GIR INSIGHT

AMERICAS
INVESTIGATIONS REVIEW
2021

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This article was first published in October 2020
For further information please contact Natalie.Clarke@lbresearch.com

Published in the United Kingdom
by Global Investigations Review
Law Business Research Ltd
Meridian House, 34-35 Farringdon Street, London, EC4A 4HL

www.globalinvestigationsreview.com

To subscribe please contact subscriptions@globalinvestigationsreview.com

ISBN 978-1-83862-267-1

Printed and distributed by Encompass Print Solutions
Tel: 0844 2480 112

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Preface

Welcome to the *Americas Investigations Review 2020*, one of *Global Investigations Review*'s special reports. *Global Investigations Review*, for newcomers, is the online home for all those who specialise in investigating and resolving suspected corporate wrongdoing. We tell them all they need to know about everything that matters, wherever it took place.

Throughout the year, *GIR* writes daily news, surveys and features; organises the liveliest events ('GIR Live'); and provides our readers with innovative tools; and know-how products to make life more efficient.

In addition, assisted by external contributors, we curate a range of comprehensive regional reviews – online and in print – that go deeper into developments than the exigencies of journalism allow.

The *Americas Investigations Review 2020*, which you are reading, is one of those reviews. It contains insight and thought leadership, from 28 pre-eminent practitioners from the region. Across 11 chapters, and 160 pages, it is part invaluable retrospective and part primer. All contributors are vetted for their standing and knowledge before being invited to take part.

Together, these writers capture and interpret the most substantial recent international investigations developments of the past year, with footnotes and relevant statistics. Other articles provide valuable background so that you can get up to speed quickly on the essentials of a particular topic.

This edition covers Brazil, Mexico and the United States – each from multiple perspectives, and has overviews on the Department of Justice's use of tools that are not the Foreign Corrupt Practices Act; on evidence gathering; and on how to ensure that history does not repeat – the art of learning the right lessons as an investigation winds down.

Among the highlights for this reader:

- a fine discussion of the *Bogucki* case – in which the US Department of Justice has been accused (by a former member of staff) of misusing mutual legal assistance treaty requests to stop the clock on cases;
- news that Airbus's huge settlement led to raids for other companies – notably Avianca;
- finding a worked example of how to learn the lessons at the end of an investigation (featuring hypothetical company 'ZYX Inc');

- the full breakdown of all corruption related fines and settlements levied in Brazil, complete with graphics; and
- discovering that covid-related corruption is already under investigation in Germany, Italy Serbia and Brazil, and that the new head of Mexico's Federal General Prosecutor's office is over 80 years old (and was chosen for his venerableness in part).

And much, much more.

If you have any suggestions for future editions, or want to take part in this annual project, we would love to hear from you. Please write to insight@globalarbitrationreview.com.

David Samuels
Publisher, Global Investigations Review
London
September 2020

Brazil: Internal Investigations and Cooperation with Enforcement Authorities

Michel Sancovski, Luís Inácio Lucena Adams and
Liliana Mascarenhas Coutinho
Tauil & Chequer Advogados in association with Mayer Brown

In summary

Among the concepts related to anti-corruption enforcement, there is the cooperation of companies with enforcement authorities with the expectation to mitigate sanctions for potential violations. While the Brazilian Anti-Corruption Law provides cooperation as a mitigating factor, the criteria and parameters for its recognition are not clearly developed and companies trying to cooperate with Brazilian authorities face some challenges. A thorough internal investigation may assist companies to cooperate, but this mechanism is not regulated and expressly recognised in Brazil. In the United States, both the concept and criteria for cooperation and the importance of internal investigations are clearer and the benefits are noticeable in the results that US authorities achieve in resolutions with companies. In this chapter, we present a parallel between the Brazilian and the American enforcement systems to consider the possibilities for Brazil to improve its anti-corruption enforcement.

Discussion points

- US anti-corruption enforcement
- Brazilian anti-corruption enforcement
- Criteria for cooperation
- Internal investigations

Referenced in this article

- Brazilian Anti-Corruption Law (Law No. 12,846/2013)
- US Foreign Corrupt Practices Act
- Foreign Corrupt Practices Act Corporate Enforcement Policy
- US Department of Justice
- US Securities and Exchange Commission
- US Justice Manual

Introduction

Corruption has a big social and economic impact[1] considering that, in recent years, the fight against corruption has turned into a priority worldwide and many countries have enacted or amended legislation related to the matter.[2] This increased legislative activity came accompanied by a stricter enforcement of these new rules and it is clear there has been an increase in the number of criminal and civil prosecution of companies that have practiced some type of misconduct.[3]

In this context of a greater enforcement, legal entities must act and adopt compliance measures to ensure adherence to the legislation they are subject to. In case of allegations of potential wrongdoings, corporate internal investigations are a relevant mechanism for legal entities to analyse internally whether the facts and misconduct actually occurred and how to remediate and prevent new violations.

