



Anti-bribery & corruption: the fight goes global

Commercial Fraud Commission

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National Report of Brazil

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1. The Legal Framework

1.1 What criminal and/or civil/administrative law(s) exist in your jurisdiction which are specifically targeted at bribery & corruption? Please provide:

- a. a brief summary of the offences;
- b. any affirmative defences that are available; and
- c. the penalties that may be imposed upon offenders.

- **Brazilian Penal Code**

The first law to criminalize corruption and bribery in Brazil was the Penal Code, with application limited to public officials and individuals involved in “public” corruption.

Articles 317 and 333 of the Penal Code specify the crimes of corruption and bribery of public officials:

- Corruption: *“To request or to receive to themselves or others, directly or indirectly, even outside the function or before assuming it, but because of it, undue advantage, or to accept the promise of such an advantage”.*

Penalty: imprisonment of two (2) to twelve (12) years and a fine.

- Bribery: *“To offer or to promise undue advantage to a public official to induce him to practice, to omit or delay any official act”.*

Penalty: imprisonment of two (2) to twelve (12) years and a fine.

- **Official Misconduct Law**

Law No. 8,429/92 foresees sanctions to public officials involved in acts of official misconduct and malfeasance in office, which may include corruption.

Corrupt payments are penalized under this law. Its provisions may apply to *“anyone who, whether or not a public official, induces or takes part in the act of improbity or benefits directly or indirectly from such act”* (Article 3). In other words, the Official Misconduct Law may be – and is in fact – applied not only to public officials, but also to private persons and/or private companies interacting with the public sector, which may have been benefited directly or indirectly by the acts in question.

In relation to the penalties applicable to office misconduct acts, this law provides that those liable for acts of improbity are subject to the following sanctions:

- loss of the goods or values illicitly added to the offenders' assets;
- full indemnification of the damage, if any;
- loss of the public function;
- suspension of political rights from three to ten years;
- payment of a penalty of up to one hundred times the amount of the patrimonial increase; and
- prohibition to contract with the Public Administration or to receive benefits or tax or credit incentives, directly or indirectly, even if by the intermediary of a company of which the offenders are majority shareholders, from a three to ten years term.

- **International Conventions**

Brazil has signed two multi-lateral conventions regarding fight against corruption: (i) the Inter-American Convention against Corruption ("IACAC") signed in 1996 and enacted by Presidential Decree No. 4,410/2002; and (ii) the UN Convention against Corruption ("UNCAC"), signed in 2003 and enacted by Presidential Decree No. 5,687/2006.

Both of them require that signatory countries establish a wide range of criminal offences for both public and private sectors, including basic forms of corruption (like bribery and embezzlement), trading in influence and the concealment and laundering of the proceeds of corruption.

- **Anti-corruption Law**

Until 2012 the Brazilian legal system did not predict any punishment for the private sector involved in corruption. Then, Law No. 12,846 was enacted due to international commitments assumed by Brazil as a result of ratification of various anti-corruption treaties, as well as demands from the civil society.

The Anti-corruption Law foresees corporate civil and administrative liability for injurious acts contrary to the Brazilian or foreign public administration.

Legal entities shall be held liable for wrongful acts against government agencies carried out in their interest or for their benefit (Article 2). Wrongful acts are defined as those "*committed against national or foreign public assets, against public administration principles or against international commitments assumed by Brazil*".

Anti-corruption Law provides for a strict liability regime (Article 2), meaning that the legal entity would be held liable even if the wrongdoings are attributable to a sole employee or service provider who acted despite of the company's compliance procedures and/or without the company's knowledge.

For instance, companies belonging to the same economic group, consortium members or JV partners will be held jointly liable for wrongful acts under the Brazilian anti-corruption law. Such joint liability will be limited to payment of fines and full compensation of damages (Article 4, Paragraph 2).

The administrative penalties set forth in Article 6 include fines and publication of the condemnatory judgment in the media, to be imposed at the end of the administrative proceeding which will be initiated and decided by "*the highest authority of each body or entity of the executive, legislative and judiciary branches*" against which the wrongful act occurred.

In addition to the administrative penalties, the law provides a list of penalties that may be imposed only at the end of a court action to be brought by the public administration entity harmed by the wrongful act or by the Public Prosecutors Office:

- confiscation of the assets, rights or values representing an advantage or profit directly or indirectly obtained out of the wrongful act, with due regard for the right of the injured party or of the good-faith third party;
- suspension or partial shutdown of their activities;
- compulsory dissolution of the legal entity;
- prohibition against receiving incentives, subsidies, grants, donations or loans from public bodies or entities and from public financial institutions or publicly-controlled institutions, for a period of one to five years.

1.2 Does your jurisdiction outlaw "private" bribery/corruption (i.e. transactions between two or more private entities or persons) as well as "public" bribery/corruption? If so, please explain how the distinction is drawn between private and public bribery/corruption.

