GIR Global Investigations Review

Brazil

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General context, key principles and hot topics

1 Identify the highest-profile corporate investigation under way in your country, describing and commenting on its most noteworthy aspects.

One of the most prominent current investigations is the Federal Police's investigation into irregularities in the transfer of funds from the Ministry of Education. The investigation was initiated at the request of the Federal Comptroller General, which sent the results of an internal audit to the Federal Police. In parallel, the Federal Supreme Court has ordered the opening of an investigation against the former Minister of Education, Milton Ribeiro, for alleged corruption and an influence peddling scheme.

Another case in the spotlight is an investigation by federal prosecutors into complaints of sexual and moral harassment against the former president of Caixa Econômica Federal (CEF), Pedro Guimarães. CEF is one of the biggest state-controlled banks in Brazil. Mr Guimarães took charge of Caixa in January 2019 after being nominated for the position by the Bolsonaro administration. He recently resigned from the position to focus on his defence.

2 Outline the legal framework for corporate liability in your country.

With the exception of environmental crimes, there is no corporate criminal liability in Brazil. The company can be held liable when an environmental crime is committed by a decision of its legal or contractual representative, or by its board, as well as for actions in the company's interests or for its benefit (Federal Law No. 9,605/1998).

The establishment of liability for crimes committed on behalf of corporations requires proof of the participation of specific individuals. Only the individual who is directly linked to a criminal activity may be held liable for the illicit act.

The mere fact of a person holding a shareholder or management position (board member, director or manager) is not sufficient to impose criminal liability under the Brazilian legal system. Shareholders and senior management, however, may be held liable for corporate criminal activity in cases in which they have acted at least with negligence.

Corporations can be held liable for administrative illicit and civil acts. The Brazilian Clean Company Act (Federal Law No. 12,846/2013) (BCCA), the Administrative Improbity Act (Federal Law No. 8,429/1992, amended by Federal Law No. 14,230/2021), the Environmental Crimes Act (Federal Law No. 9,605/1998) and the Public Biddings and Contracts Act (Federal Law No. 14,113/2021) are examples of legislation regulating corporate liability for illicit acts in Brazil.

3 Which law enforcement authorities regulate corporations? How is jurisdiction between the authorities allocated? Do the authorities have policies or protocols relating to the prosecution of corporations?

There are several government and law enforcement agencies with the power to conduct investigations. Unlike countries where the investigative authority is concentrated in a few public bodies, in Brazil this is distributed among several agencies at federal, state and municipal levels.

Whenever the facts constitute crimes, the investigative power belongs to the police. Police work in Brazil is divided between the federal police and the state police. Generally, the federal police investigate crimes involving interests of the federal administration and cross-border criminal activity. The state police investigate all other crimes.

Another relevant agency with investigative authority is the public prosecution service, which is also divided between federal and state levels. Public prosecutors can investigate both criminal and civil wrongdoing, prosecute criminal lawsuits and litigate public class action cases against corporations and individuals.

Each level of the Brazilian federation has agencies with specific investigative mandates and other roles, including the general comptroller offices, which promote general regulation and enforcement of actions against wrongdoing, and the audit courts, which promote external control of the executive power, assisting the House of Representatives in monitoring budgetary and

financial execution.

Other agencies also have surveillance and law enforcement roles for specific types of wrongdoing, including the Administrative Council for Economic Defence (CADE), with attribution to assess illicit acts against the economic order, the Securities and Exchange Commission, the watchdog of the Brazilian capital market, and the Brazilian Central Bank, which regulates and surveils the financial market.

Finally, legislative bodies can create congressional investigative commissions to investigate specific facts.

4 What grounds must the authorities have to initiate an investigation? Is a certain threshold of suspicion necessary to trigger an investigation?

To initiate an investigation, there must be probable cause of an offence and an indication that a particular individual or corporation is involved. An investigation against someone without any evidence of misconduct can itself constitute crime – an abuse of authority.

5 How can the lawfulness or scope of a notice or subpoena from an authority be challenged in your country?

The Brazilian legal system allows the interested person to dispute a notice or subpoena by filing an injunction, a preliminary defence or even a constitutional writ, such as *habeas corpus* and a writ of *mandamus*, in court.

6 Does your country make use of co-operative agreements giving immunity or leniency to individuals who assist or co-operate with authorities?

Yes. Generally, companies are entitled to sign leniency agreements and individuals are entitled to sign deferred prosecution agreements, plea bargains and non-prosecution agreements (NPAs) with law enforcement authorities.

The government requirements for a company to sign a leniency agreement in the context of the BCCA are the identification of others involved in the wrongdoing, whenever applicable, and the efficient gathering of documentation and information about the wrongdoing.

The public prosecutor can propose NPAs in relation to crimes for which the minimum penalty is imprisonment for up to four years. As part of the agreement, the individual or the legal entity must repair the damage caused as a result of the offence, carry out community service and pay a fine. The public prosecutor may also impose other obligations.

NPAs may be available to corporations only for environmental crimes, which are the only crimes for which legal entities can be held criminally liable.

7 What are the top priorities for your country's law enforcement authorities?

In recent years, law enforcement authorities have been increasingly concerned about cybercrime, which increased during the covid-19 pandemic. In 2021, Federal Law No. 14.155/2021 was passed, updating the cybercrime legal framework. The Law increased sanctions for computer device violation crimes as well as theft and fraud schemes committed electronically or over the internet.

Corruption is always on the radar of Brazilian law enforcement authorities. In July 2022, Decree No. 11,129/2022 entered into force, updating the regulation of the BCCA. One of the improvements introduced by the new regulation was a change to the factors calculating fines, enabling law enforcement to impose higher penalties.

In the context of the covid-19 pandemic, several police inquiries were launched involving state and municipal governments in relation to alleged undue public spending on health-related measures. Several types of alleged irregularities were claimed in the construction of hospitals and in the acquisition of medical supplies, such as overpricing, fraud and manipulation of bids.

8 To what extent do law enforcement authorities in your jurisdiction place importance on a corporation having an effective compliance programme? What guidance exists (in the form of official guidance, speeches or case law) on what makes an effective compliance programme?

Section 7, subsection VIII of the BCCA provides that a corporate compliance programme can be a mitigating factor when evaluating potential penalties for corporate wrongdoing. Although fines set forth in the BCCA can amount to 20 per pent of a company's gross revenue the year before a violation, an effective compliance programme can reduce that fine calculation by up

to 5 per pent.

