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TAX REFORM

PEC 45 approved by the House of Representatives

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PRESENTATION

The Proposed Amendment to the Constitution No. 45 (''PEC 45''), presented in 2019 in the House of Representatives, was approved by the Chamber on July 7, 2023. This is a profound change in the constitutional tax system, which particularly reorganizes the taxes levied on acts of consumption, relating to material and immaterial goods, as well as services in the broad sense. In addition, PEC 45 significantly changes taxes levied on property, inheritance and donations.

The text now will be sent to the Senate, where it will possibly undergo modifications in the coming months. The proposal is likely to return to the House of Representatives, which will give the final word on the draft to be enacted.

The PEC is voted in two rounds in each House of Congress and will be approved if it obtains, in each one, three-fifths of the votes of congressmen (308) and senators (49).

The Brazilian tax system has been the target of reform processes for many years. However, since 2019, such initiatives have intensified, given (1) the interpretative problems imposed by the digital economy, which challenges the materialities foreseen since the 1960s in Brazil, notably the concepts of service and merchandise, (2) the crisis of fiscal federalism, with public revenues excessively concentrated in the hands of the Federal Government, leading states and municipalities to seek new institutional arrangements to regain their financial autonomy. In this context, we have prepared this document summarizing the most important aspects of PEC 45, strictly with regard to consumption taxation, which is the focus of attention of market agents and politicians at the moment.

Have a good reading!

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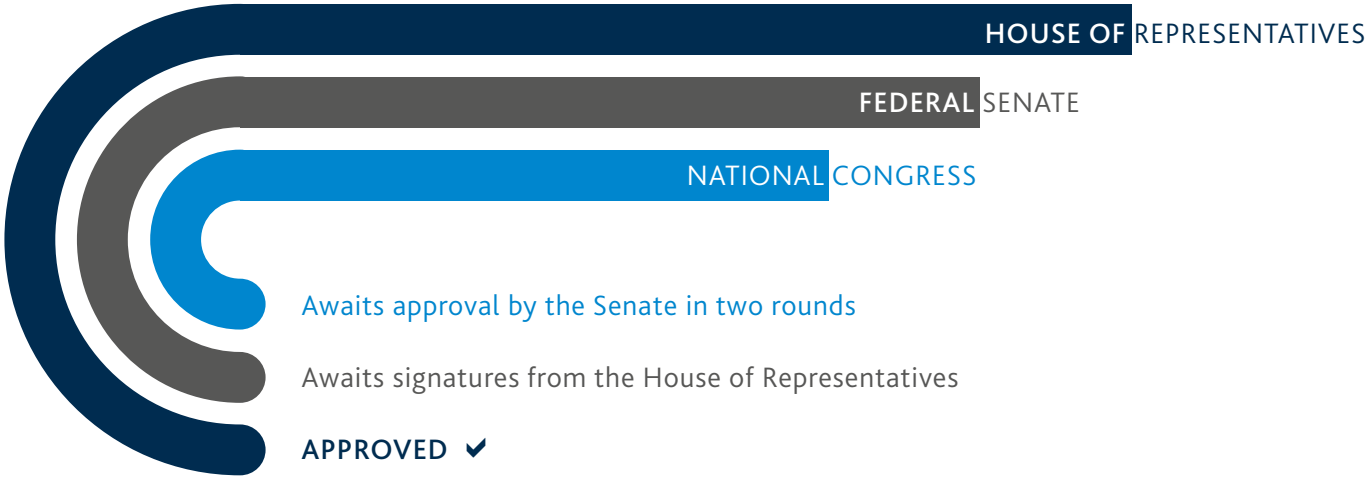
THE LEGISLATIVE PROCESS OF PEC 45

HOUSE OF REPRESENTATIVES

- **Receipt** | The Proposed Amendment to the Constitution (PEC) 45 was presented in the House of Representatives.
- **Constitution, Justice and Citizenship Commission (CCJ)** | The Constitution, Justice and Citizenship Commission (CCJ) assessed the admissibility of the proposal, verifying whether it meets the legal requirements.
- **Special Commission for Tax Reform** | After being approved by the CCJ, it was forwarded to the Special Commission for Tax Reform. At this stage, substitute texts were submitted to the House of Representatives.
- **Plenary Voting** | The most recent version of the PEC text was approved by the House of Representatives, in two rounds, on July 7, 2023.



FEDERAL SENATE

- **Constitution, Justice and Citizenship Commission (CCJ)** | Awaits signatures from the House of Representatives for forwarding to the CCJ;
- **Plenary and Commissions** | Appraisal in Plenary and input from all committees;
- **Plenary Voting** | Voting in two more rounds. If there are significant changes to the text, the PEC will return to the House of Representatives for analysis.