Although Article 12 of UNCAC brings into light the fight against private (business-to-business) corruption¹, Brazilian legal system does not consider yet such conduct

¹ "*Article 12. Private sector*

as crime. The Brazilian Penal Code only foresees corruption involving public officials as a crime. Therefore, business-to-business corruption is taken into account solely for civil matters (e.g. damages).

It is important, however, to verify if such business-to-business corruption acts would not fall under other crimes, such as unfair competition.

A committee of Brazilian Senate that is currently discussing the reform of the Penal Code has approved a proposal to criminalize active and passive corruption between private entities and individuals. The proposed penalty is one to four years in prison and a fine.

1.3 Is your law extra-territorial? If so, in what circumstances can it be enforced if the relevant acts/omissions of bribery/corruption occur outside your jurisdiction?

a) Criminal liability

Pursuant to Article 7 of the Brazilian Penal Code, several crimes committed abroad shall be subject to Brazilian law, such as those:

- against property or the Union of public faith, the Federal District, State, Territory, Municipality, public company, joint stock company, local authority or foundation established by the Government;
- against the public administration, by whom is at your service;
- that, by treaty or convention, Brazil undertook to suppress.

In the event of the first two options, the offender shall be punished under Brazilian law, even if acquitted or convicted abroad. In the event of the third option, the application of Brazilian law depends on the occurrence of the following conditions:

- the agent must enter in the country;
- the fact must also be punishable in the country where it was committed;
- the crime must be included among those for which Brazilian law authorizes extradition;

*1. Each State Party shall take measures, in accordance with the fundamental principles of its domestic law, to prevent corruption involving the private sector, enhance accounting and auditing standards in the private sector and, where appropriate, provide effective, proportionate and dissuasive civil, administrative or criminal penalties for failure to comply with such measures.”*Text made available online: http://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf

- the agent must not have been acquitted abroad, paid the penalty there, or pardoned abroad.

b) Civil and Administrative liability

The Anti-corruption Law is applicable to both Brazilian and foreign governmental entities. Wrongful acts committed against foreign governmental entities, in Brazil or abroad, are subject to civil and administrative liability under the Anti-corruption Law.

1.4 Are there any “safe harbours” or exemptions in relation to transactions that might otherwise be regarded as bribes, such as “facilitation payments”, which are expressly excluded from being illegal? If so, is this determined by statute/codified law, by case law or otherwise?

No.

Any corrupt payments are deemed as wrongful acts by the Brazilian legal system. Article 5, I of the Anti-corruption Law, for example, prohibits any *“promising, offering or giving, directly or indirectly, of an undue advantage to a government official, or to a third person related to him”*.

1.5 Does the financial regulatory system (i.e. the law and regulations governing the operation and conduct of banks and other financial institutions) in your jurisdiction address the topic of bribery & corruption? If so, please provide a brief summary of the obligations (including systems/controls and reporting obligations) that are imposed on banks and other financial institutions in this regard.

The Council for Financial Activities Control (“COAF”) is a body established under the Brazilian Ministry of Finance, which acts primarily on the prevention and combating of money laundering and terrorist financing.

COAF's powers are the following:

- To receive, examine and identify the suspicions of illicit activities;
- Notify the competent authorities for the establishment of the procedures applicable in situations where the Council establish the existence or grounded

indication of "laundering", concealment of assets, rights and values, or any other illegal;

- Coordinate and propose mechanisms for cooperation and exchange of information that allow for fast and efficient actions to combat concealment or disguise of assets, rights and values; and
- Discipline and apply administrative penalties.

Reports on potential corruption acts are prepared by COAF based on communications from banks, financial institutions and other bodies. Communications to COAF are determined automatically in case of transactions involving high values (R\$ 30,000.00 or more in cash, for example), or due to suspicion of the institutions (when the amount exceeds the economic capacity of those involved, for example). Many communications may be assembled in a single report, and many reports can give rise to a single investigation. A good example is Operation Car Wash², for which 108 reports were produced.

2. Corporate Criminal Liability

2.1 In the context of bribery/corruption, does your law recognise the concept of corporate criminal liability? E.g. can a corporate entity be found guilty of bribery?

Under Brazilian law there is no corporate criminal liability (with a very limited exception pertaining to environmental crimes). Criminal liability is personal and non-transferable, thus being imposed only to the individual who has in any way contributed to a crime either (i) by action, i.e. committing a criminal action, or (ii) by omission, i.e. omitting himself or herself even though he or she had the power or duty to avoid the crime. Corporate liability is applicable only for civil and administrative purposes.

2.2 If the answer to 2.1 above is “yes”, please provide a brief explanation of the legal theory of corporate criminal liability (i.e. what circumstances must be established for corporate liability to arise and what form does that liability take) as well as the penalties that may be imposed upon a corporate offender.

See above.

² “Operação Lava Jato” in Portuguese.