The parameters for the evaluation of an effective compliance programme were first established in Federal Decree No. 8,420/2015, which was replaced by Federal Decree No. 11,129/2022 in July 2022. Section 57 of the new Decree sets out the following parameters:

- commitment by senior management of the entity, including the councils, evidenced by clear and unequivocal support of the programme, as well as the allocation of adequate resources;
- patterns of conduct, a code of ethics, integrity policies and procedures applicable to all employees and managers, regardless of their position or the function occupied;
- patterns of conduct, a code of ethics and integrity policies extended, whenever necessary, to third parties, such as suppliers, service providers, brokers and associates;
- periodic training and communication actions in the context of the compliance programme;
- risk assessment, including a periodic review and reassessment, to make necessary adaptations to the compliance programme and efficient resource allocation;
- books and records that fully and accurately reflect the transactions of the entity;
- internal controls that ensure the prompt processing and reliability of reports and financial statements of the entity;
- specific procedures to prevent fraud and unlawful acts in the context of public bidding proceedings, in the execution of public agreements or in any interaction with public entities, even if intermediated by third parties, such as payment of taxes, inspections or obtaining authorisations, permissions and certificates;
- independence, structure and authority of the internal department responsible for implementing and monitoring the compliance programme;
- channels for reporting irregularities, which are open and widely disseminated to employees and third parties, and mechanisms for handling complaints and for the protection of reports made in good faith;
- disciplinary measures in the event of violations of the compliance programme;
- procedures that ensure the prompt interruption of detected irregularities or violations and the timely remediation of the damage caused;
- due diligence for contracting and supervision of third parties, such as suppliers, service providers, intermediary agents and associates;
- due diligence for contracting and supervising politically exposed persons, as well as their family members, close collaborators and legal entities in which they participate;
- due diligence for the realisation and supervision of sponsorships and donations;
- due diligence during mergers, acquisitions and corporate restructurings to verify the commission of irregularities or illegal acts or the existence of vulnerabilities in the entities involved; and

- continuous monitoring of the compliance programme for the purpose of its improvement in the prevention, detection and combating of the occurrence of the illicit acts set forth in Article 5 of the BCCA.

Cyber-related issues

9 Does your country regulate cybersecurity? Describe the approach of local law enforcement authorities to cybersecurity-related failings.

Brazil has enacted a National Cybersecurity Strategy to set guidelines for the federal government. Cybersecurity is regulated by sector, which is provided by regulatory agencies such as the Brazilian Central Bank, the Securities and Exchange Commission, the National Telecommunications Agency and the Brazilian Private Insurance Authority. Brazil has also enacted a National Strategy for Critical Infrastructure, establishing actions to be adopted by the government regarding cybersecurity within critical infrastructure, which includes a myriad of sectors such as oil and gas, telecommunications and energy, among others.

Cybersecurity is in part also regulated by the General Data Protection Law (LGPD), which sets forth minimum standards of cybersecurity for the protection of personal data, and by the Brazilian Internet Act, the legislation that governs certain security aspects in the context of the use of internet.

The National Data Protection Authority is responsible for receiving notification of incidents, monitoring and overseeing the processing of personal data, and the application of sanctions.

10 Does your country regulate cybercrime? What is the approach of law enforcement authorities in your country to cybercrime?

Cybercrime is regulated by specific Articles in the Brazilian Penal Code, the Brazilian Cybercrime Law, the Child Protection Law, the Brazilian Internet Act and the LGPD.

Cybercrime is usually investigated by the state police, except for specific cases where the federal police is competent for the investigation, such as dissemination of misogynistic content, electronic bank fraud, terrorism and cross-border crimes.

Brazil has recently become a signatory of the Convention on Cybercrime (known as the Budapest Convention).

Cross-border issues and foreign authorities

11 Does local criminal law have general extraterritorial effect? To the extent that extraterritorial effect is limited to specific offences, give details.

Some crimes are subject to Brazilian law even if the crime is committed in other countries. Even if a person is acquitted or convicted abroad, that person is also punished according to Brazilian law if the crime is:

- committed against the life or liberty of the President of the Brazilian Republic;
- committed against the assets or public faith of the union or a federal district, state, territory, municipality, public company, mixed capital company, autarchy or foundation instituted by the public power;
- committed against the public administration, for those who are at its service; and
- genocide, when the agent is Brazilian or domiciled in Brazil.

A second group of such crimes are those:

- that, by treaty or convention, Brazil was obliged to repress;
- practised by Brazilians; and
- practised in Brazilian commercial or privately owned aircraft or vessels, when in foreign territory and not tried there.

In these cases, the enforcement of Brazilian law depends on the following conditions:

- the individual enters the national territory;
- the act is also punishable in the country where it was committed;
- the crime is included among those for which Brazilian law authorises extradition;
- the individual has not been acquitted abroad or served the sentence abroad; and

- the individual has not been pardoned abroad or, for another reason, the punishment has not been extinguished, according to the most favourable law.

Brazilian law also applies to crimes committed by a foreigner against Brazilians outside Brazil if, in addition to the above conditions, extradition was not requested or denied, and there was a request from the Minister of Justice.

The Brazilian Criminal Code also punishes crimes of corruption and influence peddling in international transactions. Both crimes demand the involvement of a foreign public official, which is broadly defined in the Criminal Code.

12 Describe the principal challenges that arise in your country in cross-border investigations, and explain whether and how such challenges depend on the other countries involved.

One challenge relates to language and cultural aspects. Brazil is the only country in Latin America whose citizens speak Portuguese; most of the other countries in the region have Spanish as the official language. Many Brazilians do not speak English, so interviews and document reviews usually depend on Portuguese-speaking investigators. Brazilians usually are very open in working relationships, so internal investigations conducted without a local cultural context can put a strain on the workplace environment.

Another challenge relates to privilege rules as they usually vary significantly from country to country. We recommend mapping out the privilege rules that apply in each matter, as well as their application to the data and individuals at issue. Foreign lawyers are not allowed to practise law in Brazil, so it is important to have a Brazilian lawyer involved in all investigations conducted in the country.

Finally, data protection laws also vary from country to country. We recommend mapping out all data protection and data privacy restrictions, especially the transfer of data to a different jurisdiction. Keeping the data stored in Brazil, whenever possible, is advisable since there are no legal requirements for prior notice or consent from a government data agency or from the employee (except in respect of a personal device used for work) for data collection and hosting.

13 Does double jeopardy, or a similar concept, apply to prevent a corporation from facing criminal exposure in your country after it resolves charges on the same core set of facts in another? Is there anything analogous in your jurisdiction to the ‘anti-piling on’ policy as exists in the United States (the Policy on Coordination of Corporate Resolution Penalties) to prevent multiple authorities seeking to penalise companies for the same conduct?

Double jeopardy, or the *nes bis in idem* principle, is not well regulated by law in Brazil but is applicable with limitations based on constitutional guarantees and specific provisions. The main basis is *res judicata*, a constitutional guarantee by which a final ruling must be respected and not subject to new discussions.

In the criminal sphere, Brazil signed the American Convention on Human Rights and must follow its Section 8.4, under which any individual acquitted by a final ruling cannot be submitted to a new lawsuit for the same facts. The guarantee is not extended to criminal proceedings conducted in other countries. In such cases, the Brazilian Criminal Code sets forth that a sentence served in another country must be compensated in the sentence imposed in Brazil for the same facts.

The situation is different in the civil and administrative spheres, in which the *nes bis in idem principle* is usually not enforced. The Brazilian Clean Company Act (Federal Law No. 12,846/2013) (BCCA), for instance, has specific provisions by which the enforcement of its sanctions does not exclude the enforcement of other sanctions whenever the facts constitute violations

against the economic order, as well as violations set forth in the Administrative Improbity Act and the Public Bids Act. Brazilian law enforcement authorities have been working together to enable full agreements for corporations seeking co-operation to settle multiple violations in Brazil.

The Administrative Improbity Act was amended in 2021 and now has a provision that the sanctions applied to corporations based on the law and the BCCA must observe the constitutional principle of *non bis in idem*. The amendments to the law have been subject to challenges based on the argument that they may represent a setback in the fight against corruption in Brazil, so the validity of the new provision will probably be assessed by Brazilian courts.

