THE ANTI-BRIBERY AND ANTI-CORRUPTION REVIEW

Tenth Edition

Editor
Mark F Mendelsohn

THE LAWREVIEWS

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PREFACE

The covid-19 pandemic has had a monumental and disruptive effect on practically all aspects of business, politics, law and daily life in nearly every corner of the globe. For companies conducting cross-border business, and legal practitioners who advise them, corruption remains a substantial risk area. And with national governments engaging in large-scale economic stimulus programmes and contracting on an emergency basis with a wide range of suppliers of critical goods and services, the opportunities for fraud, corruption and abuse are replete. The current global health crisis unfolded onto a world stage that is dynamic and roiling with anti-corruption activity and developments. This tenth edition of *The Anti-Bribery and Anti-Corruption Review* presents the views and observations of leading anti-corruption practitioners in jurisdictions spanning the globe, including a new chapter covering Portugal. The comprehensive scope of this edition of the Review mirrors that dynamism.

Over the past two years, countries across the globe have continued to investigate and prosecute a range of corruption cases – many involving heads of state and senior officials – strengthen their domestic anti-bribery and anti-corruption laws, and adopt important new law enforcement policies and guidance documents, though tumultuous international relations, rising economic competition and the effects of the pandemic are combining to threaten international cooperation and the progress of cross-border investigations more generally.

2020 saw French-headquartered Airbus SE reach a US$3.9 billion coordinated corporate bribery and export controls resolution with authorities in France, the United Kingdom and the United States. The wide-ranging allegations involved alleged bribery of government officials in more than a dozen countries, as well as US export controls-related offences, and now other jurisdictions from Ghana to Malaysia are pressing forward with their own investigations. At the same time, the 1MDB scandal continued to play out, with still further US asset forfeiture actions, criminal charges against a major US Republican fundraiser for allegedly acting as an unregistered foreign agent in an attempt to illegally lobby the Trump administration to drop its probe into the 1MDB corruption scandal and an appeal by former Malaysian prime minister Najob Razak against his convictions on bribery and money-laundering charges and the resulting 12-year prison term. And in Brazil, which has for many years been a hotbed of anti-corruption investigations, President Jair Bolsonaro took the controversial step of ending his country's long-running Car Wash probe, following the resignation of his justice minister who, as judge, had previously presided over the probe.

Given the political turmoil and the global health crisis still confronting us in the remainder of 2021 and into 2022, this book and the wealth of country-specific learning that it contains will help guide practitioners and their clients when navigating the perils of

corruption in foreign and transnational business, and in related internal and government investigations. I am grateful to all of the contributors for their support in producing this highly informative volume.

Mark F Mendelsohn
Paul, Weiss, Rifkind, Wharton & Garrison LLP
Washington, DC
November 2021

Chapter 3

BRAZIL

Heloisa Uelze, Felipe Ferenzini, Fernanda Casagrande and Érica Porfírio[1]

I INTRODUCTION

The awareness of the importance of a culture of compliance in the corporate environment is relatively recent in Brazil and has caused significant changes in the management of companies. The global trend towards fighting corruption, recent events in the country and the promulgation of legislation dedicated to this issue have made Brazilian companies turn their attention to the need to ensure conformity and integrity while developing their activities. This trend was reinforced with recent global focus on environmental, social and governance goals.

This culture – already mature in foreign companies and multinationals, subject to anti-corruption legislation from other jurisdictions that already foresaw harsh sanctions against corrupt practices in the corporate environment – has evolved considerably in the Brazilian business environment, but there is still a long way to go. Despite the robust normative apparatus and the intrinsic ethical imperatives, it is still common to question the validity of creating new internal processes and allocate financial and human resources in developing compliance measures in companies.

In 2013, Brazil's anti-corruption law – Federal Law No. 12,846/2013 (LAC) – was enacted, following commitments made by the country in international agreements, creating unprecedented mechanisms and concepts of accountability of legal entities and the importance of implementing controls by companies in the fight against corruption and other illicit conduct in the corporate environment. According to the LAC, legal entities can be strictly liable for the occurrence of harmful acts defined in this law carried out in their interest or to their benefit, and are punishable by the conduct of their partners, employees, representatives and third parties.

Implementing compliance programmes (or integrity, as stated in the LAC) creates legal benefits for the company. Besides being an instrument for risk mitigation and accountability, the LAC established the existence of internal compliance mechanisms and procedures as a factor for reducing the calculation of applying sanctions in the event of a violation. Federal Decree No. 8,420/2015, which regulates the LAC, establishes the parameters for reduction, which can result in a decrease of up to 4 per cent of the gross revenue in the calculation of the fine that can reach up to 20 per cent.

