016, the tax auditors could no longer report to the Public Prosecution Service any evidence of crimes detected during tax assessment. According to the legislative proposal, if there are indications of crimes, the auditor should report them to the Special Secretary of the Internal Revenue Service of Brazil, which would constitute an internal committee *"to analyze the materiality of the evidence indicated by the auditor."* If the committee concluded that it is relevant and a crime, would communicate this to the Special Secretary of the Internal Revenue Service, which would, in turn, be able to sue the judiciary with request for authorization to pass the data to the prosecutor.

This procedure, of course, hampers cooperation in combating corruption, money laundering and terrorist financing. The fact that the position of Special Secretary of

⁴ According to the Awareness Handbook for Tax Inspectors for the Phenomenon of Corruption, the OECD, *"Tax administrations have an important role to play in the fight against corruption and bribery. In the course of their activity, tax inspectors are in a very strong position to identify indicators of possible bribery or corruption, and the tax administration has the responsibility to exercise its functions and powers to assist other government agencies in combating these crimes."* In performing their duty, *"Tax inspectors should be aware of the possibility of corruption in the public sector arising from operations involving a Politically Exposed Person (PEP) due to its high level of influence. An EPP is a person who has been assigned a prominent civil service, such as a senior politician, as well as their close relatives and partners. (...). To assist institutions in identifying PEPs, several public and private organizations maintain lists of PEPs that tax inspectors may be able to access in the course of their checks."*

“Receita Federal do Brasil” (Federal Revenue Services of Brazil) is political in nature, for example, exposes the cooperation in criminal matters to undue pressure. For no other reason the Criminal Chamber of the Federal Prosecutor (MPF) has opposed the proposal. On September 18, 2019, the Federal Public Prosecutor's Office issued a Technical Note recommending the rejection of any amendment to Bill 6064/16 limiting the current procedure for cooperation between the “Receita Federal do Brasil” (Federal Revenue Services of Brazil) and *Parquet*.⁵

III. Conclusion

The Tax Auditors urge the Federal Supreme Court and Federal Court of Accounts to review the decisions mentioned above, which precludes the work of the Federal Revenue, so that we can continue acting lawfully. We hope that TATF's dialogue with the Brazilian authorities will help to re-establish, in Brazilian legal system, the full compliance with international standards on combating corruption, money laundering and terrorist financing.

Sincerely,



Kleber Cabral
President - SINDIFISCO

⁵ <http://www.mpf.mp.br/atuacao-tematica/cr2/coordenacao/notas-tecnicas/notas-tecnicas-1/nota-tecnica-no-14-2019-pgr-2accr-pl-6064-2019-rfb-audidores-fiscais>.