14 Are 'global' settlements common in your country? What are the practical considerations?

It is not common in Brazil for corporations to reach global settlements, as the legal basis, the negotiation process and the outcome of the agreements significantly vary from jurisdiction to jurisdiction. Usually, a company seeking leniency from several jurisdictions needs to sign multiple agreements. In such cases, the company can use the same evidence and the same grounds, and try to compensate fines to enable the multiple agreements.

15 What bearing do the decisions of foreign authorities have on an investigation of the same matter in your country?

Brazil is a sovereign nation not bound by the decisions of foreign authorities. However, the rules of the Introduction to the Brazilian Law (Federal Decree No. 4,657/1942) set forth that rulings issued in other countries can be enforced in Brazil subject to the following requirements:

- the ruling was issued by a competent judge;
- the parties were duly notified or were legally verified by default;
- the ruling was passed in *res judicata* and has the necessary formalities for the execution in the place where it was issued;
- the ruling was translated by an authorised interpreter; or
- the ruling was approved by the Federal Supreme Court.

On top of the enforcement of a foreign ruling, Brazilian law enforcement authorities can assess the facts and evidence gathered abroad to determine whether other instances can be triggered in Brazil to assess the same facts.

Economic sanctions enforcement

16 Describe your country's sanctions programme and any recent sanctions imposed by your jurisdiction.

Brazil does not typically impose economic sanctions on other nations. However, the country is a member of international organisations and has assumed commitments with the international community to follow certain sanctions regimes.

Federal Law No. 13,810/2019 and Federal Decree No. 9,825/2019 set forth the obligation for Brazilian government agencies to enforce the sanctions imposed by the United Nations (UN) Security Council, including the freezing of assets of a sanctioned party. Section 6 of Federal Law No. 13,810/2019 states that the sanctions imposed by the UN Security Council must be

immediately enforced in Brazil. Section 24 of the Law states that the Ministry of Justice and the Ministry of Foreign Affairs shall deliberate, after a judge's request, about the national designation of individuals and entities involved with terrorism before the UN Security Council.

The failure to comply with the sanctions imposed by the UN Security Council may subject the involved individuals and entities to administrative sanctions.

17 What is your country's approach to sanctions enforcement? Has there been an increase in sanctions enforcement activity in recent years, for example?

Brazil usually does not have the initiative to impose economic sanctions on other nations and currently enforces the sanctions imposed by the UN Security Council.

18 Do the authorities responsible for sanctions compliance and enforcement in your country co-operate with their counterparts in other countries for the purposes of enforcement?

A foreign central authority may request Brazilian authorities to freeze the assets of parties under investigation in foreign jurisdictions for acts of terrorism. In such cases, the Ministry of Justice and the Ministry of Foreign Affairs shall assess whether the request is duly and objectively motivated and fulfils the legal requirements applicable to the matter.

19 Has your country enacted any blocking legislation in relation to the sanctions measures of third countries? Describe how such legislation operates.

Brazil has not enacted any blocking legislation to date.

20 To the extent that your country has enacted any sanctions blocking legislation, how is compliance enforced by local authorities in practice?

Brazil has not enacted any sanctions blocking legislation to date.

Before an internal investigation

21 How do allegations of misconduct most often come to light in companies in your country?

The most common channels for misconduct to come to light in Brazil are:

- a company's ethics line;
- anonymous tips;
- reports of potential wrongdoing to a superior;
- reports to the compliance department from current or former employees;
- information disclosed by media;
- internal audits; and

- government or regulatory proceedings.

Information gathering

22 Does your country have a data protection regime?

Yes, data protection in Brazil is regulated by Federal Law No. 13.709/2018 (the Brazilian General Data Protection Law (LGPD)).

23 To the extent not dealt with above at question 9, how is the data protection regime enforced?

Data protection is enforced by the National Data Protection Authority (ANPD), the federal public administration body responsible for overseeing, implementing and enforcing compliance with the LGPD in Brazil. The ANPD is granted technical and decision-making autonomy by law to ensure it can perform its role.

24 Are there any data protection issues that cause particular concern in internal investigations in your country?

The full effects of data protection on internal investigations remain to be seen, considering that the LGPD has been in force for only a few years and is still in the process of being regulated.

Access to the personal data of an employee in the context of an internal investigation can be justified by the legal basis of legitimate interest. However, companies need to handle access to personal data with caution, especially when the data, according to the LGPD, (1) is deemed sensitive (i.e., personal data concerning racial or ethnic origin, religious conviction, political opinion, membership of a trade union or of a religious, philosophical or political organisation or political affiliation, health or sex life, or genetic or biometric data when linked to a natural person) or (2) pertains to children or adolescents.

25 Does your country regulate or otherwise restrict the interception of employees' communications? What are its features and how is the regime enforced?

The interception of employees' communications can be considered as monitoring that is generally regulated by an employer's directive power provided in the labour laws.

The labour courts have been ruling that corporate devices, such as computers and cellphones, and emails are company property, not subject to employees' privacy and confidentiality rights. Companies may be held civilly liable for wrongdoing by employees using such devices; therefore, employers are allowed to monitor and gather relevant information from such devices for corporate investigation purposes.

Companies should clearly communicate to their employees that corporate devices may be used only for professional purposes and are subject to monitoring. These communications are usually communicated through a company's code of conduct, corporate device policies and specific clauses in employment contracts.

A great deal of controversy surrounds the monitoring of personal data. As a rule, and in a conservative approach, companies are not allowed to monitor personal emails and communications, even when they are not in compliance with corporate device polices. All personal data casually gathered on corporate devices that is not linked to the investigated facts should be excluded from the investigation and have its confidentiality preserved to avoid undue exposure of the employee's privacy and confidentiality.

Dawn raids and search warrants

26 Are search warrants or dawn raids on companies a feature of law enforcement in your country? Describe any legal limitations on authorities executing search warrants or dawn raids, and what redress a company has if those limits are exceeded.

Brazilian criminal law requires the existence of probable cause for a judge to authorise dawn raids and search warrants. Whenever the authority responsible for the investigation considers that the search and seizure is necessary, it must request the search warrant from a competent judge, with justified reasons for the decision to use this precautionary measure.

The court decision that authorises a raid must explain the object of the measure, specifying, as much as possible, which papers, documents or objects must be searched and seized. The reason and purposes of the investigation must be included in

the court order.

The law provides that searches must be carried out during the day. It is common for law enforcement authorities to carry out dawn raids to better ensure their efficiency.

If the limits of a search warrant are exceeded, both individuals and companies involved and affected by improper evidence collection can request the exclusion of any seized evidence from the case.

27 How can privileged material be lawfully protected from seizure during a dawn raid or in response to a search warrant in your country?

Privileged material, such as attorney–client communications, cannot be seized during a dawn raid or in response to a search warrant, except in cases of an indication that the lawyer subject to the raid was involved in the wrongdoing under investigation.

It is difficult to fully protect this type of material from possible seizure, but the affected party can explicitly identify confidential documents to protect them from possible seizure. However, it is still possible that law enforcement will seize privileged materials while executing a warrant. In such cases, an injunction must be presented to the court and any protected materials must be removed from the case file.

