THE INTERNATIONAL INVESTIGATIONS REVIEW

EIGHTH EDITION

Editor
Nicolas Bourtin

THE LAWREVIEWS

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PREFACE

In the United States, it is a rare day when newspaper headlines do not announce criminal or regulatory investigations or prosecutions of major financial institutions and other corporations. Foreign corruption. Healthcare, consumer and environmental fraud. Tax evasion. Price fixing. Manipulation of benchmark interest rates and foreign exchange trading. Export controls and other trade sanctions. US and non-US corporations alike have faced increasing scrutiny by US authorities for several years, and their conduct, when deemed to run afoul of the law, continues to be punished severely by ever-increasing, record-breaking fines and the prosecution of corporate employees. And while in the past many corporate criminal investigations were resolved through deferred or non-prosecution agreements, the US Department of Justice has increasingly sought and obtained guilty pleas from corporate defendants. While the new presidential administration in 2017 brought uncertainty about certain enforcement priorities, there have been few signs – even a year and a half into the new administration – of any significant departure from the trend towards more enforcement and harsher penalties.

This trend has by no means been limited to the United States; while the US government continues to lead the movement to globalise the prosecution of corporations, a number of non-US authorities appear determined to adopt the US model. Parallel corporate investigations in several countries increasingly compound the problems for companies, as conflicting statutes, regulations and rules of procedure and evidence make the path to compliance a treacherous one. What is more, government authorities forge their own prosecutorial alliances and share evidence, further complicating a company's defence. These trends show no sign of abating.

As a result, corporate counsel around the world are increasingly called upon to advise their clients on the implications of criminal and regulatory investigations outside their own jurisdictions. This can be a daunting task, as the practice of criminal law – particularly corporate criminal law – is notorious for following unwritten rules and practices that cannot be gleaned from a simple review of a country's criminal code. And while nothing can replace the considered advice of an expert local practitioner, a comprehensive review of the corporate investigation practices around the world will find a wide and grateful readership.

The authors who have contributed to this volume are acknowledged experts in the field of corporate investigations and leaders of the bars of their respective countries. We have attempted to distil their wisdom, experience and insight around the most common questions and concerns that corporate counsel face in guiding their clients through criminal or regulatory investigations. Under what circumstances can the corporate entity itself be charged with a crime? What are the possible penalties? Under what circumstances should a corporation voluntarily self-report potential misconduct on the part of its employees? Is it a

realistic option for a corporation to defend itself at trial against a government agency? And how does a corporation manage the delicate interactions with employees whose conduct is at issue? *The International Investigations Review* answers these questions and many more and will serve as an indispensable guide when your clients face criminal or regulatory scrutiny in a country other than your own. And while it will not qualify you to practise criminal law in a foreign country, it will highlight the major issues and critical characteristics of a given country's legal system and will serve as an invaluable aid in engaging, advising and directing local counsel in that jurisdiction. We are proud that, in its eighth edition, this publication covers 23 jurisdictions.

This volume is the product of exceptional collaboration. I wish to commend and thank our publisher and all the contributors for their extraordinary gift of time and thought. The subject matter is broad and the issues raised are deep, and a concise synthesis of a country's legal framework and practice was challenging in each case.

Nicolas Bourtin
Sullivan & Cromwell LLP
New York
July 2018

Chapter 7

BRAZIL

João Daniel Rassi, Gauthama C C Fornaciari de Paula and Victor Labate[1]

I INTRODUCTION

Brazilian criminal procedure law establishes that investigation of the origins and content of crimes committed within or by companies may be carried out by federal and state civil police forces.[2] It is also possible that the Public Prosecutor's Office (at state and federal levels) will carry out its own investigation.[3] Nevertheless, in both situations, judgment of the case rests with the courts. Police officers, public prosecutors and members of the court have discretionary powers to conduct cases free from external influences, as far as the conduct of these authorities respect the guarantees of due process and the right to privacy.

In the context of administrative offences, companies and their employees and executives can also be investigated by other bodies, such as parliamentary investigation committees (at local, state and federal levels), which have subpoena powers, and by audit tribunals (again at local, state and federal levels), which are empowered to investigate wrongdoing in public administration.