NATIONAL CONGRESS

- **Promulgation and Publication** | After being approved by the House of Representatives and the Federal Senate, without further amendments, the PEC will be promulgated in a new joint session and officially published.

OVERVIEW

- Broad-based
- "Full" non-cumulative basis
- Uniform rates, subject to express exceptions in the Constitution
- Destination principle
- External levy
- Reimbursement of accumulated credits
- Excise tax (IS) with extra-taxation objective
- Transition period

CURRENT TAXES

PIS / Cofins

IPI

ICMS

ISSQN

NEW TAXES

CBS
Contribution on Goods and Services

IBS
Tax on Goods and Services

Excise Tax

IBS
TAX ON GOODS AND SERVICES

Creation by **Complementary Law** at the initiative of the **Federative Council** (27 representatives of the States and Federal District + 27 representatives of the Municipalities).

54
Representatives
TOTAL

LEVY

It will be levied on

- Transactions in tangible or intangible assets, including rights, or services;
- Imports of tangible or intangible assets, including rights, or of services performed by an individual or legal entity, even if it is not a regular taxpayer, regardless of their purpose.

It will not be levied on

- Exports, ensuring the exporter the maintenance of credits related to operations in which it is the purchaser of the asset, whether tangible or intangible, or service, with reimbursement determined by Complementary Law;
- Itself and other taxes/contributions;
- Immunities for taxes already provided for in the Constitution.

Characteristics

- Rates set **by each** federative entity by specific law (total sum);
- **Uniform** rates, except in cases exempted by the Constitution;
- Reference rates defined by Senate resolution;
- It does not allow **tax benefits**, except in cases exempted by the Constitution;
- Levied on **destination**.

Complementary Law (LC): "the criteria for defining the destination of the transaction, which may also be the place of delivery, provision or location of the goods, the place of provision or availability of the service or the place of domicile or location of the purchaser of the goods or service, with differentiation being allowed due to the characteristics of the transaction."

APPRAISAL

Rapporteur's opinion

"The tax debit and credit entries would be booked per establishment, with calculation and payment of the IBS due centrally."

Full non-cumulative basis?

"with the aim of observing the neutrality principle, it shall be non-cumulative, the tax due by the taxpayer being offset against the amount charged on all transactions in which it acquires assets, whether tangible or intangible, including rights, or services, except exclusively those considered for personal use or consumption, under the terms of the complementary law, and the hypotheses provided for in this Constitution;"

Rapporteur's opinion

"Its constitutional basis provides for the crediting of the tax levied on all transactions in which the taxpayer is the purchaser of assets, whether tangible or intangible, except for transactions characterized as personal use or consumption by complementary law. Therefore, we do not use the expression 'necessary for economic activity', precisely to avoid new legal discussions about what should be considered necessary for the enterprise, which currently occurs in relation to the Contribution to PIS and Cofins. Thus, the infra-constitutional legislator will be free to define the operations excluded from the crediting system, being, however, subject to the constitutional delimitation of what qualifies in the semantic field of the terms 'personal use or consumption', in addition to, of course, the prohibitions provided for in the Constitution. [...] for those who defend the 'will of the legislator' as a hermeneutical vector, it should be clear that **the intention derived from this Constitutional Amendment is to guarantee a full non-cumulative basis, i.e., the right of the taxpayer to offset the amount of IBS and CBS due against the amount of these taxes charged in all transactions that contribute to its economic activity, regardless of whether they are linked to the administrative function or to the company's end activity**".

LC may, only in the following cases, link crediting to proof of IBS payment:

II – the offset regime, with the possibility of establishing hypotheses in which the credit use will be conditioned to the verification of the effective payment of the tax levied on the operation, provided that:

a) the purchaser can pay the tax levied on their purchases of goods or services; or

b) the payment of the tax occurs at the financial settlement of the transaction.

Reversal of credits

Only exempt and immune outputs. No mention about non-levy. As IBS is levied on «operations», transfers do not generate levy and do not entail a reversal, if the Rapporteur's Opinion on the autonomy of establishments is implemented.

Problem regarding immunity, because the reversal of credit empties its maximum effectiveness.

SPECIAL REGIMES

Simplified Taxation System (Simples Nacional)

Maintenance of favorable treatment for companies opting for Simples Nacional.

Optional

- Collecting IBS/CBS within the Simples Nacional: purchaser will be entitled to credit up to the limit of the amount paid;
- Collect only IBS/CBS by the general regime (credit and debit), outside the Simples. In this case, the purchaser will be entitled to the credit for the full amount.