28 Under what circumstances may an individual's testimony be compelled in your country? What consequences flow from such compelled testimony? Are there any privileges that would prevent an individual or company from providing testimony?

No individual can be forced to involuntarily provide any type of information or statement that directly or indirectly incriminates the individual. This is because there is a fundamental right not to self-incriminate, which means that no one is obliged to self-incriminate or to produce evidence against himself or herself.

Brazilian criminal law establishes that the accused has the right to remain silent during interrogation and this silence cannot be interpreted to the detriment of the accused. Any agency that (1) compels a person to testify, under threat of arrest, if that person must keep a secret or maintain secrecy, or (2) decides to proceed with the interrogation of an individual who has decided to remain silent, commits the crime of abuse of authority.

Witnesses, on the other hand, are obliged to speak and to speak the truth. A witness who makes a false statement or remains silent about the circumstances that she or he has witnessed, may be held in contempt of court.

Whistleblowing and employee rights

29 Describe the whistleblowing framework in your country. What financial incentive schemes exist for whistleblowers? What legal protections are in place for whistleblowers?

Blowing the whistle in Brazil may happen in two ways: internal or external disclosure.

Internal disclosure

The Brazilian Clean Company Act (Federal Law No. 12,846/2013) (BCCA) lists reporting wrongdoings as one of the mitigating factors to be considered when sanctioning a company that has committed a violation. Federal Decree No. 11,129/2022, which regulated the BCCA, also sets forth whistleblowing channels as a parameter of an efficient compliance programme.

There are no legal provisions regarding benefits for whistleblowers who make an internal report.

Companies may have such a provision in their compliance programmes, but it is not common practice. Robust compliance programmes usually spread the 'do the right thing' message and, therefore, the motivation for internally reporting a wrongdoing should not be to gain benefits but rather to act compliantly and with integrity.

External disclosure

Disclosure to government authorities may be performed by an employee of a corporation who reports wrongdoing in which that employee has not participated. Whistleblowing is regulated by Federal Law No. 13,608/2018, which sets forth legal protections and financial incentives for whistleblowers.

Among the legal protections available are full protection against retaliation and immunity from civil or criminal liability with

regard to the complaint made, except if the whistleblower consciously presented false information or evidence.

The whistleblower is also protected against retaliation, such as arbitrary dismissal, unjustified alteration of functions, imposition of sanctions, salary reduction, suppression of benefits, or refusal to provide good professional references. The practice of any retaliatory action or omission against whistleblowers will be considered a serious disciplinary offence and shall result in the termination of the agent from public service. Any material damage caused to the whistleblower as a result of retaliation shall be repaid twofold.

The whistleblower's identity must be protected and may only be disclosed if there is relevant public interest or concrete interest for the investigation of the facts and with the whistleblower's formal consent.

With regard to financial incentives, the law establishes that a reward, including payments in cash, may be offered in exchange for information that is useful for the prevention, repression or investigation of illicit acts and crimes. If the information provided results in the recovery of products of crime against the public administration, the whistleblower may be rewarded with up to 5 per pent of the recovered amount.

There is a different framework for wrongdoers who self-disclose their conduct to the authorities. An individual who committed a crime and is already under investigation or is being prosecuted may report the wrongdoing to the authorities in exchange for being granted leniency, which may range from a penalty reduction to a judicial pardon.

For corruption and other white-collar crimes, as a general rule, companies are entitled to sign leniency agreements and individuals are entitled to sign collaboration agreements with law enforcement authorities.

The Criminal Organisations Act (Federal Law No. 12,850/2013) enables individuals to co-operate with the authorities and be entitled to negotiate a form of plea agreement known as a collaboration agreement. The BCCA sets forth that companies are entitled to co-operate with authorities through leniency programmes. These mechanisms allow individuals and companies involved in wrongdoing to receive benefits from the authorities in exchange for information about the misconduct.

30 What rights does local employment law confer on employees whose conduct is within the scope of an investigation? Is there any distinction between officers and directors of the company for these purposes?

The Federal Constitution and the labour laws are the sources of individuals' rights subject to internal investigations. The Constitution sets forth that the confidentiality, private life, honour and image of people must not be violated. Therefore, companies must guarantee that their internal investigations will not expose investigated individuals to other employees and the market. Undue exposure may constitute a violation to the above-mentioned rights and provide the individual with grounds to seek damages from the company.

Statutory officers and directors are not subject to labour laws, but they are protected by the Constitution and other laws, such as the Civil Code.

Companies doing business in Brazil have broad discretion to choose whether and how to conduct an internal investigation, but it is considered best practice to conduct internal investigations within the limits of the individuals' rights. To achieve this best practice, it is recommended for companies to regulate internal investigations and related aspects, such as the application of disciplinary measures and the use of corporate devices.

31 Do employees' rights under local employment law differ if a person is deemed to have engaged in misconduct? Are there disciplinary or other steps that a company must take when an employee is implicated or suspected of misconduct, such as suspension or in relation to compensation?

Employees' rights under Brazilian employment law do not differ if a person is deemed to have engaged in misconduct.

Companies in Brazil may impose remunerated leave – also called suspension – on employees while conducting an internal investigation or when there are concerns about those employees destroying evidence, influencing witnesses or engaging in other conduct that could compromise the integrity of an investigation. This is a common and efficient practice in Brazil, especially in relation to employees in management positions.

Despite the lack of specific legal provisions, labour counsel recommend that this suspension should not exceed 30 days to avoid allegations of indirect rescission of the employment contract by the employer. It is also recommended that the leave is formally recorded with signatures of the employee at the times of departure and return.

An employee engaged in misconduct may be subject to disciplinary measures, including dismissal with or without cause. Inconsistency in disciplinary measures may give grounds for employees to file labour claims seeking indemnification or the return to work. Termination for cause is the harshest disciplinary measure and must be applied only in extreme situations as

quickly as possible and based on clear evidence of significant misconduct. Examples of extreme situations are corruption, fraud, unfair competition and breach of corporate secrecy. Brazilian labour courts have been ruling that companies have the burden of proof in terminations for cause.

32 Can an employee be dismissed for refusing to participate in an internal investigation?

Yes, employees may be dismissed without cause, subject to severance compensation, if they refuse to participate in an internal investigation and at the discretion of the employer. Such conduct does not constitute a reason for dismissal with cause, according to section 482 of the Labour Code.

Commencing an internal investigation

33 Is it common practice in your country to prepare a document setting out terms of reference or investigatory scope before commencing an internal investigation? What issues would it cover?

Yes, it is common and a good practice to draw up an investigation plan addressing, at a minimum, the following topics:

- the case background;
- the scope of the investigation, including questions to be answered;
- the investigation team;
- the investigation focal point at the company;
- the investigation measures expected to be executed; and
- the investigation time frame.

Special attention must be paid to cases in which independent auditors conduct a simultaneous investigation and require modifications to the original investigation plan.

34 If an issue comes to light prior to the authorities in your country becoming aware or engaged, what internal steps should a company take? Are there internal steps that a company is legally or ethically required to take?

It is recommended that a company retain a lawyer whenever an issue comes to light, as a legal assessment will determine the best course of action, especially if the case involves co-operation with law enforcement.

There are no specific legal or ethical requirements to follow in such cases.