Along with internal investigations, the concept of cooperation with enforcement authorities has developed and become very relevant. Allegations of misconduct are often taken to regulators and authorities, who will start their own investigation about the facts and decide on potential sanctions to companies that violate anti-corruption legislation. A proper and well conducted internal investigation allows a company to consider cooperating with the authorities and possibly being granted credits or leniency for the cooperation.

However, in general, there is no unique definition for what should be considered cooperation. While some jurisdictions have developed clearer criteria to guide companies in their efforts to cooperate with enforcement authorities, there are other jurisdictions where legal entities do not have a clear path for conduct or acts that would be recognised as a company's effort to cooperate and be granted credits or leniency.

For example, in the United States, there are guidelines and standards established by the Department of Justice (DOJ) and the Securities and Exchange Commission (SEC) for the recognition of a company's cooperation in procedures related to the US Foreign Corrupt Practices Act

1 Impacts of corruption are seen in the most diverse sectors of society. Although it is not possible to precisely estimate the economic cost of corruption, in a 2016 report, the International Monetary Fund calculated that the annual cost of bribery alone could reach between US$1.5 to US$2 trillion. (IMF Staff Discussion Note – Corruption: Costs and Mitigating Strategies. May 2016, page 5. Available at https://www.imf.org/~/media/Websites/IMF/imported-full-text-pdf/external/pubs/ft/sdn/2016/_sdn1605.ashx.

2 As examples, we have the Brazilian Anti-Corruption Law, enacted in 2013; the Mexican General Law on Administrative Accountability, which is in force since July 2017 (https://www.complianceweek.com/mexico-unveils-new-anti-corruption-law/2578.article); Argentina's Law No. 27,401, from December 2017, that amended some corruption provisions in the Criminal Code and established corporate criminal liability for certain corruption offenses (https://fcpamericas.com/english/anti-corruption-compliance/argentina-introduces-corporate-liability-compliance-standards-anti-corruption-law/#); and Italy's New Anti-Corruption Legislation, that came into force in January 2019 (https://www.loc.gov/law/foreign-news/article/italy-new-anti-corruption-legislation-comes-into-force/).

3 In the United States, starting 2007, the number of enforcement actions of the US FCPA by the DOJ and the SEC has largely increased, as it can be seen on a graph available on the Stanford's Law School FCPA dedicated website (http://fcpa.stanford.edu/statistics-analytics.html?tab=1). To illustrate the increase, in 2006, the DOJ started only six enforcement actions, while in 2019 there were 32 enforcement actions started by the DOJ.

(FCPA). These authorities have created policies and have been systematically working alongside companies in disciplinary efforts to avoid new potential violations to anti-corruption legislation, as well as dealing with and remediating prior violations.

On the other hand, in Brazil, the Brazilian Anti-Corruption Law (Law No. 12,846/2013) has provided for the recognition of a legal entity's cooperation as a mitigating factor, if the legal entity faces an administrative proceeding involving a potential violation of that law or similar legislation. Unlike in the United States, however, the Brazilian Anti-Corruption Law – as well as its decree (Decree No. 8,420/2015), which provides regulatory details for the application of the law – lacks clarity on its definition and understanding of cooperation and its recognition involves dealing with many obstacles, including related to the definition of the appropriate authority to enforce the law in different levels of the public administration.

In this chapter, we adopt the US cooperation standard as a benchmark and discuss a parallel between the US rules and procedures for cooperation and the rules and procedures for cooperation in Brazil, highlighting the role a deep and thorough internal investigation can play in the company's expectancy of receiving credits for cooperation and potential leniency.

The Brazilian Anti-Corruption Law and the US Foreign Corrupt Practices Act

Prior to editing a specific Anti-Corruption Law, Brazil had already been involved in global attempts to fight corruption with rules spread among different laws[4] and in having signed conventions and adopting rules issued by transnational organisations on the topic, such as by the Organisation for Economic Co-operation and Development,[5] Organization of American States[6] and the United Nations.[7]

In 2013, Brazil enacted the Brazilian Anti-Corruption Law, which stipulates in what way and to what extent legal entities may be placed under civil and administrative responsibility for corruption or other acts considered detrimental to either a national or foreign public administration.

The Brazilian Anti-Corruption Law is based on a strict liability regime, which means that legal entities will be held liable for illegal acts committed by any of its employees or by third parties, without the need to evidence intent or that the company's management had actual knowledge or approved the specific improper acts. The authorities only need to evidence that

4 For example, the Brazilian Criminal Code for many years provided for criminal penalties against corruption according to articles 317, 333 and 337-B. In addition, the Administrative Improbity Law (Law No. 8,429/1992) contained penalties to government employees for the misconduct performed in their capacity of government employees for personal purposes, as well as for individuals or companies encouraging such misconduct or benefiting from them. Other Brazilian laws also address the corruption subject, such as the Public Procurement Law (8,666/1993) and the Anti-Money Laundering Law (Law No. 9,613/1998, as amended by Law No. 12,683/2012).