Concerning incidents of corruption within public administration, Decree No. 8,420/2015, which regulates the Brazilian Anticorruption Law (Law No. 12,846/2013), provides that the investigation of civil and administrative liability rests with the highest authority of the aggrieved entity. To assess where responsibility lies, the entity must start a preliminary investigation and, based on the evidence gathered, the relevant authority may determine the commencement of the administrative procedure[4] by which any sanctions on the entity under investigation will be established. A finding of guilt is always subject to judicial review.

Private agencies and investigators, even though they are authorised to operate in Brazil, do not have special powers of investigation (e.g., to force people to give testimony or produce evidence), but they can collect evidence to the extent that it does not violate any rights of the targeted individuals, such as privacy, freedom of movement and property.

Law No. 13,432/17 provides the legal basis for those working as private investigators, especially in relation to how those professionals may influence the gathering of evidence by public authorities. In this sense, there can be cooperation, by which evidence uncovered through private efforts can be submitted to the authorities,[5] as long as the evidence has

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1 João Daniel Rassi and Gauthama C C Fornaciari de Paula are partners and Victor Labate is an associate at Siqueira Castro Advogados.

2 Mostly, the competence of federal justice is provided under Article 190 of the Brazilian Federal Constitution.

3 Federal Supreme Court (STF), RE 593.727.

4 Article 4 of Decree No. 8,420/2015.

5 Article 5 of Law No. 13,432/2017.

been obtained within the tenets of the law. Pursuant to Law No. 13,432/17, companies and individuals are legally allowed to cooperate with the authorities by providing evidence gathered as part of an internal investigation.

II CONDUCT

i Self-reporting

As a rule, private companies are not required to report irregularities committed by their employees to the authorities.[6] However, the Money Laundering Law (Law No. 9,613/98)[7] lists the individuals and legal entities engaged in business activity that are required to communicate to the Council for Control of Financial Activity, within 24 hours, all transactions suspected of involving money laundering (Article 11.II.b).[8] In general, the parties so obligated are individuals and legal entities that – permanently or occasionally, principally or secondarily – engage in activities connected with the following markets: finance, real estate, luxury goods, sports or arts, transport of valuables and livestock breeding.[9]

Under the Money Laundering Law, no benefit is obtained by those who comply with their reporting duties. However, the public authority may impose more severe penalties on those who fail in the duties required under Article 12 thereof.[10]

For those accused of money laundering, it is possible to obtain leniency by voluntarily collaborating with the authorities, providing information about the crime, identifying the other perpetrators, and so on. As a consequence of collaborating with the authorities, a shorter jail term or a sentence of probation may be imposed (or less severe conditions, such as a minimum security prison or authorisation to work during the daytime).[11]

Other laws also allow for leniency, called 'rewarded denunciation'.[12] In fact, any individual accused of engaging in organised crime in Brazil can collaborate with the authorities in return for a lighter sentence or other benefits (Articles 4 to 7 of Law No. 12,850/13).[13]

6 The situation is different in the public sector, where the duty to report suspected criminal behaviour applies to federal civil servants, as per Law No. 8,112/90.

7 The law covers crimes of money laundering, concealment of assets and use of the financial system for commission of crimes, and created the Council for Control of Financial Activities, among other things.

8 It is possible for the parties who fail to inform the suspect transactions to face charges for complicity in money laundering, although the theme of criminal liability of compliance officers for omission is still polemical in Brazil.

9 The list, which is comprehensive, can be found in Article 9 of Law No. 9,613/98.

10 Among the penalties established in the law are (1) warning, (2) fine, (3) temporary ineligibility to hold management positions and (4) cancellation or suspension of authorisation to engage in activity, operation or functioning.

11 Article 1, Section 5 of Law No. 9,613/98.

12 Rewarded denunciation is also applicable to the crimes committed against the national financial system (Law No. 7,492/86, Article 25, Section 2), tax crimes (Law No. 8,137/90, Article 16), drug trafficking (Law No. 11,343/06, Article 41) and kidnapping (Penal Code, Article 159, Section 4).

13 It was through rewarded collaboration of this nature that *Operation Car Wash*, the biggest investigation Brazil has ever seen of corruption and money laundering involving important executives, was successful.