35 What internal steps should a company in your country take if it receives a notice or subpoena from a law enforcement authority seeking the production or preservation of documents or data?

The first step is to engage a lawyer to assess the notice or subpoena and determine whether it is recommended to contact the law enforcement authority to learn the reason and nature of the request, as well as the position of the company in the proceeding. If the company or its representatives are targets of the investigation, for instance, they may follow a defensive strategy not to collaborate.

The second step is to determine whether the company wishes to collaborate and, if so, collect the documents or data. It is not common in Brazil for companies to provide law enforcement authorities with a suggestion of custodians and search terms. Companies usually preserve the documents or data and share them with their lawyers to proceed with the course of action previously determined.

36 At what point must a company in your country publicly disclose the existence of an internal investigation or contact from a law enforcement authority?

There is no obligation for companies in Brazil to publicly disclose the existence of an internal investigation or contact from a law enforcement authority, as a rule. Listed companies, however, have the duty to disclose relevant facts – such as the existence of an internal investigation – under specific circumstances.

37 How are internal investigations viewed by local enforcement bodies in your country?

Internal investigations are relatively new in Brazil and for many years were restricted to multinational companies doing business in Brazil, which referred to facts that could harm the economic order and, therefore, trigger law enforcement by the Administrative Council for Economic Defence (CADE). In those days, CADE was the only agency in Brazil with the ability to

sign leniency agreements with corporations and individuals.

This changed dramatically in 2014 after the enactment of the Brazilian Clean Company Act (Federal Law No. 12,846/2013) (BCCA). In addition to the strict liability for corporations regarding the practice of wrongdoing in corporate activities, two innovations brought by the BCCA were noteworthy: (1) the possibility for companies involved in corruption violations to enter into a leniency agreement with other government agencies; and (2) the existence of a compliance programme beginning to be considered a mitigating factor in the determination of the sanctions set forth in the law.

Federal Decree No. 11,129/2022 sets forth mechanisms for handling whistleblowing as a parameter of an effective compliance programme. However, there are no specific provisions on how such mechanisms must be implemented, granting companies a large amount of discretion to choose whether and how to conduct an internal investigation.

Companies doing business in Brazil and in compliance with the BCCA usually follow international best practices and implement specific rules on internal investigations. These rules usually encompass:

- the implementation of an ethics hotline for the receipt of reports from employees and stakeholders;
- the definition of a department responsible for internal investigations;
- an investigative protocol to ensure the accuracy, consistency and legality of the internal investigations; and
- an ethics committee with the ability to assess the findings of the internal investigations as well as decide on disciplinary and remediation measures.

Local enforcement authorities welcome internal investigations, provided they are conducted independently and in accordance with international best practices. Furthermore, internal investigations are usually essential for a company seeking collaboration and leniency from Brazilian law enforcement authorities.

Attorney–client privilege

38 Can the attorney–client privilege be claimed over any aspects of internal investigations in your country? What steps should a company take in your country to protect the privilege or confidentiality of an internal investigation?

It is common in Brazil that compliance professionals conduct internal investigations instead of in-house counsel, as companies have been choosing to segregate legal roles from compliance roles. However, if an investigation is conducted by a lawyer, legal professional secrecy can be claimed over the investigation process and results.

There are some best practices that can be followed to create and preserve confidentiality, especially in cross-border cases:

- map privilege rules that apply to the different jurisdictions involved and the relevance of each of them for the investigation in terms of data and individuals;
- set up a restricted work team composed of external counsel and specific individuals designated to represent the company as the client (in-house lawyer, in-house compliance professional or special committee);
- ensure a formal agreement between the client and the law firms retained in the different jurisdictions stating that the client expects legal advice and guidance on potential legal proceedings or litigation with law enforcement authorities;
- ensure that the work of other third parties, such as forensic consultants, is retained and performed under the guidance of a lawyer;
- limit the creation of and access to classes of documents and information by individuals based in jurisdictions where those documents or information are vulnerable to disclosure;
- create attorney–client privilege and work-product logs in relevant communications and documents produced during the investigation; and
- keep the client representative in the loop in respect of every communication kept between the external law firms retained in the different jurisdictions.

Complex investigations are usually outsourced to external counsel to guarantee impartiality and independence throughout the investigation. The hypotheses for the delegation of internal investigations to external counsel must be set forth in the company's investigative protocol and usually encompass – but are not limited to – cases involving:

- individuals acting as the management of the company;
- misappropriation of considerable amounts or relevant corporate assets;
- substantial risk of reputational damage for the company; and

- suspicion of criminal activity within the company.

39 Set out the key principles or elements of the attorney–client privilege in your country as it relates to corporations. Who is the holder of the privilege? Are there any differences when the client is an individual?

The professional practice of law is well regulated in Brazil. Besides the Federal Constitution, Brazilian lawyers are both protected by and bound to several provisions set forth in the Brazilian Bar Association Statute (BBAS) and the Brazilian Bar Association Ethics Code (BBAEC). The provisions cover both litigation and advisory legal professional practices, making clear that there is no distinction between them in Brazil.

As opposed to other countries, legal professional secrecy in Brazil is not treated as a privilege arising from the attorney–client relationship. Neither is there a clear distinction between the attorney–client communications and the work-product doctrine. All aspects of a client's legal protection in Brazil are regulated in a rights and duties system.

The BBAS sets forth as every lawyer's right the inviolability of the lawyer's office or place of work, as well as the lawyer's work tools, and written, electronic, telephone and telematics correspondence, as long as they relate to the practice of law. This right may only be breached if there is an indication that the lawyer took part in a crime or keeps physical evidence of a crime in his or

her office. This means that Brazilians lawyers have a comprehensive right to the inviolability of their communications, work tools and work-products, regardless of the direct involvement of a client and as long as they relate to the practice of law and are not related to any illicit actions by the lawyer.

The BBAEC sets forth the duty of every Brazilian lawyer to keep the facts they become aware of during the practice of their profession confidential. The BBAEC also states that professional secrecy is of public interest, regardless of any request made by the client, and that communications of any kind between a lawyer and a client are presumed to be confidential. This duty may only be breached if there is threat to the lawyer's life or honour, or for the lawyer's own defence. Breach of the duty without cause may subject the lawyer to penalties ranging from formal warnings to disbarment.

The client, therefore, is protected by both lawyers' rights to inviolability and their confidentiality duty. The protection is effective, and it is not common in Brazil for lawyers and law firms to have legal professional confidentiality breached in respect of the exceptions set forth in the applicable law (i.e., if there is an indication that a lawyer took part in a crime or keeps physical evidence of a crime in his or her office).

Most of the publicly available cases involving restriction measures imposed on lawyers relate to an indication that the lawyer could have been involved in the wrongdoing under investigation. Furthermore, the Brazilian Bar Association is very active in the defence and preservation of legal professional guarantees, especially confidentiality.

40 Does the attorney–client privilege apply equally to in-house and external counsel in your country?

Yes, the BBAS does not differentiate between in-house and external counsel. Section One of the BBAS specifically includes legal management as a lawyer's private activity. The only exception is in respect of in-house lawyers who perform executive management roles or other activities not related to the practice of law.