5 OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions dated 17 November 1977, adopted by Brazil under Decree No. 3,867/2000.

6 Inter-American Convention Against Corruption dated 29 March 1996, except for section XL, paragraph 1, item c, adopted by Brazil under Decree No. 4,410/2002.

7 United Nations Convention against Corruption of 31 October 2003, adopted by Brazil under Decree No. 5,687/2006.

the illegal acts were committed in the benefit or interest of the legal entity. This law is of such importance that it may be considered one of the Brazilian government's biggest steps in its efforts to combat corruption and bribery.

When it comes to sanctions, the Brazilian Anti-Corruption Law provides for civil and administrative penalties but it also establishes some mitigating factors in the calculation of the sanctions. For example, if the company demonstrates that it had an effective compliance programme in place when the illegal act was committed – with audit mechanisms and procedures that encourage employees to report irregularities and effectively apply codes of ethics and conduct[8] – the sanctions to be imposed on the company will be significantly reduced.

The Brazilian Anti-Corruption Law allows legal entities to apply for leniency agreements when the company, in addition to complying with other requirements, recognises the misconduct and voluntarily cooperates with investigating authorities.[9] Although the law mentions 'full and permanent cooperation' there is no clarification as to what is considered cooperation.

The Brazilian Anti-Corruption Law resembles to some extent the FCPA, enacted by the US Congress in 1977 after the Watergate[10] and Lockheed[11] scandals. The FCPA provides for anti-bribery and accounting violations and is one of the most known anti-corruption laws.

The FCPA covers both misconduct committed in the United States and abroad and is enforced by the DOJ and the SEC. As guidance to companies subject to the FCPA, the DOJ and the SEC released in November 2012 a publication entitled 'A Resource Guide to the US Foreign Corrupt Practices Act' (Resource Guide to the FCPA) compiling case law and the authorities' interpretation of the provisions of the FCPA.

In July 2020, a second edition of the Resource Guide to the FCPA[12] was released, bringing new case law and examples and detailing some concepts, as well as incorporating some policies released by US enforcement authorities in the previous years. Some of the policies incorporated in the new edition of the Resource Guide to the FCPA were:

8 Article 7: 'Will be considered for the application of sanctions: [...] VIII – the existence of mechanisms and internal procedures of integrity, audit and incentive to whistleblow of irregularities and the effective application of the ethics and conduct codes within the legal entity.'

9 Article 7, item VII, article 16 and article 17. Article 7: 'Will be considered for the application of sanctions: [...] VII – the cooperation of the legal entity in the investigation of the violations'; 'Article 16. The highest authority of each body or public entity may execute leniency agreement with the legal entities responsible for the practice of acts provided for in this Law that collaborate effectively with the investigations and the administrative proceeding, as long as the collaboration results in: I – the identification of the others involved in the violation, when applicable; and II – rapidly obtaining information and documents that prove the misconduct under investigation. Article 17. The Public Administration may also execute leniency agreement with the legal entity responsible for the practice of unlawful acts provided for in Law No. 8,666, of 21 June 1993, with the intent to exempt or mitigate the administrative sanctions provided for in articles 86 to 88.'

10 Case involving espionage and sabotage by the Republican Party against the Democratic Party during the 1972 US presidential elections. In the investigation conducted at the time, illegal payments to election campaigns and illegal transfers by companies to American politicians and public officials from foreign countries were detected.

11 In this case, payment of bribes to foreign civil officials of several countries by American companies was discovered, particularly involving Lockheed Aircraft Corporation.

12 Available at: https://www.justice.gov/criminal-fraud/file/1292051/download.

- the FCPA Corporate Enforcement Policy;
- the Selection of Monitors in Criminal Division Matters;
- the Coordination of Corporate Resolutions Penalties (Anti-Piling On Policy); and
- the Criminal Division's Evaluation of Corporate Compliance Programs.

Particularly relevant for our discussion here is the FCPA Corporate Enforcement Policy, which provides for the presumption of declination in cases where the company voluntarily self-discloses, cooperates fully, and timely and appropriately remediates the misconduct. This policy establishes some criteria that the DOJ and the SEC consider for recognising cooperation and is better discussed in the next section.

Cooperation: criteria for recognition

The United States

In November 2017, the DOJ announced the FCPA Corporate Enforcement Policy[13], in substitution of the FCPA Pilot Program that was in place since April 2016. The FCPA Corporate Enforcement Policy was incorporated into the Justice Manual (previously known as United States Attorneys' Manual)[14] and, in July 2020, was incorporated into the DOJ and SEC's Resource Guide to the FCPA.

Among its provisions, the FCPA Corporate Enforcement Policy establishes a presumption of declination for companies that comply with three requirements, absent aggravating circumstances:

- voluntary self-disclosure;
- full cooperation; and
- timely and appropriate remediation.

It also provides for definitions and comments on the concepts, increasing transparency in the DOJ's decisions and reducing the risk of a too discretionary enforcement.