In the area of antitrust law, the forming of a cartel is both an administrative[14] and a criminal[15] offence. Although there is no obligation to report such behaviour by individuals or companies, both can be eligible for benefits by cooperating, in the criminal sphere (individuals only) or the administrative sphere, under the leniency programme established in Article 86 of Law No. 12,529/11. That programme is made operational by the signing of a consent decree between a member of the cartel or individuals involved in its operation and the Administrative Council for Economic Defence, the antitrust agency, in return for cooperation in identifying and producing evidence against the other participants.[16]

With respect to the criminal sphere, Article 87 of Law No. 12,529/11 establishes that the consent decree prevents charges being brought against the individual signatories, but suspends the running of the time bar of crimes against the economic system (Article 4 of Law No. 12,529/11) and related crimes,[17] such as fraud in public tenders (Article 90 of Law No. 8,666/93) and criminal conspiracy (Article 288 of the Penal Code).[18] Upon compliance with the obligations assumed in the consent decree, the competent criminal judge will declare that the person is not eligible for punishment (Article 87 of Law No. 12,529/11).

The granting of such benefits by the authorities responsible for establishing the collaboration agreement and the leniency programme are subject to the authorities' subject valuation. The lack of objective parameters is often criticised by legal entities.[19]

ii Internal investigations

Companies that receive denunciations of or suspect their employees of irregular acts can conduct their own investigations to identify the behaviour and impose penalties on those found responsible.[20] They can also engage external advisers, private detectives or audit firms to conduct investigations. As a rule, the investigation should involve as few people as possible

14 Law No. 12,529/11. Administrative and criminal spheres are autonomous even though, in some cases, the collaboration in the administrative sphere can reflect in the criminal area (e.g., the leniency agreement). In this sense, considering that benefits from the law can reflect in the two different areas and their interest towards investigation is mutual, the Administrative Council for Economic Defence and the Federal Prosecutor's Office of Cartel Combat signed the Memorandum No. 1/2016 to strengthen their cooperation.

15 Article 4 of Law No. 8,137/90.

16 There is also the benefit called a cease and desist agreement (TCC), related to the practice under investigation or its harmful effects. According to Article 85 of the Brazilian Competition Law, the TCC should contain the following elements: (1) the specification of the defendant's obligations not to practise the investigated activity or its harmful effects, as well as obligations deemed applicable; (2) the settlement of the fine to be paid in case of failure to comply, in full or in part, with the undertaken obligations; and (3) the settlement of the pecuniary contribution to be paid to the Diffuse Rights Defence Fund, whenever applicable. The act of signing a TCC grants no benefits in the criminal area, such as a lighter penalty, no criminal action, suspension of the time bar, etc. This will only happen in the leniency agreement.

17 In its last Peer Review on Competition Law and Policy in Brazil, the OECD recommended modification of the leniency programme to eliminate the exposure of leniency participants to prosecution under criminal laws other than the Economic Crimes Law.

18 Concerning non-related crimes, it is possible for the defence to request the diminishing of criminal penalty for confession under Article 65, III d) of the Brazilian Penal Code.

19 *O acordo de leniência e seus reflexos penais*, M B Salomi, Faculdade de Direito da Universidade de São Paulo (USP): São Paulo, 2012, p. 186.

20 *Manual de Compliance: preservando a boa governança e a integridade das organizações*, M A Coimbra, V A M Binder, org. São Paulo: Atlas, 2010, pp. 98 to 101.

to protect the person making the accusation, the accused individual or individuals and to preserve the investigation itself. For this purpose, all those involved are typically asked to sign a confidentiality undertaking.[21]

Audit reports, spreadsheets, official emails[22] and transcripts of interviews are examples of evidence that can be gathered during this kind of investigation. During the proceedings, the suspect is entitled to retain a lawyer to be present at interviews, and while there is no legal requirement, the lawyer is permitted to see internal documents regarding the investigation that are related to the client.