2.3 Are there any pending or expected changes to the law of corporate criminal liability in your jurisdiction? If so, please explain the proposed changes and the expected timeframe for implementation.

Brazilian Anti-corruption Law is rather recent, and as a result, its regulation has not been approved yet. It is unlikely, however, that this pending regulation will address corporate criminal liability, due to the limitations brought by the Brazilian criminal law system, in which a corporate entity cannot be found guilty of any crime (except for environmental ones).

3. Mutual Legal Assistance / Co-operation

3.1 Is your jurisdiction a signatory to any bi-lateral or multi-lateral treaties or other instruments regarding mutual legal assistance / co-operation in the context of bribery & corruption? If so, which ones?

As already mentioned above, Brazil is a signatory of UNCAC since 2003. UNCAC provisions obligate State Parties to take a number of public and private anti-corruption cooperation measures:

- Countries agree to cooperate with one another in every aspect of the fight against corruption and are required to give mutual legal assistance in gathering information for use in court. Countries are also required to undertake measures to support the tracing, freezing, seizure and confiscation of corrupt assets.
- Asset recovery, requiring the needs of countries seeking illicit assets to be reconciled with the legal safeguards of the countries whose assistance is sought. Provisions specify how cooperation and assistance will be rendered and aim to return assets to the country of origin.

Brazil has also signed IACAC, which aims to promote and strengthen the mechanisms to combat corruption, and to promote, facilitate and regulate cooperation to ensure the effectiveness of the measures to combat corruption in the performance of public functions. Some of IACAC anti-corruption cooperation measures between the signatory countries are:

- Mutual legal assistance, technical cooperation, extradition and identification;
- Asset Recovery, through cooperation between its States Parties for tracing, freezing, seizing and forfeiting the proceeds of acts of corruption;
- Monitoring corruption with the IACAC Follow-Up Mechanism (“MESICIC”), providing a comprehensive system of inter-state monitoring and compliance assessments.

3.2 Are the regulatory/prosecution authorities in your jurisdiction parties to any formal or informal co-operation arrangements with equivalent authorities in other jurisdictions (e.g. a memorandum of understanding, etc.)? If so, please provide a brief summary of the arrangements and the other authorities/jurisdictions.

COAF participates actively in the activities and meetings of the main multilateral organizations related to preventing and combating corruption money laundering:

- Financial Action Task Force (“FATF/GAFT”);
- Financial Action Task Force of Latin America (“GAFILAT”);
- The Egmont Group of Financial Intelligence Units (“FIUs”);
- Working Subgroup 4 (SGT-4 Financial Affairs) of MERCOSUR;
- Caribbean Financial Action Task Force (“CFATF”);
- Committee of Experts on the Evaluation of Anti-Money Laundering Measures and the Financing of Terrorism (“MONEYVAL”);
- Asia/Pacific Group on Money Laundering (“APG”);
- Interpol

Brazil also maintains bi-lateral co-operation arrangements, called Treaties of Legal Assistance in Criminal Matters, with 17 countries, amongst them Switzerland and the USA.

4. Cases

4.1 Please describe in brief three (3) cases of bribery/corruption in (or involving) your jurisdiction which illustrate the trend towards cross-border/global investigation and enforcement of anti-bribery laws. For example, cases where:

- a. your jurisdiction’s law(s) were enforced on an extra-territorial basis;
- b. there was a degree of cooperation/assistance provided by your jurisdiction to another jurisdiction, or vice versa; and/or
- c. penalties were imposed by your jurisdiction as well as by other jurisdictions, in relation to the same set of facts.

Paulo Maluf, politician and ex-mayor of the city of São Paulo, was accused of money laundering in 2013. He used to possess several international bank accounts in tax havens, in which he kept amounts diverted during his mandate.

Based on the Treaty of Legal Assistance in Criminal Matters between the Federative Republic of Brazil and the Swiss Confederation (Decree No. 6,974/2009), signed in Berne on May 12, 2004, the Brazilian prosecutors asked for Swiss co-operation, through lift of bank secrecy of Maluf's accounts. Brazilian prosecutors were able to identify 12 accounts pertaining to his family. The governments of the USA, France and Jersey Island also co-operated during the investigation.

The Federal Court of Switzerland decided to confiscate more than US\$ 13 million from Maluf's accounts, and the Court of Jersey also imposed penalties to Maluf. It sentenced two companies associated with the Maluf family to reimburse £ 22 million to the Government of São Paulo, due to the overpricing in public works by means of false invoices. According to the indictment, this amount was sent to the US, then sent to the accounts of companies that were controlled by Maluf's sons in Jersey and other tax havens.

BIBLIOGRAPHY

- United Nations. *United Nation Convention against Corruption*. http://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf. Access in February 27, 2015.
- Conselho de Controle de Atividades Financeiras. <http://www.coaf.fazenda.gov.br/>. Access in February 27, 2015.