The importance of cooperation and its value to the authorities, which allows for it to become a mitigating factor, is well explained in the Justice Manual:

> *For these reasons and more, cooperation can be a favorable course for both the government and the corporation. Cooperation benefits the government by allowing prosecutors and federal agents, for example, to avoid protracted delays, which compromise their ability to quickly uncover and address the full extent of widespread corporate crimes. With cooperation by the corporation, the government may be able to reduce tangible losses, limit damage to reputation, and preserve assets for restitution. At the same time, cooperation may benefit the corporation – and ultimately shareholders, employees, and other often blameless victims – by enabling the government to focus its investigative*

13 Available at: https://www.justice.gov/criminal-fraud/file/838416/download.

14 Justice Manual, Title 9-47.120. Available at: https://www.justice.gov/jm/jm-9-47000-foreign-corrupt-practices-act-1977#9-47.120.

> *resources in a manner that may expedite the investigation and that may be less likely to disrupt the corporation's legitimate business operations. In addition, cooperation may benefit the corporation by presenting it with the opportunity to earn credit for its efforts.*[15]

The Justice Manual establishes a threshold for cooperation credits to be granted[16] and, specifically as to cooperation in the context of the FCPA, the FCPA Corporate Enforcement Policy adds the following requirements.

- Timely and proactive production of all facts relevant to the misconduct. The production of facts include rolling disclosure of information from a company's internal investigation and all relevant facts discovered during a company's independent internal investigation (attributing to the source when possible, considering attorney–client privilege), as well as facts related to involvement in criminal activity by individuals or third-party companies that relate to the company under investigation.
- Timely preservation, collection and disclosure of relevant documents.
- De-confliction of witness interviews.
- Making available, when requested, individuals potentially involved in the misconduct or possible witnesses for interviews with the DOJ.

The FCPA Corporate Enforcement Policy establishes some items also for the recognition of a timely and appropriate remediation and, in this context, for a company to receive full credits according to the policy, it requires that the company have in place:

> *an effective compliance and ethics program, the criteria for which will be periodically updated and which may vary based on the size and resources of the organization.*[17]

Along with the criteria included in the FCPA Corporate Enforcement Policy, the SEC has also defined some general principles for evaluating a company's cooperation in the context of civil actions for FCPA violations, including providing to the authorities all relevant information about the misconduct and the company's efforts for remediation.[18]

It is relevant to note that these principles and criteria are not only provided for but are actually observed by the authorities in the United States.

15 JM, Title 9-28.700. Available at: https://www.justice.gov/jm/jm-9-28000-principles-federal-prosecution-business-organizations#9-28.700.

16 The factors listed in the Justice Manual include identifying all individuals substantially involved in the misconduct and provide to the DOJ all relevant facts related to the misconduct. (JM, Title 9-28.700).

17 FCPA Corporate Enforcement Policy. Available at: https://www.justice.gov/criminal-fraud/file/838416/download.

18 See the 2001 Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934 and Commission Statement on the Relationship of Cooperation to Agency Enforcement Decisions (Seaboard Report). Available at: https://www.sec.gov/litigation/investreport/34-44969.htm.

The US experience shows the benefits of a clear interpretation of its anti-corruption legislation. To date, since the FCPA came into effect in 1977, there have been over 240 enforcement actions, involving over 50 countries and resulting in more than US$19.7 billion in financial penalties.[19] According to statistics available at the Standford Law School's FCPA dedicated website, 44 per cent of the companies have self-reported, and 92 per cent of the defendants have settled with the SEC and 74 per cent have settled with the DOJ.

The statistics also show benefits for the companies that cooperate, with substantially smaller sanctions for companies that self-disclose (through March 2020, an average of US$68.7 million for companies that have self-disclosed against US$212 million for those that have not).

Finally, since the FCPA Corporate Enforcement Policy was published, the DOJ has issued six declination letters pursuant to the policy.[20]

Brazil

Unlike in the United States, in Brazil, although there is legislative provision of benefits for cooperation with enforcement authorities according to the Brazilian Anti-Corruption Law, there is no specific criteria that the authorities follow to recognise cooperation. This allows for an environment that is too discretionary and for there to be uncertainties on how a company should behave when facing corruption allegations but intending to cooperate with the authorities.

Even though there have been several cases in recent years in which the Brazilian Anti-Corruption Law was applied, as well as several resolutions by leniency agreements pursuant to the law, there is no clear definition of what is considered cooperation or what factors authorities take into account when deciding on granting credits or not.

The Brazilian Anti-Corruption Law mentions only that leniency agreements would be a possibility for companies that 'collaborate effectively', and states that this collaboration must allow two factors:

- the identification of the others involved in the violation, when applicable; and
- rapidly obtaining information and documents that prove the unlawful acts under investigation.[21]

These are two very broad criteria that do not provide guidance as to which steps a company could take to having its cooperation recognised. For example, the Brazilian legislation does not have any provisions acknowledging the role and importance of internal investigations, which could be a relevant mechanism for companies to identify information to share with the authorities.