Generally, these kind of investigations are conducted by external counsel, or by internal counsel assisted by external professionals, to ensure that the impartiality of proceedings is not affected. At the end of the investigation, a report should be prepared outlining the case and the findings regarding the alleged irregularities and the wrongdoers involved, as well as proposing solutions and recommendations depending on which law has been infringed, and any possible penalties to be applied.[23] Although it is not mandatory to submit the content of the report to the public authorities, courts may require it to be presented and, unless publication of the information presents a risk to the company, that order may be fulfilled.

Finally, attorney–client privilege still applies to investigations conducted by companies, owing to the broad scope established by the Brazilian Bar Association Statute. However, since this is a disposable right, the right to secrecy can be waived by the client, for instance if the accused person wishes to benefit from collaboration with the company. In situations like this, it is recommended that the individual and the company are represented by a counsel to avoid any allegations of coercion or abuse of rights by both sides.

iii Whistle-blowers

A whistle-blower, by definition, is an individual who denounces a fact that is perceived to be illegal or improper within the company or public agency for which he or she works, without being involved in the allegedly criminal conduct.[24]

Despite the fact that Decree No. 8,420/2014 determines that companies can create internal channels to enable denunciation of irregularities, for which benefits may be used as reward, the Brazilian legal system does not provide any specific mechanism to protect whistle-blowers.[25] There are also no provisions on administrative penalties or punishments for those who make denunciations in bad faith or that are knowingly false,[26] nor any specific rules on anonymous denunciation of irregularities.

21 Ibid, pp. 98 to 101.

22 The best policy is to both specify the rule in the code of conduct and require all employees to sign a consent form when hired.

23 Depending on the gravity of the act, the employee can be dismissed with or without cause, under the situations described in Article 482 of the Consolidated Labour Law (Decree-Law No. 5,452/43).

24 Whistle-blowers should be differentiated from those who in some way have participated in or contributed to the crime and decide to cooperate with the authorities in return for leniency, as in the case of rewarded collaboration (V Greco F, *Comentários à Lei de Organização Criminosa*, São Paulo: Saraiva, 2014).

25 D M Cardoso, *A extensão do compliance no Direito Penal: análise crítica na perspectiva da Lei de Lavagem de Dinheiro*, Faculdade de Direito USP: São Paulo, 2013, p. 66.

26 On this aspect, the Brazilian Penal Code, in Articles 138 to 140, defines the crimes of calumny (falsely accusing someone of a criminal offence), defamation (harming someone's reputation by false accusations)

However, if a whistle-blower suffers a backlash as a result of making a denunciation, such as dismissal or mental harassment, he or she can file a labour suit against the company.[27]

III ENFORCEMENT

i Corporate liability

Companies can be held civilly liable for the acts of their employees in three situations, two general and one specific: (1) by reason of *culpa in eligendo* (poor choice of those entrusted with performance of obligations); (2) by reason of *culpa in vigilando* (insufficient oversight of the performance of obligations); and (3) when an employee commits an act injurious to public administration, in Brazil or abroad.

The first and second situations of corporate responsibility are provided under Article 932, III of the Brazilian Civil Code and *Súmula*[28] 341 from the Federal Supreme Court.[29] The third situation, above, is a new form of corporate responsibility established by the Anticorruption Law (Law No. 12,846/13), which contains provisions on strict civil and administrative liability for acts that are injurious to national or foreign public administration.[30]

Civil and administrative corporate liability under this provision does not preclude the personal liability of the individuals involved in such conduct.[31]

Criminally, only companies can be held liable for the commission of environmental crimes, regardless of the individual responsibility of their agents. Article 3 of the Environmental Crimes Law (Law No. 9,605/98) establishes that companies shall be held criminally liable in cases of environmental infractions committed 'by decision of their legal or contractual representative, or collegiate body, in the interest or benefit of the entity'.

Finally, there is no legal impediment for the company and employees to be represented by the same lawyer, in either administrative or criminal proceedings. This will depend on the situation, namely if there is the possibility of a conflict of interest.

ii Penalties

The possible penalties will depend first of all on the category of culpability, among those defined above. For situations of *culpa in vigilando* or *culpa in eligendo*, the company will be liable in proportion to the loss caused.