1 Heloisa Uelze and Felipe Ferenzini are a partners and Fernanda Casagrande and Érica Porfírio are associates at Trench Rossi Watanabe. Trench Rossi Watanabe and Baker McKenzie have executed a strategic cooperation agreement for consulting on foreign law.

II DOMESTIC BRIBERY: LEGAL FRAMEWORK

i Corporate liability under Brazilian legislation

Individuals and legal entities can be held liable for bribery of public officials in Brazil.

The Brazilian Criminal Code (Decree Law No. 2,848)[2] defines the crime of active bribery as the offering or promising an undue advantage to a public official, in order to influence him or her to perform, hide or delay an official act within the scope of his or her duties. The Code defines penalties for individuals – only individuals can be held criminally liable for bribery in Brazil.

The LAC and its regulating Federal Decree No. 8,420/2015 are the main pieces of legislation regarding compliance matters in Brazil. The LAC establishes civil and administrative liability of companies for acts of corruption and other acts against the local or foreign public administration. The LAC only provides for sanctions on companies, not natural persons (the latter can be subject to criminal liability under the Criminal Code, and civil liability under improbity as per Federal Law 8,429/92).

It is important to stress that in Brazil, in the vast majority of cases, non-natural persons, such as corporations or other legal entities, cannot be charged with crimes. The exception to this general rule is criminal liability imposed on corporate entities for environmental crimes.

ii Definition of domestic public official

As set forth in Article 327 of the Brazilian Criminal Code, a 'public official' is any person who, even on a temporary basis or without remuneration, renders services in governmental agencies or entities, and carries out a public function, job or office.

iii Definition of foreign public official

For LAC enforcement purposes, the definition of public foreign official is set out in Article 5, §3: any agent who, even temporarily or without compensation, holds a public position, job or office in a government agency and entity, or in diplomatic representations of a foreign country, as well as in a legal entity directly or indirectly controlled by the government of a foreign country or in an international public organisation, will be considered a foreign public agent.

iv Brazilian anti-corruption law

As mentioned above, in 2013, Brazil enacted the LAC, later regulated by Federal Decree No. 8,420/2015, which provides for civil and administrative liability of legal entities for conduct against local and foreign public administration. The provisions not only cover bribery but also prohibit fraud in public tenders, manipulation of contracts, obstruction of investigations and other illicit acts practised against both national and foreign public administration. It is important to highlight that private bribery is not criminalised under Brazilian legislation.

Differently from US anti-corruption laws and very similar to the UK Bribery Act, under the LAC, legal entities can be strictly liable (and therefore is not necessarily to demonstrate intent) for prohibited acts committed in their interest or for their benefit (whether exclusively or not). This means that the authorities only need to show that the illegal acts were committed

2 Article 333.

for the benefit or interest of the legal entity. Note also that the LAC provides for successor liability if amendments to the articles of incorporation, transformation, restructuring, merger, acquisition or spin-off of a company occurs.

In addition to the LAC, other laws also provide liability and sanctions for offences against public administration, such as:

a Federal Law No. 8,429/1992 (the Brazilian Improbity Law), which establishes civil and administrative corporate liability for acts against public law principles, such as morality and legality; and

b Federal Law No. 14,133/2021 (the new Brazilian Public Procurement Law), which replaces Federal Law No. 8,666/1993 and establishes rules for public tenders and contracts with the government.

v Penalties under the LAC

Legal entities are prohibited from promising, offering or giving, directly or indirectly, any undue advantage to a national or foreign public official, or a related third person, and to defraud a public tender or public contract, among other illicit conduct. If a violation occurs, the administrative and civil sanctions in the LAC are as follows.

Administrative sanctions include:

a a fine ranging from 0.1 to 20 per cent of the gross revenue of the legal entity in the fiscal year prior to the start of administrative proceedings, excluding taxes, and never less than the advantage gained and never more than three times the advantage gained, when it is possible to estimate this; if such criteria cannot be used, the fine will range from 6,000 to 60 million reais; and

b publication of the condemnatory decision.

Judicial sanctions include:

a prohibition from receiving incentives, subsidies, grants, donations or loans from public agencies or entities and from public financial institutions or institutions controlled by the government, for up to five years;

b loss of assets, rights or valuables representing the advantage or profit, directly or indirectly obtained from the wrongdoing;

c partial suspension or interdiction of the legal entity's activities; and

d compulsory dissolution of the legal entity.