Activities with rates (IBS and CBS) reduced by 60%

- Education;
- Health;
- Medical and accessibility devices for people with disabilities (reduction can be up to 100%);
- Medicines and basic menstrual health care products (reduction can be up to 100%);
- Collective passenger transport by road, rail and waterway, urban, semi-urban, metropolitan, intercity and interstate (may be exempt);
- Fresh agricultural, aquaculture, fisheries, forestry and plant extraction products;
- National artistic, cultural, journalistic and audiovisual productions and sports activities;
- Agricultural and aquaculture inputs, food for human consumption and personal hygiene products;
- Goods and services related to national security and sovereignty, information security and cyber security.

Presumptive credit for IBS and CBS

- Goods and services of a rural producer, natural or legal person;
- Self-employed carrier services;
- Waste and other materials destined for recycling, reuse or reverse logistics, from individuals, cooperatives or other forms of popular organization;
- Used movable property of a non-taxpaying individual for resale.

Cashback

LC will determine the hypotheses of tax refunds to individuals, including the limits and beneficiaries, with the aim of reducing income inequalities.

Activities with rates (IBS and CBS) reduced by 100%

- Prouni
- Perse

SPECIAL REGIMES BY COMPLEMENTARY LAW

Acquisition of capital goods

LC will define how the impact of the tax on the acquisition of capital goods by the taxpayer can be reduced.

Purchases made by direct public administration, municipalities and public foundations

LC will define the non-levy of IBS and CBS, allowing the maintenance of credits.

Basic food basket

LC will define the products intended for human consumption that will compose the Brazilian National Basic Food Basket, on which the IBS and CBS rates will be reduced to zero.

Fuel

- Single-phase regime;
- Uniform rates throughout the country (without autonomy of the federated entities in their individual setting);
- Ad valorem or ad rem rates, allowing differentiation by type of fuel;
- The IBS credit is prohibited only when the acquisition of fuel is intended for distribution, commercialization or resale;
- Authorized credit for the fuel consumer;
- LC for biofuels: lower taxation than that levied on fossil fuels, capable of ensuring a competitive advantage over them.

Cooperatives

- Optional regime;
- Non-levy on transactions conducted between the cooperative society and its members, between them and the cooperative society and by cooperative societies among themselves when associated for the achievement of corporate objectives;
- Specific discipline of a non-cumulative basis by LC.

Hospitality, amusement parks and theme parks, restaurants and regional aviation

LC will define hypotheses for changes in tax rates and crediting rules.

Special customs regimes

LC will define the hypotheses of tax deferral applicable to special customs regimes and export processing zones.

Financial services, real estate transactions, health care plans and lottery contests

- The tax will be calculated based on revenue or billing, with a uniform rate throughout the national territory.

LC can change

- Rate dynamics;
- Calculation basis;
- Crediting rule, the general rule of a non-cumulative basis may be waived.

The Manaus Free Trade Zone (ZFM) and free trade areas

LC will define the mechanisms necessary to maintain, on a general basis, the competitive differential assured to the Manaus Free Trade Zone and to the Free Trade Areas existing on May 31, 2023, at the levels established by the legislation related to the extinct taxes.

CBS
CONTRIBUTION ON GOODS AND SERVICES

Identity with IBS, as the same taxes have been defined for each of these:

- Taxable events, calculation bases, hypotheses of non-levy and taxable persons;
- Immunities (except for Art. 195, Paragraph 7, concerning charitable social assistance entities, which applies only to CBS);
- Specific, differentiated or favored tax regimes; and
- Non-cumulative basis and crediting rules.