In relation to practices injurious to a national or foreign governmental entity, according to Article 19 of the Anticorruption Law, a company can be liable to the following penalties:

a seizure or forfeiture of money, rights or other assets gained directly or indirectly from the infraction, with reservation made for the rights of injured parties or third parties who acted in good faith;

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and libel or slander (offending someone's dignity or decorum with false claims). These crimes are subject to private penal action prosecuted by the offended party (as opposed to public penal actions, in which the plaintiff is the people, represented by the public prosecutor).

27 Labour legislation allows indirect termination of the labour contract in the situations listed in Article 483 of the Consolidated Labour Law (Decree-Law No. 5,452/43). Employees can also file suits for moral damages against acts of the employer, according to Articles 186 and 927 of the Civil Code.

28 A *súmula* is a statement of consolidated position, or jurisprudence, from a higher court.

29 The culpability of the employer or principal for the acts of the employee or agent is presumed.

30 The list of injurious acts is contained in Article 5 of Law No. 12,846/13.

31 Article 3, Section 1 of Law No. 12,846/13.

b partial suspension or interdiction of activities;
c prohibition from receiving incentives, subsidies, donations or loans from governmental entities or official financial institutions, for between one and five years; or
d compulsory dissolution, when the company is found to have habitually facilitated or engaged in illegal acts or was incorporated to conceal illicit interests or the identity of the beneficial owners.

According to Articles 21 to 24 of the Environmental Crimes Law, the penalties applicable to companies for the practice of environmental crimes are:

a fines;
b partial or total suspension of activity;
c temporary interdiction of an establishment, project or activity;
d prohibition from contracting with governmental entities or obtaining subsidies or donations from them;
e payment for environmental programmes of projects;
f reclamation of degraded areas;
g maintenance of public spaces;
h contributions to public environmental or cultural entities; or
i forced liquidation, with the assets realised being transferred to the National Penitentiary Fund.

iii Compliance programmes

The Environmental Crimes Law does not provide for any leniency regarding penalties for companies that have compliance or integrity programmes. Rather, it establishes that the penalty must be set in light of the gravity of the infraction, its motives and the consequences for public health and the environment, as well as the antecedents regarding compliance with environmental laws or regulations, and the economic situation of the company,[32]

The situation is different regarding civil and administrative liability for acts injurious to national or foreign governmental entities. The Anticorruption Law specifies that in applying penalties, the parameters of the sanction must be established by considering the existence of functional internal mechanisms and procedures for integrity, auditing, any incentive for the denunciation of irregularities, and the effective application of codes of ethics and conduct within the company.[33]

The parameters for evaluating a compliance programme are listed under Article 42 of Decree No. 8,420/15. These provisions include the existence of periodic training for employees concerning the scope of the company's integrity programmes, the existence of independent structures for application of the integrity programme, the use of disciplinary measures in the event of violation of the programme's provisions, and the transparency of any donations made by the companies to political parties, among others. These provisions are used as a guide for organisations when creating or reviewing compliance programmes.

Therefore, the existence of compliance programmes must be taken into consideration when imposing administrative or civil penalties for acts deemed injurious to public

32 Article 6 of Law No. 9,605/98.
33 Article 7, VIII of Law No. 12,846/13.

administration, by express provision of the Anticorruption Law. In the environmental sphere, there is no such provision, but this does not preclude consideration in this respect by the judge when imposing punishment.[34]

iv Prosecution of individuals

Besides the prosecution of individuals for administrative, civil or criminal liability as discussed above, a company can dismiss a person from their job[35] – even if dismissal is not mandatory for the matter in question – in case the public authorities seek to hold the individual liable or in the case of an existing investigation into that person.

On the other hand, the company can, if there is no conflict of interest, help to defend its employee by presenting documents, depositions, etc. Indeed, it is common for companies to pay the legal costs of this defence, depending on whether there is a conflict of interest.