The LAC sets out a list of factors that will be taken into consideration when applying sanctions, such as the seriousness of the offence, the advantage gained or sought, whether the offence was fully or partially completed, the level of damage and the negative effects produced by the offence.

Individuals are subject to criminal prosecution in the case of corrupt acts. Criminal liability requires evidence of the participation of each individual and of the extent of each person's intent in perpetrating the improper conduct. Therefore strict liability does not apply to criminal charges.

vi Political contributions

According to Federal Law No. 9,504/97, individuals can make political contributions that do not exceed 10 per cent of their gross income. Law No. 9,504/97 formerly allowed companies to contribute to candidates or political parties, but this provision was revoked by Federal Law No. 13,165/2015, and companies are no longer permitted to make political contributions.

vii Commercial bribery and facilitation payments

Commercial bribery is not regulated by Brazilian legislation. Facilitation payments are considered as undue payments and hence as acts of corruption.

viii Improbity Law and Public Procurement Law

The definitions of illegal acts are similar in the LAC, the Administrative Improbity Law and the Public Procurement Law. Breaches of Federal Law No. 8,429/1992 (the Administrative Improbity Law) may result in sanctions to legal entities and individuals whose misconduct results in illicit enrichment of public officials, losses to the public treasury and violation of the key principles of public administration. In Article 3, the Law extends the sanctions to those who induce or contribute to the practice of the act of improbity or benefit from it in any direct or indirect form. In this sense, administrative improbity proceedings will prosecute the private individual as well as the private legal entity to which they are linked.

Under the Federal Law No. 14,133/2021 (the Public Procurement Law) companies unduly benefiting from any illegal act during a public bidding process are subject to sanctions such as fines, suspension and blacklisting from participating in public tenders or signing contracts with government bodies.

In addition, at a federal level, the Federal Court of Accounts (TCU) has powers to review public disbursement and violations of public procurement laws.

III ENFORCEMENT: DOMESTIC BRIBERY

If an individual commits a crime of corruption or other crimes set forth in the Brazilian Criminal Code or laws, the state police, federal police and the state or federal Public Prosecutor's Office are the authorities entitled to investigate and prosecute corruption.

For LAC violations, the highest authority of the relevant agency or entity of the executive, legislative and judiciary branches is allowed to investigate the matter and initiate administrative proceedings. The Office of the Federal Comptroller General (CGU) has authority to investigate and impose sanctions relating to illegal acts set out in the law that are committed against a foreign public administration. At the federal executive level, the CGU will also have concurrent authorisation to initiate administrative proceedings against legal entities and audit the proceedings handled by other authorities. In the case of judicial sanctions, the entities may follow the procedure established by the Brazilian Class Action Law, set out in Law No. 7,347/1985.

In addition, the LAC allows the public administration to sign leniency agreements with legal entities that violate the law, provided they effectively collaborate with the investigation, and that the collaboration results in:

a identifying those involved in the violation, when applicable; and

b rapidly obtaining information and documents proving the illegal acts under investigation.

Furthermore, Federal Decree No. 8,420/2015 specifies that implementing or improving an existing compliance programme according to the 16 parameters set out in Section X may also be included among the obligations of a company wishing to enter into a leniency agreement.

The leniency agreement does not exempt the legal entity from its obligation to redress the damage caused. However, it reduces the fine by up to two-thirds, and exempts the legal entity from making the condemnatory decision public and from the prohibition on receiving incentives, subsidies, grants, donations or loans from public agencies or entities and from public financial institutions or institutions controlled by the government, from one to five years.

Also, the Anti-Crime Law (Law No. 13,964/19) created the possibility for defendants in an administrative improbity lawsuit to negotiate civil non-prosecution agreements.

The covid-19 pandemic scenario

As a reaction to the World Health Organization declaration of the covid-19 pandemic in March 2020, public federal, state and municipal administrations passed decrees and provisional acts to soften legislation given the exceptional situation faced worldwide.

In order to encourage donations from individuals and companies to strengthen the fight against the pandemic, the federal government published Federal Decree No. 10,314/2020, which allows the government to receive donations of goods, services or technology, assuming charges or duties in exchange (such as transport logistics). The regulation amends Federal Decree No. 9,764/2019, which allowed donations to be made by any natural or legal persons, national or foreign, in a regular situation in the country, but without any charges to the government. With the inclusion of this new type of donation, legal entities and individuals will be able to establish conditions, such as requiring the beneficiary to bear the logistics costs.