19 Information available at the FCPA Blog Enforcement Index: https://app.fcpablog.com/features/landing/?mepr-unauth-page=24&redirect_to=%2F.

20 Data updated until September 26th, 2019. Declination letters available at: https://www.justice.gov/criminal-fraud/corporate-enforcement-policy/declinations. Since the FCPA Pilot Program that have been a total of 13 declination letters.

21 Article 16: 'The highest authority of each body or public entity may execute leniency agreement with the legal entities responsible for the practice of acts provided for in this Law that collaborate effectively with the investigations and the administrative proceeding, as long as the collaboration results in: I – the identification of the others involved in the violation, when applicable; and II – rapidly obtaining information and documents that prove the misconduct under investigation.'

Furthermore, companies in Brazil face another big challenge: how to cooperate when it is unclear with which authority they should deal with. The Brazilian Anti-Corruption Law does not specify a single authority that is responsible for prosecuting violations to its dispositions; on the contrary, it refers to all highest authorities of the Legislative, Executive and Judiciary, in a general manner, as possible enforcers of the law and it also allows delegation.[22]

The situation becomes even harder when considered that the Brazilian anti-corruption legal system involves much legislation and there are many cases in which more than one law is applicable. Examples of other laws in the Brazilian anti-corruption system are:

- the Public Procurement Law (Law No. 8,666/1993);
- the Administrative Improbity Law (Law No. 8,429/1992);
- the Criminal Code;
- the Anti-Money Laundering Law (Law No. 9,613/1998);
- the Economic Crimes Law (Law No. 8,137/1990); and
- the Organized Crime Law (Law No. 12,850/2013).

Considering the various laws in force, multiple authorities seek to enforce anti-corruption provisions in Brazil, such as:

- the Federal Prosecution Office (MPF);
- the Comptroller General of the Union (CGU);
- the Attorney-General of the Union (AGU);
- the Federal Court of Accounts (TCU); and
- the Brazilian Securities and Exchange Commission (CVM), this last one from a securities and capital markets point of view.

The police (in more than one sphere) has also showed interest in conducting procedures to assist in anti-corruption enforcement, for example executing plea bargain agreements.[23]

22 For example, articles 8 and 16 of the Brazilian Anti-Corruption Law, which establish: 'Article 8. The commencement and decision of an administrative proceeding to assert liability of a legal entity is competence of the highest authority in each body or entity of the Executive, Legislative and Judiciary Powers, who will act ex officio or upon request, always observing due process and full defense principles. Paragraph One. The competence to initiate and decide on an administrative proceeding to assert liability of a legal entity may be delegated, while sub-delegation is forbidden. Paragraph Two. Within the Federal Executive Power, the Comptroller-General of the Union – CGU will have concurrent competence to initiate administrative proceedings for liability of legal entities or to claim the proceedings started pursuant to this Law, to verify their regularity or to correct their progress. [...] Article 16. The highest authority of each body or public entity may execute leniency agreement with the legal entities responsible for the practice of acts provided for in this Law that collaborate effectively with the investigations and the administrative proceeding, as long as the collaboration results in: I – the identification of the others involved in the violation, when applicable; and II – rapidly obtaining information and documents that prove the misconduct under investigation'.

23 In June 2018, the Brazilian Federal Supreme Court held that Chief Police Officers of the Federal Police and the Civil Police could negotiate plea bargain deals with individuals without the approval of the Prosecution Office. Supreme Court decision available at: http://www.stf.jus.br/arquivo/cms/noticiaNoticiaStf/anexo/ADI5508MMA.pdf. Media news available at: http://www.stf.jus.br/portal/cms/verNoticiaDetalhe.asp?idConteudo=382031.

There are cases of cooperation provisions between authorities. For example, in 2008, the MPF and CVM signed a Term of Technical Cooperation with the purpose to maximise joint actions in the prevention, investigation and anti-corruption enforcement in the capital markets. This Term of Technical Cooperation was executed with a five-year term but it has been extended twice, the last time in May 2018 for five more years.

Another relevant example is the Joint Ordinance No. 4, from August 9 2019, executed between CGU and AGU. This ordinance defines procedures for the negotiation and execution of leniency agreements provided for in the Brazilian Anti-Corruption Law, the Public Procurement Law and in the Administrative Improbity Law.