IV INTERNATIONAL

i Extraterritorial jurisdiction

Brazil's Antitrust Law (Law No. 12,259/11) applies to the conduct of individuals and companies outside the country in cases when the practices took place integrally or partially inside the national territory, or the consequence of the practices produces or might produce effects in Brazil.[36]

Concerning the latter situation, the possibility of extraterritorial application of Brazilian law requires that the potential injury caused by the conduct be real and effective, not just hypothetical, or there will be no configuration of a crime.[37]

Likewise, the Anticorruption Law allows civil and administrative penalties to be applied to Brazilian individuals or companies that commit crimes against foreign governmental entities, even if the crime is committed abroad.[38]

In the criminal sphere, the rule in Brazil, as in many other countries, is of territoriality, by which Brazilian criminal laws apply only to acts committed in the country or to:

a crimes committed against the life or freedom of the President;
b crimes committed against the property of public entities, the Brazilian state, the federated states and the municipalities;
c crimes committed against the public administration; and
d crimes of genocide when the criminal is Brazilian or resident in Brazil, and for crimes that Brazil is obligated to repress owing to international treaties and conventions.[39]

34 In this respect, the Environmental Crimes Law allows reduction of penalties for 'prior communication to the agent regarding the imminent risk of environmental degradation', as well as for 'collaboration with agents entrusted with environmental vigilance and control', circumstances that can be interpreted as resulting from the existence of a compliance programme.

35 The jurisprudence from the labour courts takes the position that an employee can only be discharged for cause owing to commission of a crime after a final guilty verdict. However, the company can fire employees for cause based on other grounds, such as malpractice or administrative improbity, which are not crimes.

36 Article 2 of Law No. 12,259/11.

37 G Oliveira, J G Rodas, *Direito e Economia da Concorrência*, Rio de Janeiro: Renovar, 2004, pp. 381 and 382.

38 Article 28 of Law No. 12,846/13. See in this respect V Greco F, J D Rassi, *O combate à corrupção e comentários à lei de responsabilidade de pessoas jurídica*s (Law No. 12,846, of 10 August 2013), São Paulo: Saraiva, 2015, p. 214.

39 Article 7 of the Penal Code.

However, application of the foregoing to companies is as yet unclear, because the extraterritoriality rule was established at a time when the liability of companies for corrupt practices was not set forth in the legal system.

ii International cooperation

The Brazilian government can cooperate with application of the law of other countries by means of passive international legal cooperation, which consists of the practice of national public acts that are instrumental in the functioning of foreign jurisdiction. This cooperation exists in three forms: direct (direct and immediate contact between the authorities of the two countries), indirect (through an intermediary for processing of requests) and direct assistance (postulation, through an intermediary, of a national decision for the benefit of the requesting state, in substitution of it).

Countries that cooperate with each other generally have treaties to that effect.[40] However, the absence of a bilateral accord does not preclude cooperation by the Brazilian government with foreign governments. In these cases, the solicitation must be sent to the Superior Tribunal of Justice via a letter rogatory, and if the matter cannot be decided there, it will be sent to the Ministry of Justice for the necessary steps to be taken to provide direct assistance.[41]

Extradition is common and is regulated by the Foreigner Statute (Law No. 6,815/80), Decree No. 86,715/81 and Article 22, XV of the Federal Constitution. For extradition to be granted, it is necessary for certain conditions to be fulfilled, including (1) that the act be considered a crime both in Brazil and in the requesting state, (2) that the prospective person to be extradited is a foreigner and (3) that there is a treaty or convention signed with Brazil or, if none exists, a promise of reciprocity by the foreign government.

The Federal Supreme Court has original jurisdiction over extradition requests, according to Article 102, I(g) of the Federal Constitution, which is why its final decision is not subject to appeal.[42]

iii Local law considerations

As has already been stated, Brazil adopts the principle of territoriality as a rule for application of criminal law, both substantive and procedural, although there are exceptional situations in which local law can be applied to crimes committed by Brazilians abroad. Therefore, if the Brazilian justice system has jurisdiction to judge a certain crime even though it has been committed abroad, the procedural rules applied will be those of the Brazilian Criminal Procedure Code.

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40 Such as the bilateral and multilateral accords on mutual assistance in criminal matters listed on the website of the Federal Prosecution Service: www.internacional.mpf.mp.br/normas-e-legislacao/tratados/tratados-de-mutual-legal-assistance-auxilio-juridico-mutuo-em-materia-penal.