On 28 April 2020, the CGU launched the booklet 'Good Practices of Integrity in Public-Private Relations in Times of Pandemic', guiding companies in operations carried out with the public sector in the course of the pandemic. The document emphasises the importance of promoting transparency and integrity in public–private relations, in addition to directing the main inspection actions that will be prioritised after the normalisation of the situation faced by the country. The booklet is divided into the topics 'orient, register, disseminate, monitor, report and preserve your image', providing guidance and suggesting guidelines to be followed by companies.

The financial sector is particularly vulnerable in the current crisis, and the Council for the Control of Financial Activities (COAF) reinforced the importance of diligent control to mitigate risks, particularly those related to fraud. The COAF published a list with the main warning signs it had detected, such as contracting third parties with no previous bidding and overpricing, the receipt of public funds for the purchase of equipment or supplies to fight the pandemic with immediate transfer to third parties with no apparent financial relationship and transfer of funds to public agents by companies that received payments resulting from administrative contracts.

It revealed an immediate need for risk assessment or reassessment by companies. New measures must be adopted or existing measures updated to mitigate the various dangers that the crisis could bring. The compliance department must adopt extraordinary checks to monitor the programme's conformity and reinforce its checks, mainly in relation to:

a donations to public agencies;

b public contracts, agreements and partnerships, especially when arising from emergency contracts;

c adequacy of accounting records; and

d control mechanisms for employees and third parties, given that they are exercising their activities outside the company, when applicable.

Other recommended measures are periodic reports to senior management (and in certain cases to investors) and the establishment of a crisis committee to address the issues, which must be multidisciplinary and include the compliance expert.

With the pandemic, allegations of corruption and fraud related to public expenses with the fight against covid-19 emerged around the country and led to numerous police investigations involving state and municipal governments. Operation Placebo has been the most prominent in national media, targeting Rio de Janeiro's state governor Wilson Witzel for misuse of public resources, which led to his impeachment.

In addition, a parliamentary inquiry commission is ongoing to investigate alleged omissions and irregularities in the actions of the federal government during the pandemic.

IV FOREIGN BRIBERY: LEGAL FRAMEWORK

Individuals and legal entities can be liable for bribery of foreign public officials in Brazil. Bribery of foreign public officials is regulated under the Brazilian Criminal Code (Decree Law No. 2,848)[3] for individuals, and the LAC for legal entities (administrative and civil liability).

The Brazilian Criminal Code defines the crime of active bribery in an international commercial transaction as an individual offering or promising undue advantage to a foreign public official or to a third party to influence him or her to perform, hide or delay an official act related to an international commercial transaction.

Under the concept of bribery in the LAC, it is forbidden to promise, offer or give, directly or indirectly, an undue advantage to a national or foreign public official, or a third person related to them. The Law not only covers acts of corruption, but also prohibits acts such as fraud in public tenders, for both national and foreign public administration.

In Brazil, foreign public officials are those who, even temporarily and without compensation, hold a public position, job or office in government agencies and entities, or in embassies of a foreign country, as well as in legal entities controlled, directly or indirectly, by the government of a foreign country, or in international public organisations. Public international agencies and entities, diplomatic representations of foreign countries, legal entities controlled, directly or indirectly, by the government of a foreign country, and international public organisations, are considered foreign public administration, according to the LAC.

The consequences of bribery of foreign public officials are as follows.

a individual: under the Brazilian Criminal Code, individuals who commit acts of corruption in international commercial transactions can be subject to a fine and up to eight years' imprisonment; and

b company or legal entity: under the LAC, legal entities can be subject to the administrative and judicial penalties described in Section II.v.

3 Article 337-B.

V ASSOCIATED OFFENCES: FINANCIAL RECORD-KEEPING AND MONEY LAUNDERING

Federal Law No. 9,613 of 1998 (the AML Act), as amended by Law No. 12,683/2012, increased prosecution for money laundering crimes in Brazil. This regulation establishes a stricter criminal regime for the crime of money laundering, broadening its scope and establishing additional sanctions on different parties who participate in money laundering schemes. The AML Act no longer restricts the crime of 'money laundering,' to the prior occurrence of one of the crimes previously described in Article 1 of the AML Act. Hence, the list of predicate offences has been extinguished and this concept now encompasses any criminal offence, including misdemeanours and, notably, tax evasion crimes. These measures were designed to prevent the misuse of the financial system for illicit actions described in this law. It also requires legal entities to identify its customers and to maintain updated records of any transaction, as well as the duty to report any transaction that seems related to crimes referred to in this law. In case of omission, entities may be subject to administrative penalties for non-compliance.