Provision 207/2021 issued by the Federal Council of the Brazilian Bar Association regulates the prerogatives of lawyers working in public, private or quasi-governmental companies – including their legal professional secrecy. Therefore, Brazilian in-house counsel can conduct internal investigations and preserve legal professional confidentiality in their communications, work tools and work-product.

41 Does the attorney–client privilege apply equally to advice sought from foreign lawyers in relation to investigations in your country?

Foreign lawyers are not allowed to practise law in Brazil, so it is important to have a Brazilian lawyer on board in internal investigations conducted in the country. Foreign lawyers may act in Brazil only as a partnership of consultants in foreign law, and foreign attorneys are considered consultants when acting in Brazil. They must follow the ethical provisions that regulate the activities of Brazilian lawyers, including legal professional confidentiality duties.

42 To what extent is waiver of the attorney–client privilege regarded as a co-operative step in your country? Are there any contexts where privilege waiver is mandatory or required?

The waiver of legal professional secrecy is not mandatory for co-operation in Brazil. A company can enter into a leniency agreement and co-operate with law enforcement authorities without waiving legal protection, especially if all relevant documentation and data can be gathered in other areas of the company.

However, external investigators can determine that the legal department of the corporation is a potential custodian of relevant documentation or data. In such cases, a waiver – at least partially – may be required and is recommended to implement some precautions: (1) to ensure the forensic preservation and processing of the data from the legal department in a separate

environment; (2) to designate or restrict lawyers who will review the documentation or data; (3) to apply privilege or legal professional secrecy flags in the review environment; and (4) to select only documentation or data that is relevant for the investigation to limit the waiver.

43 Does the concept of limited waiver of privilege exist as a concept in your jurisdiction? What is its scope?

No, the concept of limited waiver of privilege does not exist as a concept in Brazil. However, companies can produce information protected by legal professional secrecy to law enforcement authorities and ask for it to be filed and preserved with restricted access to the company, its lawyers and the authority in charge of the case.

44 If privilege has been waived on a limited basis in another country, can privilege be maintained in your own country?

Yes, professional legal secrecy in Brazil is governed by federal law and regulations issued by the Brazilian Bar Association. These rules are applied only in Brazil, so the use of privilege documentation or data in other jurisdictions does not constitute an automatic waiver in Brazil. The consequences in Brazil of a limited waiver in another country must be assessed case by case.

45 Do common interest privileges exist as concepts in your country? What are the requirements and scope?

No, there is no regulation in Brazil about common interest privileges.

46 Can privilege be claimed over the assistance given by third parties to lawyers?

Yes, assistance given by third parties to lawyers conducting internal investigations is covered by legal professional secrecy as long as the third-party work is retained and performed under the guidance of lawyers.

It is recommended that either the retention of consultancy services be done by the law firm in charge of the investigation or the law firm is present in the agreement entered by and between the consultant and the client.

Witness interviews

47 Does your country permit the interviewing of witnesses as part of an internal investigation?

Conducting interviews in the process of an internal investigation is not regulated by law in Brazil but is considered a good practice.

48 Can a company claim the attorney–client privilege over internal witness interviews or attorney reports?

Yes, internal witness interviews and attorneys' reports are considered information created during the practice of law and work-product. The content of both is also protected by a lawyer's confidentiality duty.

49 When conducting a witness interview of an employee in your country, what legal or ethical requirements or guidance must be adhered to? Are there different requirements when interviewing third parties?

There is no legal requirement to issue any type of formal warning to employees subject to internal investigations in Brazil. Companies have no obligation to disclose either the existence or the scope of an internal investigation to its employees in Brazil. However, such warnings can be issued depending on the circumstances.

Companies conducting internal investigations in the context of co-operation with law enforcement authorities are usually required to follow globally accepted best practices. In such cases, the agency in charge of the co-operation can ask for the issuance of litigation hold notices and *Upjohn* warnings during the internal investigation.

It is also important to assess the necessity of issuing an *Upjohn* warning, or equivalent, in cross-border cases, as evidence gathered in Brazil may be required in other jurisdictions that demand such warnings.

50 How is an internal interview typically conducted in your country? Are documents put to the witness? May or must employees in your country have their own legal representation at the interview?

Interviews are a key stage of any internal investigation. Interviewees are defined in each specific case and may include:

- the whistleblower;
- the subject of the investigation;
- direct witnesses;
- employees the reporter asked to be interviewed;
- employees the subject asked to be interviewed;
- former employees; and

- relevant third parties.

The first step in an effective witness interview is the preparation of the interviewers, which involves acknowledgement of the case, conducting public source research, preparation of an interview outline and consideration of a proper location for the interview.

The second step is to plan the notification of the interview to the employee. The interviewees must be notified to attend a meeting with the investigation team; if they are employees, the notification is usually sent by their immediate supervisor, by the human resources department or by the legal department of the company.

It is recommended that interviews be conducted in the interviewee's native language and the interviewer must necessarily be polite and professional. The interview can be recorded, if necessary, but this is neither usual nor a recognised best practice in Brazil. It is also controversial in Brazil whether recording the interview requires the interviewee's authorisation. The common practice has been to take notes during the interview and to prepare a summary of the main topics addressed in the interview or a minute of the meeting afterwards.

Depending on the case, documents can be presented to the interviewee to either support the questions or to confront any discrepancies in statements. Legal representation is not mandatory but can be requested by the interviewee depending on the situation.

Reporting to the authorities

51 Are there circumstances under which reporting misconduct to law enforcement authorities is mandatory in your country?

The reporting of misconduct to law enforcement authorities is not mandatory in Brazil as a rule. In some instances, there are reporting obligations applicable to certain entities or individuals, such as the mandatory reporting of suspicious operations set forth by the Anti-Money Laundering Act (Federal Law No. 9,613/1998).

The reporting of misconduct is required if an individual or a company wishes to enter into a leniency or plea agreement with Brazilian law enforcement authorities.

52 In what circumstances might you advise a company to self-report to law enforcement even if it has no legal obligation to do so? In what circumstances would that advice to self-report extend to countries beyond your country?

Self-reporting may entail a significant reduction of sanctions or even full immunity in the context of a leniency agreement or plea deal, depending on the matter and the law enforcement authority involved. For instance, if a company is the first to report antitrust irregularities to the Administrative Council for Economic Defence (CADE) through a leniency agreement, it may be granted full immunity regarding the reported misconduct if it provides details of the irregularities and names the other companies involved.

53 What are the practical steps needed to self-report to law enforcement in your country?

The first step in reporting findings of internal investigations to law enforcement and regulatory authorities is to map which agencies may have responsibility to investigate or impose sanctions in view of the facts revealed by the investigation. Brazil has several government agencies with overlapping responsibilities, so it is crucial to map those relevant to each case.

The second step is to assess whether the co-operation agreement applicable for the case requires the company to be the first to report the facts to the government. This is a requirement, for instance, for leniency agreements signed with CADE in the context of offences against the economic order. The Brazilian Clean Company Act (Federal Law No. 12,846/2013) has similar provisions, but law enforcement agencies have been easing this requirement.

The third step is to reach out to the competent authorities and start the negotiations. The first instrument to be signed, typically, is a confidentiality agreement between the parties. Entering into a confidentiality agreement with the authorities can (1) limit the authority's discretion to disclose information and materials, (2) secure non-waiver provisions, especially to third parties, and (3) address clawback provisions to mitigate inadvertent disclosures.