Despite being a normative that seeks to identify a more clear role for the CGU and for the AGU in the anti-corruption enforcement, it does not provide clarification as to the requirements for the recognition of cooperation by a legal entity, since it repeats the legal provision of the Brazilian Anti-Corruption Law on the matter.[24]

In relation to leniency agreements, in 2015, TCU passed the Normative Instruction No. 74, which established steps that TCU would take in the supervision of execution of the leniency agreements and determined that agreements entered into by CGU pursuant to the Brazilian Anti-Corruption Law had to mandatorily be submitted to TCU for approval in all the stages of the execution process. This Normative Instruction was revoked and substituted by Normative Instruction No. 83, in 2018, which repealed the need of TCU's prior approval of the clauses as a condition for the efficacy of the leniency agreement, although TCU may analyse the conditions agreed to. The new Normative Instruction also provides that the authorities that execute the leniency agreement may be deemed liable if the agreement contains clauses that limit or make TCU's supervision difficult.[25]

The MPF also edited normative acts related to leniency agreements. Orientation No. 07, from August 2017, is divided into 18 items and informs the parameters demanded for the homologation of leniency agreements and establish instructions of how the MPF members should negotiate and execute new agreements.[26]

It is interesting to note that, in June 2017, the former minister of CGU, Luiz Navarro, stated that the lack of coordination between the authorities in charge of anti-corruption enforcement created uncertainties and compromised the effectiveness of the leniency agreements signed

24 Joint Ordinance No. 4 – Article 2: 'Article 2. The leniency agreement will be executed with legal entities liable for the practice of unlawful acts provided for in Law No. 12,846, from 2013, Law No. 8,429, from 2 June 1992, in Law No. 8,666, from 21 June 1993, and in other public bidding and procurement rules, with the purpose of exempting or reducing the respective sanctions, as long as they effectively collaborate with the investigations and the administrative proceeding, provided that from the collaboration results: I – the identification of the others involved in the violation, when applicable; and II – rapidly obtaining information and documents that prove the misconduct under investigation'.

25 Article 4: 'The authorities that execute leniency agreements may be held liable for the inclusion of clauses or conditions that limit or difficult the Federal Court of Accounts activities, as well as the efficacy and execution of its decisions, pursuant to Law No. 8,443, of 1992.'

26 Available at: http://www.mpf.mp.br/pgr/documentos/ORIENTAO7_2017.pdf.

with each competent authority individually.[27] This shows that it is clear also in the authorities' point of view the obstacles that a non-harmonious relationship between the multiple authorities in the enforcement may create.

In July 2017, there was news that the ministers of the TCU had approved the creation of a committee formed by members of the MPF, CGU, AGU, TCU and the Administrative Council for Economic Defence for joint enforcement action in the context of leniency agreements, with the intent to avoid contradictions among similar agreements, hoping for a harmonic and collaborative negotiation and execution of agreements and also to discuss the survival of the companies that signed resolutions with the authorities, since many could face bankruptcy.[28] A working group was created to study the creation of this committee but, in July 2018, this working group was dissolved. There is no information available about the reason for dissolution.[29]

More recently, in August 2020, the TCU signed a Technical Cooperation Agreement (ACT) with the CGU, the AGU and the Ministry of Justice and Public Safety (MJSP), under the coordination of the President of the National Council of Justice. The agreement intends to promote a more effective coordination of the various authorities, particularly in the context of the execution of leniency agreements. It is relevant to note that the MPF, at the moment, is not a party of the agreement, since MPF's 5th Chamber of Coordination and Review understood that the terms provided for in the ACT would diminish its powers, as well as from other authorities, and would not in fact contribute for a cooperation environment in the enforcement of anti-corruption legislation. However, the matter is currently under review of the prosecutor general for a final decision.

As detailed, although there are efforts to clarify some of the authorities responsibilities, the fact is that the context of anti-corruption enforcement in Brazil has shown conflicts and even competition among the several authorities that hold similar enforcement powers – which makes cooperation by companies even more difficult.

There is a lack of coordination between authorities and the potential harm to companies is greater considering that a prosecution or settlement with one authority does not bind the others, allowing for multiple penalties connected to a same set of facts. This also increases expenditure of public resources – that are used for more than one authority to investigate the same event – and is a challenge for the international cooperation between authorities of different jurisdictions, since it may create confusion as to which authority the international counterparty should reach out to.

Even though a stronger enforcement of anti-corruption legislation is a more recent trend in Brazil and there have been good results already, there is still a long way to go. Better developing concepts and procedures, defining specific enforcement authorities and establishing clear criteria for companies to act and seek cooperation credits are essential for the development of

27 Available at: https://www.correiobraziliense.com.br/app/noticia/politica/2017/06/06/interna_politica,600381/sem-coordenacao-conjunta-acordos-de-leniencia-estao-sob-risco-de-anul.shtml.

28 Available at https://g1.globo.com/politica/noticia/tcu-aprova-criacao-de-comite-para-discutir-acordos-de-leniencia.ghtml.

29 Union Official Gazette 27 July 2018, Section 1, page 203. Available at: http://pesquisa.in.gov.br/imprensa/jsp/visualiza/index.jsp?data=27/07/2018&jornal=515&pagina=203&totalArquivos=274.

the anti-corruption enforcement system in Brazil and for legal certainty, one of the hallmarks of the Brazilian Federal Constitution.[30] The US experience provides an interesting standard and there is no reason that similar provisions could not be adapted to the Brazilian legal system and legislation.