The AML Act is based on the Financial Action Task Force (FATF) recommendations that identify three phases of money laundering crimes:

a placement;
b layering; and
c integration of assets originating from crime.

Even if money laundering crimes are related to a prior criminal offence, the proper authorities may investigate money laundering acts and initiate a criminal lawsuit even before the prior criminal offence has received a definitive ruling from the courts. It is important to stress that money owners may be held criminally liable alongside anyone who facilitated the use, acquisition or retention of criminal property on behalf of another person. Individuals who work for an entity used directly or indirectly for money laundering may also be held liable if they had knowledge of the scheme.

On the other hand, some corporations and individuals, including financial institutions, brokers (currency or stock exchanges), insurance, credit card companies, leasing and factoring companies, gold, jewellery, arts and luxury items dealers, real estate agents and several others, have a legal duty to establish anti-money laundering and terrorism financing policies and to report all suspicious activity to the authorities.

The same law created the COAF, an agency that is now subordinate to the Central Bank of Brazil and currently named the Financial Intelligence Unit (UIF). It is responsible for the regulation and investigation of transactions suspected of money laundering. The UIF has the power to impose administrative penalties. Law No. 12,683/2012 broadened the number of individuals and legal entities that are obliged to inform suspicious activities to the UIF. Some entities such as stock exchanges, commodities exchanges, derivative exchanges, banks, securities brokers and dealers, insurance companies and factoring companies must pay special attention to suspicious transactions in relation to money laundering rules and inform the UIF of transactions that violate money laundering laws. Moreover, any transaction conducted with those entities involving assets that can be converted into currency exceeding 10,000 reais must be reported to the UIF.

The Central Bank has published specific rules regarding money laundering prevention. For example, it has issued rulings in order to enhance the anti-money laundering and terrorist finance system in Brazil. These rules were enacted in accordance with FATF recommendations.

FATF is the inter-governmental body created to promote the development of international policies to combat money laundering and terrorism financing. Brazil has been a member of FATF since 2000.

VI ENFORCEMENT: FOREIGN BRIBERY AND ASSOCIATED OFFENCES

Even though it is not common, there have been cases of enforcement for foreign bribery, such as the Lava Jato operation cases involving public officials in Peru.

VII INTERNATIONAL ORGANISATIONS AND AGREEMENTS

Brazil is a signatory to the United Nations Convention against Corruption, the Inter-American Convention against Corruption and the OECD Anti-Bribery Convention, although it is not a member of OECD. Brazil is also a member of FATF.

VIII LEGISLATIVE DEVELOPMENTS

In addition to the provisions of the Anti-Corruption Law and the Federal Decree No. 8,420/2015, several other bills advance in this matter by offering advantages to companies with effective compliance structures in place.

Most Brazilian states have already implemented the Anti-Corruption Law through local laws or decrees that benefit the effective application of the Law at the state level - and the issue is under discussion in other states that have not yet done so.

In January 2020, Federal Law No. 13,964/2019 (the Anti-crime Package) came into effect, bringing innovative measures in whistle-blowing practices within the public administration. It is now mandatory for public bodies to create whistle-blowing channels for receiving complaints, including direct administration agencies – augmenting public bodies with a mechanism that is already recommended for private companies and already mandatory for indirect administration (public companies and mixed-capital companies under the State-Owned Companies Law).

The Law brings provisions on retaliation against whistle-blowers, prohibiting activities such as arbitrary dismissal, unjustified alteration of functions, imposition of sanctions and other types of reprisal. The Law addresses retaliation against whistle-blowers as a serious disciplinary offence. Those engaging in this conduct may be subject to dismissal from public service and, in addition, the whistle-blower may be doubly compensated for any material and moral damage.

In addition, the Anti-crime Package provides, in Article 4-C Section 3, the possibility of compensation to whistle-blowers of up to 5 per cent of the amount recovered by the state if the information provided results in the recovery of losses from crimes against the public administration.

Federal Law No. 13,303/2016 (the State-Owned Companies Law) provides for the legal status of state-owned companies, government-controlled private companies and their subsidiaries, within the union, the states, the federal district and municipalities. In this regard, the State-Owned Companies Law contains provisions on the modernisation of the management of state-controlled companies, seeking to inhibit the political influence on their administration with rules regarding corporate governance, compliance and transparency in their activities.