After the initial steps, the agreement is signed, approved by the competent government agency or court and executed by the parties.

It is possible to make a self-disclosure in Brazil without automatically waiving legal professional confidentiality, as there are no provisions of such a waiver in laws and official guidelines issued by law enforcement authorities. Therefore, preparation is a key

step for the disclosure of investigation findings to authorities.

Responding to the authorities

54 In practice, how does a company in your country respond to a notice or subpoena from a law enforcement authority? Is it possible to enter into dialogue with the authorities to address their concerns before or even after charges are brought? How?

The most common way to respond to a notice or a subpoena is to file a petition to the authority, presenting the required data or documentation, whether the company is investigated or only a third-party collaborator.

Yes, it is possible to initiate a dialogue with the authorities before the charges are lodged. Voluntarily notification to law enforcement has increased in criminal procedures in the past decade, since plea negotiations and agreements have become more frequent.

55 Are ongoing authority investigations subject to challenge before the courts?

Yes, defendants have the right to file writs of *habeas corpus* and *mandamus* to courts, challenging procedural misconduct during investigations or requesting dismissal of charges.

56 In the event that authorities in your country and one or more other countries issue separate notices or subpoenas regarding the same facts or allegations, how should the company approach this?

In a multi-jurisdictional context of hypothetical overlapping subpoenas, the company may seek to enter into a dialogue with Brazilian authorities and present the same documents and data to different authorities. Brazil has had a general data protection law since 2018, but a specific data protection regulation in criminal investigations is pending discussions in Congress.

57 If a notice or subpoena from the authorities in your country seeks production of material relating to a particular matter that crosses borders, must the company search for and produce material in other countries to satisfy the request? What are the difficulties in that regard?

If a Brazilian authority's subpoena demands production of evidence beyond the country's territorial limits, it is not mandatory for the company to comply with the request. However, in the spirit of collaboration and good faith, the company may spontaneously hand over the requested data to the law enforcement authority.

58 Does law enforcement in your country routinely share information or investigative materials with law enforcement in other countries? What framework is in place in your country for co-operation with foreign authorities?

Brazilian authorities are increasing the exchange of information with law enforcement abroad. To have legal admissibility in Brazilian courts, the evidence must be submitted through a mutual legal assistance procedure. The rules of international co-operation are provided in Ordinance No. 501/2012, issued by the Ministry of Justice.

59 Do law enforcement authorities in your country have any confidentiality obligations in relation to information received during an investigation or onward disclosure and use of that information by third parties?

The general rule is that official investigations and lawsuits are public and, therefore, not protected by any kind of secrecy. However, the judicial authority may determine secrecy of investigations and lawsuits.

60 How would you advise a company that has received a request from a law enforcement authority in your country seeking documents from another country, where production would violate the laws of that other country?

Our advice would be to respond to the request, informing the authorities of the impossibility of production considering the violation of laws in the country where the documents are situated.

61 Does your country have secrecy or blocking statutes? What related issues arise from compliance with a notice or subpoena?

Secrecy in Brazil usually derives from a legal duty (e.g., professional secrecy), a stipulation of parties (e.g., a non-disclosure

agreement) or a judicial discretionary ruling. If compliance with a subpoena or notice would result in violation of confidentiality, this circumstance must be disclosed to the requesting authority as a justification not to disclose the information.

62 What are the risks in voluntary production versus compelled production of material to authorities in your country? Is this material discoverable by third parties? Is there any confidentiality attached to productions to law enforcement in your country?

The general rule in Brazil is that lawsuits and investigations are not protected by confidentiality. Brazilian law does not differentiate between compelled production or voluntary production in terms of secrecy.

If the judicial authority ordered the sealing of records, third parties can access them only if they have a legitimate interest.

Prosecution and penalties

63 What types of penalties may companies or their directors, officers or employees face for misconduct in your country?

Individuals can face imprisonment, fines and restrictions of rights (such as the right to vote, the right to practise a profession or the right to leave the country, among other things).

Companies can face fines, debarment, suspension or a specific restraint, such as a prohibition from participating in government bids.

64 Where there is a risk of a corporate's suspension, debarment or other restrictions on continuing business in your country, what options or restrictions apply to a corporate wanting to settle in another country?

A corporation wanting to settle in another country should also consider disclosing the facts in Brazil and seeking co-operation with Brazilian law enforcement authorities. Although it is very unlikely to reach a global settlement, the corporation can negotiate and sign simultaneous agreements and distribute the sanctions and any financial settlements among all parties.

65 What do the authorities in your country take into account when fixing penalties?

The law provides that the authorities must apply penalties, taking into consideration the parameters set forth in the legislation, the gravity of the offence and personal aspects of the offender. The parameters set forth in the legislation vary among fields of law. Usually, there is a minimum and a maximum penalty for each offence and several circumstances that can increase and reduce the penalty.

Resolution and settlements short of trial

66 Are non-prosecution agreements or deferred prosecution agreements available in your jurisdiction for corporations?

Deferred prosecution agreements were introduced in Brazil by Federal Law No. 9,099/1995, which regulates the civil and criminal misdemeanour courts. Section 89 of that Law provides that for crimes for which the minimum imprisonment penalty is equal to or lower than one year, the Public Prosecutor must propose the suspension of the case for between two and four years if the defendant meets specific requirements. These agreements are applicable to a small number of crimes in Brazil, so other types of consensual resolutions in criminal matters have been established.

Plea bargains were only regulated in a structured way in 2013, with the enactment of the Criminal Organisations Act (Federal Law No. 12,850/2013). Although a settlement between defendants and law enforcement agencies (police or public prosecutors), a plea bargain is considered a way of gathering evidence about criminal activity by criminal organisations. A plea bargain can benefit the defendant with a judicial pardon, reduction of a term of imprisonment by up to two-thirds, or replacement with alternative penalties. The benefits apply only for those who have collaborated effectively and voluntarily with the criminal proceeding.

Federal Law No. 13,964 was passed in 2019 and introduced several improvements in both the Criminal Code and the Criminal Procedure Code. One of the main innovations was the institution of a non-prosecution agreement for many types of crimes. The agreement can be signed by public prosecutors and defendants for non-violent crimes and with minimum penalties of up to

four years' imprisonment. The agreement must be sufficient to deter and prevent crime. Law enforcement agencies have been entering into and enforcing such agreements ever since, but there remains much debate on the nature and the limits of the agreements.

The Brazilian Clean Company Act (Federal Law No. 12,846/2013) (BCCA) also established the possibility of a company entering into a leniency agreement with the highest authority relating to the entity against which the illicit act was committed. The Act sets forth requirements for the leniency agreement, including that the company must (1) be the first to report an interest in collaborating with the investigations, (2) have ceased its involvement with the irregularities, and (3) admit its participation in the wrongdoings and co-operate fully and permanently with the investigations and administrative proceedings.

67 Does your jurisdiction provide for reporting restrictions or anonymity for corporates that have entered into non-prosecution agreements or deferred prosecution agreements until the conclusion of criminal proceedings in relation to connected individuals to ensure fairness in those proceedings?

The BCCA establishes that the dissemination of information about leniency agreements must occur after their execution, provided that there is no damage to future investigations, maintaining consistency with the Federal Constitution and the Access to Information Act (Federal Law No. 12,527/2011).