Internal investigations: how can they help?

A procedure that can help in the anti-corruption enforcement environment is the conduction of internal investigations by companies that face allegations of violations to the legislation.

In the United States, internal investigations are recognised as relevant when it comes to cooperation since, as stated in the FCPA Corporate Enforcement Policy, one of the requirements for a company to receive full credits for cooperation includes sharing with the authorities information and documents that the company had access to during an internal investigation.

US authorities expect a properly conducted and thorough internal investigation that will elucidate all facts relevant to the matter. Otherwise, the authorities may not be satisfied with the results, in which the company will not receive full credit for cooperation.

Internal investigations are a means through which a company may 'ascertain the level and breadth of any misconduct'[31] that it is notified of. This notification may come from a whistleblower complaint in the company's internal channels, from risk assessments conducted internally, as well as from media news or from criminal actions (if there is a search warrant or a subpoena to the company, for example).

Once a company is informed of a potential wrongdoing, conducting an internal investigation can be a defence.[32] It will allow the company to clarify the facts and identify individuals involved in the wrongdoing, so the company can take appropriate measures to remediate and to cooperate with authorities' investigations to reduce potential sanctions.

From a government standpoint, internal investigations can also be relevant. Recognising an internal investigation as a way to cooperate with the authorities allows the government to access information and evidence faster and to spare public resources that would be spent in conducting much longer investigations.

30 Article 5, item XXXVI: 'Article 5. All persons are equal before the law, without any distinction whatsoever, Brazilians and foreigners residing in the country being ensured of inviolability of the right to life, to liberty, to equality, to security and to property, on the following terms: [...] XXXVI - the law shall not injure the vested right, the perfect juridical act and the res judicata'.

31 Bruce A Green & Ellen S Podgor, 'Unregulated Internal Investigations: Achieving Fairness for Corporate Constituents', 54 *Boston College Law Review* 73 (2013), page 90. Available at: http://lawdigitalcommons.bc.edu/bclr/vol54/iss1/3.

32 In this sense, Dervan explains: 'Given the sensitive nature and significant business and reputational risks associated with criminal charges stemming from this type of conduct, American corporations began to realize the value of conducting internal investigations before the government became involved in the matter, rather than merely utilizing this tool to settle existing enforcement actions' (Lucian E Dervan, 'International White Collar Crime and the Globalization of Internal Investigations', 39 *Fordham Urban Law Journal* 361 (2011), page 365. Available at: https://ir.lawnet.fordham.edu/ulj/vol39/iss2/2).

In Brazil, there has been an increase in the number of corporate internal investigations both in the context of the FCPA, considering its extraterritorial reach, and related to the Brazilian anti-corruption legal system. In fact, there have been some instances of recognition of a company's power to investigate information included in its corporate equipment and emails,[33] as well as leniency agreements that were achieved after a company conducted an internal investigation.[34]

However, as mentioned in the previous topic, Brazil does not have any regulation that acknowledges the role and importance of internal investigations as a cooperation mechanism.

That recognition, along with the better clarification of the criteria for cooperation and the definition of each enforcement authorities, responsibilities, can strengthen anti-corruption enforcement. Enforcement actions would be more transparent and companies would have clear guidance on how to help authorities, guaranteeing credits for this assistance and collaborating for the achievement of a more ethical society.

Conclusion

In the context of combating corruption, countries have adopted mechanisms to allow for cooperation by companies that may have been involved in misconduct and violations to the applicable legislation. The United States and Brazil are examples of countries that include cooperation as a factor for granting credits or other potential benefits to the companies that face allegations of corruption.

The US is well-positioned when it comes to the clarification of the procedures related to anti-corruption enforcement (specifically to the FCPA):

- it has in place the FCPA Corporate Enforcement Policy, which guides the authorities in their discussions with companies;
- it recognises the importance of an independent internal investigation as a process to gather and clarify facts, allowing the company to provide the relevant information to the authorities in a cooperation procedure and, thus, helping the government in saving resources and focusing its investigative efforts; and
- it is clear as to which authorities are responsible for enforcing the FCPA: the DOJ and the SEC.

33 For example, in the decision of RR-996100-34.2004.5.09.0015, the Superior Labour Court (TST) held that corporate communication means are not protected by the individual's right to secrecy in correspondence. Because the individual had used his corporate e-mail, which the company made available as an instrument for work, the content of the e-mail could be known by the company (TST, RR-996100-34.2004.5.09.0015, 7. T., reporter Min. Ives Gandra Martins Filho, DEJT 20.02.2009. Available at https://jurisprudencia-backend.tst.jus.br/rest/documentos/63f1074a507ebd9b2db05362ba7598a).