In April 2021, Federal Law No. 14,133/2021 was enacted, dealing with Public Tenders and Administrative Contracts, replacing Law No. 8,666/1993. Although already in force, a two-year transition period has been established until the former law is revoked.

The main new compliance-related features of the law are:

a creation of the National Public Contracting Portal, aiming to unify the registration of bidders and publicise details of bidding procedures, such as notices, contracts, electronic invoices, price consultation panel and access to the National Register of Disreputable Companies and Suspended Companies and the National Register of Punished Companies; and

b making a compliance programme mandatory as a condition for hiring for major contracts and a tie-breaker criterion for other contracts.

IX OTHER LAWS AFFECTING THE RESPONSE TO CORRUPTION

Besides the LAC and the Brazilian Criminal Code, additional federal laws contain provisions that affect the response to corruption:

a the Brazilian Improbity Law establishes civil and administrative corporate liability for acts against public law principles, such as morality and legality;

b Bill No. 2,505/2021 aiming to make changes in the Improbity Law may create impacts and is being criticised for creating obstacles to enforcement. Among the potential changes are time limits for an investigation to be concluded, reduction of statute of limitations and restriction of cases allowing assets to be frozen;

c the Brazilian Public Procurement Law establishes rules for public tenders and contracts with the government; and

d the State-Owned Companies Law regulates the status of state-owned and state-controlled companies and their subsidiaries, aiming to modernise the management of public companies and avoid corruption, creating distance from political influences, as mentioned above.

X COMPLIANCE

The LAC and its regulating Federal Decree No. 8,420/2015 are the main pieces of legislation regarding compliance matters in Brazil. The LAC establishes that the highest authority of the damaged public entity of the executive, legislative and judiciary has competence to investigate and impose administrative sanctions under the LAC. The CGU has authority to investigate, process and sanction illegal acts set forth in the LAC that are committed against a foreign public administration. At the federal executive branch level, the CGU also has concurrent authority to initiate administrative proceedings against legal entities and audit the progress of proceedings handled by other authorities.

The implementation of a compliance programme is not mandatory under the LAC. If a violation occurs, the entity's compliance programme will be assessed by the enforcement authorities and may be considered a mitigating factor for a fine. The existence of a compliance programme does not eliminate civil or administrative liability for legal entities, but it can reduce sanctions on them.

Federal Decree No. 8,420/2015 provides guidance on what can be considered an effective compliance programme. According to this Decree, a compliance programme must be customised and structured to each legal entity and its activities. This provision is important

and solidifies the understanding that there are no 'off-the-shelf' compliance programmes. Furthermore, Federal Decree No. 8,420/2015 establishes 16 parameters against which a compliance programme will be evaluated:

a commitment by the legal entity's senior management, including board members, proven by their clear and unequivocal support for the programme;

b standards of conduct, code of ethics, policies and integrity procedures to be applied to all employees and administrators, regardless of their position or role;

c standards of conduct, code of ethics and integrity policies extended, when necessary, to third parties (e.g., suppliers, service providers, intermediaries and other associates);

d periodic training on the compliance programme;

e periodic analysis of risks to implement necessary adjustments to the compliance programme;

f precise accounting records that reflect all transactions of the legal entity;

g internal controls that assure that reports and financial statements of the legal entity are readily prepared and trustworthy;

h specific procedures to prevent fraud and illicit acts within tender processes, in the execution of administrative contracts or in any interaction with the public sector, even if intermediated by third parties, such as the payment of taxes, subjection to inspection, or the obtaining of authorisations, licences, permits and certificates;

i independence, in structure and authority, of the internal department responsible for enforcing the compliance programme and monitoring its compliance;

j channels to report irregularities, openly and broadly disseminated among employees and third parties, and mechanisms to protect good-faith whistle-blowers;

k disciplinary measures enforced against those found to have violated the compliance programme;

l procedures that assure the immediate suspension of irregularities or detected infractions and the timely remediation of the damage caused;

m proper due diligence conducted prior to engaging third parties and, depending on the circumstances, monitoring of third parties such as suppliers, service providers, intermediaries, and other associates;

n verification, during a merger, acquisition or other corporate restructuring, of irregularities or illicit acts, or the existence of vulnerabilities in the legal entities involved;

o continuous monitoring of the compliance programme to ensure it remains effective at preventing, detecting and otherwise addressing wrongful acts described in the LAC;[4] and

p transparency surrounding donations to candidates and political parties made by the legal entity.