41 A S Fernandes and M A C Zili, coord, *Direito Processual Penal Internacional*, São Paulo: Atlas, 2013, p. 365. On the matter of direct assistance, H Estellita states that unlike the procedure for letters rogatory established in Resolution 09/2005 from the STJ, it 'does not put the affected person as a subject of the cooperation and does not offer the guarantees regarding observance and respect for his fundamental rights to defence, rebuttal and inadmissibility of illegally obtained evidence'. In R J M Silveira and J D Rassi coord, *Cooperação internacional penal passiva e garantias processuais do afetado*. *Estudos em homenagem a Vicente Greco Filho*, São Paulo: LiberArs, 2014 p. 195.

42 On this theme, see the publication (in Portuguese) by the Federal Supreme Court at www.stf.jus.br/arquivo/cms/bibliotecaConsultaProdutoBibliotecaBibliografia/anexo/extradicao_nov2009.pdf.

Brazilian higher courts have a consolidated approach concerning the existence of *lis alibi pendens* investigations in a sense that the closure of investigations being carried out by Brazilian public authorities may not occur under ordinary instances, provided that the admissibility test of a foreign sentence depends on analysis of the Superior Justice Tribunal. By determining the closure of the investigation, the ordinary judge would be anticipating the analysis of a higher court.

Likewise, if another state is competent to judge a crime committed by a Brazilian national, its own procedural rules will apply, even if they are in conflict with Brazilian guarantees. On this point, international treaties and conventions on human rights come to the fore, by establishing protection and a guarantee of the rights of individuals facing prosecution in another signatory state.[43] Hence, for example, personal and banking data are protected by secrecy and may only be disclosed by court order,[44] pursuant to the constitutional principle of privacy and private life (Article 5, X of the Constitution). If any such information is obtained illegally, it will not be admissible in court.[45]

V YEAR IN REVIEW

Two topics are of current interest in Brazil:

a the possibility of serving provisional sentences in respect of criminal matters; and

b publication of the Orientation No. 7/2017, enacted by the 5th Chamber of Coordination and Revision of the Federal Public Prosecution Office, which establishes the minimum parameters required for the conclusion of a leniency agreement as brought under Law No. 12,846/2013.

The first derives from a prior ruling of the Supreme Federal Court that was reaffirmed on 4 April 2018, during former President Lula's petition for a *habeas corpus* judgment, questioning the constitutionality of provisory sentence serving on criminal cases.

During the *Lula* trial, the final decision was agreed by six of the 11 judges, requiring Justice Cármen Lúcia, President of the Court, to break the tie in casting the last vote. The justices who voted against the petition argued for the necessity of an effective jurisdictional response that could only be achieved by allowing provisional sentences to be served. Some also relied on the fact that prior jurisprudence on this topic has been discussed by the court in 2016, and should be respected.

The second consists of a guide for public prosecutors who may enter into negotiation with companies and individuals willing to conclude a leniency agreement under the Anticorruption Law. The importance of this provision rests on publicising the consolidation of the parameters that have been demanded by the Federal Public Prosecution Office while concluding such agreements.

Besides the essential clauses required to conclude an agreement, an Orientation also provides the criteria used by the Federal Public Prosecution Office to estimate the applicable fees, bringing more transparency and predictability to such agreements.

43 See in this respect the American Convention on Human Rights (Decree No. 678/92) and the International Covenant on Civil and Political Rights (Decree No. 592/92).

44 Some argue that a court order is not necessary to obtain basic listing information such as name, address and telephone number, only a command from a police authority.

45 Article 157 of the Criminal Procedure Code and Article 5, LVI of the Federal Constitution.

VI CONCLUSIONS AND OUTLOOK

The following main conclusions can be drawn.

The developments in *Operation Car Wash* have increased the number of companies being targeted by the investigative authorities, mainly the Federal Public Prosecutor Office and the Administrative Council for Economic Defence.

This, allied with the possibility of provisional sentencing in criminal cases, has also increased the number of collaboration agreements and leniency agreements that have been concluded with prosecution authorities. For that, the internal investigations are being consolidated as a recurrent practice for companies' legal teams and assisting external counsels.

The recurrence of such practice is allowing the parties involved in this kind of negotiation to create a know-how, which in turn is bringing more security to companies and individuals.

Appendix 1

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