34 In April 2018, Interpublic group was the first to execute a leniency agreement in Brazil that included all anti-corruption enforcement authorities that enforce the Brazilian Anti-Corruption Law. When allegations of corruption became known, the group started an internal investigation and, when it was concluded, the group reached out to the Car Wash Task Force (MPF), with whom it signed a leniency agreement in October 2015. After almost 3 years of negotiation, the group signed in April 2018 a leniency agreement with CGU and AGU, approved by TCU, mirroring the agreement signed in 2015 with MPF. News available at https://www.migalhas.com.br/quentes/278523/celebrado-primeiro-acordo-de-leniencia-que-envolveu-todos-os-orgaos-de-controle-anticorrupcao.

Although Brazil has adopted, in some ways, part of the US ideas connected to the enforcement of the FCPA, it still needs to develop and be more clear on the provisions related to anti-corruption enforcement – especially the requirements for acknowledging a company's cooperation with the authorities need to be more clearly developed and implemented.

Moreover, there has to be a clarification on the power each authority in Brazil has, to ensure that the company will interact with the appropriate authority and, when a resolution is reached, there is no risk of new prosecution of the same facts. Clarification as to the authorities responsible for enforcement in Brazil would also benefit international cooperation in cases involving multiple jurisdictions.

The United States has provided a path that can be adapted for Brazil, considering the country's particularities, and that will allow more transparency and clarity in the Brazilian anti-corruption enforcement actions. A clearer set of criteria that companies and authorities should follow will empower legal entities to take action more fearlessly and can benefit government, corporations and the Brazilian society as a whole. Also, the role of deep and appropriately conducted independent internal investigations play in this context needs to be acknowledged, as they allow efficient use of public resources and efforts.

Thus, even though Brazil has evolved in the past years in its anti-corruption enforcement actions and efforts, it still needs to develop and impart more clarity on the provisions on the theme, including to guarantee legal certainty to legal entities when dealing with the enforcement authorities.

Michel Sancovski
Tauil & Chequer Advogados in association with Mayer Brown

Michel Sancovski is a partner of the anti-corruption and compliance group of Tauil & Chequer Advogados in the São Paulo Office.

He focuses on corporate compliance and anti-corruption matters and his experience includes advising in anti-corruption compliance cases, taking into account local and foreign laws, coordinating highly complex major investigations, developing, reviewing and implementing compliance programmes, and assisting with anti-corruption due diligences in third parties and in M&A transactions. Michel has also been a key participant in negotiations with Brazilian and US authorities, as well as in leniency agreements. As guest professor at renowned institutions, he often lectures in compliance courses and has great experience in providing in-house compliance training to top executives.

Michel co-led and coordinated an internal investigation that is deemed one of the world's largest investigations. He occupied a prominent position in the interaction with the special committee of the investigation and the company's board of directors.

In 2019 and 2020, Michel has been named by *Global Investigations Review* and *Who's Who Legal* as a 'Future Leader' in the investigations area, which focuses on the leading practitioners aged under 45.

Luís Inácio Lucena Adams
Tauil & Chequer Advogados in association with Mayer Brown

Luis Adams is a partner of the litigation, arbitration and compliance practices of Tauil & Chequer Advogados.

In the Brasília office, he is responsible for matters related to Superior and Supreme Courts. Adams worked as national attorney of the Ministry of Finance since 1993, being discharged in 2017. He worked as secretary-general of litigation for the Attorney-General of Brazil (2001–2002) and as legal counsel and adjunct executive secretary of the Ministry of Planning, Budget and Management (2003–2006). In 2006, he was named as general counsel of the Ministry of Finance until he was chosen to be attorney-general of Brazil, a position he kept from 2009 to 2016.

As attorney general, Adams conducted major cases in the judiciary, being responsible for coordinating the environment agreement between the Brazilian government and Samarco, Vale and BHP.

Liliana Mascarenhas Coutinho
Tauil & Chequer Advogados in association with Mayer Brown

Liliana Coutinho is an associate in the anti-corruption and compliance practice of Tauil & Chequer Advogados in the São Paulo office.

She has experience in conducting internal investigations and in the interaction and cooperation with local and international authorities. She advises in cases on violations to anti-corruption legislation in Brazil and abroad, in the implementation and review of compliance programmes, anti-corruption due diligence and risk assessments. Liliana also has experience in litigation and in providing advice on constitutional law and administrative law matters.

Liliana is a dual-qualified lawyer (Brazil and New York) and, before joining Tauil & Chequer Advogados, she practiced in prestigious law firms in Washington, DC and in Brasília.

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SCS Quadra 9, Bloco A, Torre B, Salas 503/504 Ed
Parque Cidade Corporate
Brasília DF 70.308-200
Brazil
Tel: +55 61 3221 4310

Av. Juscelino Kubitschek, 1455 - 5º, 6º e 7º andares
Vila Nova Conceição - 04543-011
São Paulo
Brazil
Tel: +55 11 2504 4210

www.tauilchequer.com.br/pt

Michel Sancovski
msancovski@mayerbrown.com

Luís Inácio Lucena Adams
ladams@mayerbrown.com

Liliana Mascarenhas Coutinho
lcoutinho@mayerbrown.com

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ISBN 978-1-83862-267-1