Another factor considered when applying sanctions is 'the cooperation of the legal entity with the investigation of the offence'. Federal Decree No. 8,420/2015 sets forth that penalties may be reduced by 1 to 1.5 per cent, regardless of a leniency agreement, if the entity had cooperated with the authorities.

As mentioned above, there is no specific legal requirements to implement codes of conduct, policies, procedures, corporate protocols and whistle-blowing channel, but the adoption of compliance measures effectively represents a relevant benefit to the entity in

4 Article 5.

case of a violation. In addition, the CGU has published guidelines related to the LAC and to Federal Decree No. 8,420/2015. Those materials include a guideline to assist companies in developing and improving a code of conduct, policies and instruments according to the parameters set forth in Federal Decree No. 8,420/2015, a manual providing guidelines on the calculation of penalties imposed by the LAC and a manual about conflicts of interest.

There have been recent discussions and developments to unify the competence of public authorities to enter into leniency agreements with legal entities. On 6 August 2020, a cooperation agreement was signed by the CGU, the Office of the Attorney General (AGU), the Federal Supreme Court, the TCU and the Ministry of Justice. The agreement formalises a multi-agency information-sharing scheme and dictates that leniency deal negotiations are to be handled solely by the CGU and AGU, which resembles the actual leniency system practices in the United States.

Under the new system, the signatory agencies will share the information and documents provided by the collaborating company with other institutions. However, the agreement establishes that the CGU and AGU will have exclusivity over the execution and negotiation of leniency agreements pertaining to the Anti-Corruption Law, with consideration to cases where the facts are subject to the TCU's jurisdiction; the agencies will forward the necessary information to estimate the resulting damages.

However, on 10 August 2020 the anti-corruption section of the Federal Prosecution Service (MPF) released a technical note opposing the new system and withdrawing from the agreement. The enforcement agency said the cooperation agreement will not improve cooperation but rather harm the performance of each of the signatory agencies. The section also claimed that the deal is unconstitutional as it limits the scope of its anti-corruption enforcement as given in the federal Brazilian Constitution.

Previously, in May 2020, the MPF had released a technical note on the terms of adhesions or subscriptions of individuals in leniency agreements signed with the public body. The document was prepared by Permanent Commission for Advising Leniency and Plea Bargain Collaboration with a view to guiding the actions of prosecutors in negotiations involving people connected to companies that entered into leniency agreements with the MPF and safeguarding equality in granting benefits.

For this reason, the technical note established guidelines on the possibility of extending benefits to individuals, in order to ensure greater predictability regarding their legal situation, as well as engender greater security to the cooperation link necessary to fight corruption in the country. In this way, the benefits system can even be extended to the criminal sphere, since the criminal classifications of the illicit conduct of the individuals involved imply in different personal responsibilities.

XI OUTLOOK AND CONCLUSIONS

Even though the LAC has no mandatory provision for the implementation of a compliance programme, the government is using its procurement power to positively encourage companies to implement compliance programmes. Some states have regulations that require companies to implement compliance programmes when contracting with the public administration depending on a certain threshold. It is a strong trend towards the requirement of a compliance programme when contracting with a public entity.

Additionally, in January 2019, the National Bank for Economic and Social Development (BNDES) published Resolution No. 3,493/2018, which amended the rules of contracts

signed by the bank. Therefore, the BNDES began to require its financial agents to prove, whenever requested, the adoption of procedures aimed at complying with rules to prevent money laundering and terrorism financing. Furthermore, it also required financial agents to prove the adoption of a compliance programme, policies and procedures aimed at preventing and combating corruption, fraud and other irregularities foreseen in legislation, in particular in the LAC and its changes in the applicable regulations and in the policies and norms of the BNDES.

Therefore, the lack of a compliance programme may impede a company's participation in certain public transactions. In those circumstances, it is advisable to consult local regulations to verify whether there is any need to adapt the compliance programme to meet local requirements.

Another entity that followed the trend in Brazil is the Brazilian Securities and Exchange Commission (CVM). In 2019, the CVM published Rule No. 607/2019 regulating its sanctioning activity and establishing that any publicly held company with an effective compliance programme may have their fines reduced. The text provides that 'the effective adoption of internal mechanisms and procedures of integrity, auditing and incentives to report irregularities, as well as the effective application of codes of ethics and conduct within the legal entity' are mitigating circumstances in the new administrative process, reducing the penalty by up to 25 per cent.