EXCISE TAX

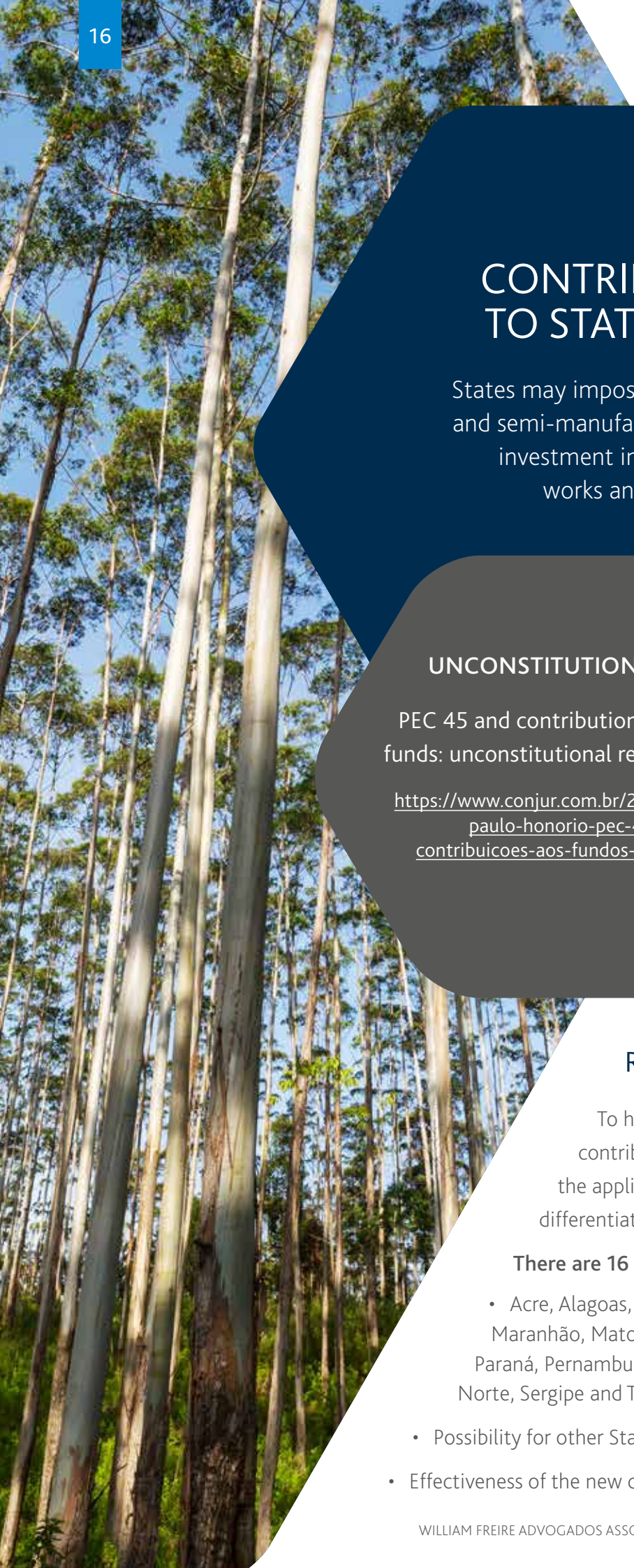
It is within the competence of the Federal Government, to be created by ordinary law, and will compose the calculation basis of the IBS and CBS.

It will be levied

- On production, marketing or import of goods and services harmful to health or the environment, in accordance with the law;
- Included, alongside IBS, II and IE, as one of the taxes that may be levied on transactions with electricity, telecommunications services, petroleum products, fuels and minerals;
- Rates will be set by Decree.

It will not be levied

- On IBS or CBS;
- On exports;
- On goods or services for which IBS and CBS rates are reduced.



CONTRIBUTIONS TO STATE FUNDS

States may impose a levy on primary and semi-manufactured products for investment in infrastructure works and housing.

UNCONSTITUTIONALITY

PEC 45 and contributions to state funds: unconstitutional retrogression

https://www.conjur.com.br/2023-jul-09/paulo-honorio-pec-45-contribuicoes-aos-fundos-estaduais

Requirements

To have created, up to April 30, 2023, a contribution to state funds, as a condition for the application of deferral, special regime or other differentiated treatment, related to ICMS.

There are 16 funds of this kind:

- Acre, Alagoas, Bahia, Ceará, Espírito Santo, Goiás, Maranhão, Mato Grosso, Mato Grosso do Sul, Paraíba, Paraná, Pernambuco, Piauí, Rio de Janeiro, Rio Grande do Norte, Sergipe and Tocantins.
- Possibility for other States to set up similar funds.
- Effectiveness of the new contribution **restricted to 12/31/2043**.

TRANSITION

No mention of PIS/Cofins credits

2026

IBS at 0.1% and CBS at 0.9%

- **1% can be deducted from Cofins (no increase in charge) and, up to 2028, from CBS**.
- If the taxpayer does not have sufficient debts to make the Cofins deduction, the amount paid may be offset against any other federal tax or be reimbursed within 60 days.

2027

"Full" CBS

Extinct PIS and Cofins, and IPI with 0% rate, except for products industrialized at the ZFM.

2029 a 2032

ICMS and ISS are reduced to:

9/10 **2029**

8/10 **2030**

7/10 **2031**

6/10 **2032**

- ICMS tax benefits will be reduced by the same proportion.
- Reference rates of IBS and CBS in this period will be set by Senate Resolution, in the year prior to their implementation, without observing the 90-day holding period.
- As defined in the Complementary Law, the reference rates will be reviewed annually in order to maintain the tax burden, without this implying the right to retroactive collection or refund.

2033

ICMS, ISS and IPI extinct

Accumulated ICMS credit balance in 2032. Provided they are approved by the States (expressly or tacitly), the credits can be:

- Offset against the IBS;
- Transferred to third parties;
- Reimbursed by the Federative Council if no offsetting is possible;
- In the case of fixed assets, for the remaining term;
- In other cases, 240 months;
- Credits will be adjusted by the IPCA from 2033.

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