The Federal Comptroller General and the Federal Attorney General have been disclosing documentation of leniency agreements signed with corporations involved in wrongdoing. The published agreements contain some classified information owing to the framing in legal hypotheses of secrecy, such as commercial and tax information about companies, personal data,

information and documents relating to investigations resulting from the signing of agreements that, if disclosed, may harm the leniency policy and its results, and information that can expose the strategies of negotiations to preserve the public interest in the agreements.

In April 2020, the Federal Public Prosecution Service (MPF) made available to citizens an electronic panel with information about all leniency and collaboration agreements signed with corporations and individuals since 2014. The aim of the tool is to optimise transparency and accountability to society about the agreements signed. The platform gathers information such as the amounts settled in the agreements, which have already been or will be returned to the public coffers; the MPF units responsible for the agreements; and links to the entire agreements that are not confidential.

Furthermore, all judgments not subject to secrecy can also be found on the websites of courts and regulatory agencies.

68 Prior to any settlement with a law enforcement authority in your country, what considerations should companies be aware of?

Companies should consider which benefits it will receive, such as reduction of penalties or even full immunity depending on the matter and authorities involved. It is also important to determine whether there is enough evidence to support the settlement and the extent of the company's involvement with the irregularities.

69 To what extent do law enforcement authorities in your country use external corporate compliance monitors as an enforcement tool?

Although many companies doing business in Brazil have faced monitoring proceedings as part of co-operation agreements signed with foreign law enforcement agencies, external and independent monitoring is not a common practice in agreements signed between companies and law enforcement agencies in Brazil.

The Brazilian law enforcement agencies in charge of an agreement signed with a company usually conduct the monitoring process on their own, based on the understanding that monitoring – whenever necessary as per an agreement – is a public duty that must be performed by the government.

The enactment in 2022 of Federal Decree No. 11,129/2022 introduces the possibility of the monitoring of a company's compliance programme as a requirement for a leniency agreement and the possibility for the monitoring to be conducted indirectly by the Federal Comptroller General, laying the groundwork for potential external corporate compliance monitors.

In some cases, the law enforcement agencies appoint an independent committee composed of experienced lawyers to support the monitoring process conducted by the government. In some of the leniency agreements entered into in the context of the *Lava Jato* operation, the Federal Comptroller General has requested that an external compliance monitor be retained for a certain period.

70 Are parallel private actions allowed? May private plaintiffs gain access to the authorities' files?

Private criminal actions are only allowed for a few types of crimes in Brazil, such as crimes against honour, in which the victim may proceed with a private criminal action against the offender. In these types of crimes, the prosecution office does not take part in the prosecution.

A private criminal action is also allowed if the prosecution office fails to initiate a public criminal action within the deadline established by the law (Criminal Procedure Code, section 29).

As regards civil actions, plaintiffs may request access to documents held by defendants that are relevant to the matter, according to requirements set forth in sections 396, 397 and 404 of the Civil Procedure Code.

Publicity and reputational issues

71 Outline the law in your country surrounding publicity of criminal cases at the investigatory stage and once a case is before a court.

The general rule is that official investigations and lawsuits are public, and therefore not protected by any kind of secrecy. However, the judicial authority may determine secrecy of investigations and lawsuits. Some precautionary measures, such as wiretapping and breach of banking and fiscal confidentiality, are usually conducted in secrecy, both to protect the personal information of the individuals involved and to enable the efficacy of the precautionary measure.

An authority that leaks the content of a confidential proceeding may be held responsible for the violation. However, it is

common for media vehicles to have access to information protected by secrecy and leak it in the public domain. Brazilian courts have ruled in the past that a journalist does not commit crimes in such cases, in view of the free press and the source protection laws.

72 What steps do you take to manage corporate communications in your country? Is it common for companies to use a public relations firm to manage a corporate crisis in your country?

Depending on the size of the company and the seriousness of the crisis, it is quite common for companies to retain external consultants to manage public relations matters or even to have an internal team responsible for these activities.

73 How is publicity managed when there are ongoing related proceedings?

The decision to seal the records of a proceeding is usually based on the circumstances of the investigations and the parties involved in that particular proceeding. The existence of other related procedures, such as a civil proceeding on a similar matter, is not usually considered by the judge when deciding about the publicity of criminal actions.

Duty to the market

74 Is disclosure to the market in circumstances where a settlement has been agreed but not yet made public mandatory?

The Securities and Exchange Commission determines that publicly traded companies have the duty to notify the market about a relevant fact whenever, among other situations, a fact of a political or administrative nature relating to the relevant business may significantly influence (1) the market price of the securities issued by the relevant corporation or backed by them, (2)

investors' decisions as to whether to buy, sell or preserve those securities, or (3) investors' decisions as to whether to exercise any rights inherent to titleholders of securities issued by the relevant corporation or backed by them. Therefore, listed companies usually disclose agreements signed with law enforcement authorities.

In other cases, it is not mandatory to disclose a settlement unless it has been determined in the agreement.

Environmental, social and corporate governance (ESG)

75 Does your country regulate ESG matters?

Regulation of ESG matters is according to sector and is provided by regulatory agencies such as the Brazilian Private Insurance Authority, the Brazilian National Monetary Council, the Brazilian Central Bank and the Brazilian Securities and Exchange Commission (CVM). The latter requires listed companies to disclose their indicators in respect of climate issues, in addition to their ESG risks.

76 Do you expect to see any key regulatory or legislative changes emerge in the next year or so designed to address ESG matters?

A new CVM instruction relating to ESG was approved in December 2021 and will come into force in 2023, introducing rules for the disclosure of ESG information about listed companies.

At the beginning of 2022, the Brazilian Financial and Capital Markets Association established criteria for identifying sustainable funds. The new framework requires the definition and dissemination of the strategy, methodology and data that support portfolio management, as well as due diligence and monitoring actions regarding the measurement of ESG objectives.

There are also several bills of law currently under discussion by the legislature that propose measures such as (1) guidelines for the creation of the Brazilian System for Greenhouse Gas Emissions Registration and Trading, (2) a reduction in the corporate income tax payable by companies that employ women victims of violence, (3) a reduction in the corporate income tax payable by companies that employ women who are head of a household, and (4) encouragement of the issuance of green debentures aimed at investment projects for sustainable development.

77 Has there been an increase in ESG-related litigation, investigations or enforcement activity in recent years in your country?

Although the changes made to the CVM's instruction that governs ESG rules applicable to listed companies is not yet in force, many companies are already including ESG data in their balance sheets.

There has been more public scrutiny of companies in respect of ESG topics, and cases have been reaching the courts. Recently, a company was ordered by the Federal Regional Court of the 4th Region to indemnify a black employee who was subjected to racist humiliation inflicted by a company supplier. The Court considered that the company was aware of the humiliation and had to be held liable for its neglect.

Anticipated developments

78 Do you expect to see any key regulatory or legislative changes emerge in the next year or so designed to address corporate misconduct?

The Brazilian Congress is currently debating the Bill of Law No. 4,391/2021, which has two aims: (1) to regulate the practice of lobbying by companies and individuals, defined by the proposal as the representation of private interests before public agents, and (2) to address a recommendation made by the Organisation for Economic Co-operation and Development, to which Brazil is currently pledging membership.

Footnotes

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