Another initiative, Pró-Ética, created by the CGU, aims to promote the voluntary adoption of compliance measures by companies through the public recognition of those measures that, regardless of the size and industry, demonstrate that they are committed to implement measures aimed at the prevention, detection and remediation of acts of corruption and fraud. In summary, companies provide information and documents to the CGU regarding the compliance measures that were adopted. At the end of the process, companies that reach a certain score are considered 'Pro-Ética companies', and the information is later disclosed to the public.

Another significant topic, although not covered by criminal law (as there is no strict liability in criminal matters), is the growing understanding that compliance officers may face personal liability for corporate irregularities as a result of their absence or omission in performing their duties. Based on the 'in fact control theory', even though individuals have committed no active crime, they may be considered liable if they:

a had control over the perpetrators of the illicit act; and

b could have prevented the crime.

Even with no direct action, individuals such as compliance officers who could have frustrated a crime, but failed to carry out their activities or acted recklessly (negligence, malpractice, omission, etc) making the crime possible, may be held criminally liable. In Brazil there have as yet been no decisions regarding compliance officers' liability for corporate wrongdoing; however, the matter has been a frequent topic of discussion among legal experts and enforcement authorities.

Appendix 1

ABOUT THE AUTHORS

HELOISA UELZE

Trench Rossi Watanabe

Heloisa Barroso Uelze joined the firm in 2000 and became a partner in 2005. She has practised for over 25 years and is currently the head of the Brazilian Public law, government relations and regulatory group at Trench Rossi Watanabe. Her areas of expertise are public and regulatory law, government affairs and infrastructure projects, with a focus both on litigation and on consultancy matters. She assists clients in the regulatory area, both in consultancy and litigation matters, especially in cases involving public entities and regulatory agencies or infrastructure projects, such as international and national bids and government contracts, including complex negotiations and assisting clients in elaborating strategies to meet the local content requirements in public tenders. Heloisa has vast experience working in compliance matters representing clients both before the public administration and the judiciary department. In several occasions she has dealt with the federal and state public prosecutor's offices negotiating deals in matters that involved the Improbity Law and the Clean Companies Act. She has also defended clients' interests before several Courts of Accounts (at federal, state and municipal levels). Heloisa also works with clients in strengthening their compliance areas, by improving both the internal rules and the mechanisms to enforce such rules. She prepares and reviews internal policies and guidelines and also provide speeches and training to the clients' teams in order to make sure everyone is aware of the applicable rules.

Heloisa has been recognised for her work by the main legal directories such as *LACCA Approved*, *Latin Lawyer 250*, *Análise Advocacia 500* and *The Legal 500*.

FELIPE FERENZINI

Trench Rossi Watanabe

Felipe Noronha Ferenzini joined the firm in 2009 and became a partner in 2018. He jointly coordinates the compliance and investigations group in Brazil. Felipe has vast experience in the compliance area, with a focus on structuring and leading complex internal investigations, implementation of compliance, risk and governance programmes (risk assessment, internal policies, remediation mechanisms and training). Felipe also has a relevant background in administrative law and the related sanctions regime. He also has robust experience in advising foreign and Brazilian companies regarding compliance law (Brazilian anti-corruption law, FCPA, money laundering and regulatory compliance, including pharmaceuticals, oil and gas and banking) dealing with relevant stakeholders (authorities, regulators, internal and external auditors, boards of directors, regulatory agencies and independent oversight committees).

Felipe has been recognised for his work as a compliance expert in Brazil by publications such as *The Legal 500* (2021 edition – Next Generation Partner), *LACCA Approved* in 2020 and 2021 (being appointed as a Thought Leader and the third most voted lawyer in all areas in Brazil in the 2021 edition). He has been certified by the Association of Certified Fraud Examiners, New York 2018, by the Association of Certified Anti-Money Laundering Specialists 2020, and is an alumnus of the International Anticorruption Academy (scholarship granted).

FERNANDA CASAGRANDE

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Fernanda Fischer Casagrande joined the firm in 2017. She is a senior associate in the compliance and investigations group, working with a focus on anti-corruption compliance issues and questions involving corporate matters such as financial fraud and money laundering. Fernanda has a wide breadth of experience in interacting with judicial and regulatory authorities, conducting small and large internal investigations (including multi-jurisdictional), assistance in reporting information to enforcement authorities, boards of directors and other controllers in cases of violation of national and foreign anti-corruption law and Brazilian criminal law. In addition, she undertakes the development, review and implementation of compliance programmes, training of directors and employees, conducting compliance risk assessments and anti-corruption audits in the context of M&A projects.

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