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Law enforcement and the hurdles to the Brazilian anticorruption leniency program

Introduction

In March 2017 the Brazilian federal government auctioned off concessions to operate four airports. All winners – in fact, all bidders – were foreign investors. Local construction conglomerates who had been historically very active in bids for large infrastructure projects were nowhere to be found this time.

All of those conglomerates are deeply implicated in the so-called "Operation Car Wash" - a probe on illicit payments, bribes and kickbacks in contracts with the federal government and with government-controlled oil & gas conglomerate Petrobras.

Without prejudice to business reasons each of those conglomerates may have had to skip this recent auction, "Operation Car Wash" is not in itself a reasonable explanation for their absence from the auction process – at least not when it comes to Odebrecht and a few other conglomerates who had already settled with the Office of the Federal Public Prosecutor ("*Ministério Público Federal*" – the MPF) several months ago in order to clean their slate and resume business with the federal government.

Despite their settlements, Odebrecht and those other conglomerates still run the risk of paying additional damages to, or even being prohibited from contracting with, that very federal government further down the road.

The core problem is that several public authorities are legally vested with the power (and the duty) to punish wrongdoers but are not legally required to coordinate their actions.

Law enforcement agents in corruption probes and their powers and duties

An intricate set of rules applies to the internal and external oversight, control, review and enforcement as regards management and execution of the federal budgets, federal procurement, and lawfulness of contracts between the federal government and the private sector[1].

Pursuant to the Constitution and to statute, no less than four different authorities have investigatory and punitive roles in connection with "Operation Car Wash" and similar probes, roughly as follows:

a) The MPF represents the public interest (the people) in court and in that capacity it may file civil and criminal lawsuits. The MPF is fully independent from the Executive branch.
b) The Federal Accountability Court ("*Tribunal de Contas da União*" – the TCU) is an administrative tribunal for oversight and audit of the contracts and budgets of the federal government and its owned and controlled businesses. It is also independent from the Executive branch as its members are appointed by Congress.
c) The Office of the Federal Attorney General ("*Advocacia-Geral da União*" – the AGU) represents the federal government in court and in that capacity it may file civil lawsuits. The Attorney General is a cabinet member.
d) The Office of the Federal Comptroller General ("*Ministério da Transparência, Fiscalização e Controladoria-Geral da União*" – the CGU) is the Ministry in charge of preventing and punishing corruption internally. The Comptroller General is also a cabinet member.

In summary, the way those authorities interpret their own powers and duties is that the MPF may press criminal charges, both the MPF and AGU may pursue civil claims, including collective lawsuits ("*ações civis públicas*"), malfeasance/improbity suits ("*ações*

[1] To name a few: articles 71 to 74, 129 and 131 of the Constitution; Law No. 7,347 dated 7.24.1985; Law No. 8,429 dated 6.2.1992; Law No. 8,443 dated 7.16.1992; Law No. 8,666 dated 6.21.1993; and Law No. 10,683 dated 5.28.2003.

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de improbidade administrativa") and suits for damages, and both the CGU and TCU may impose administrative penalties such as fines and a temporary ban on wrongdoers from bidding for and entering into contracts with the federal government.

This institutional design has proven deeply troubling when it comes to leniency agreements between the federal government and entities implicated in corruption probes.

Leniency agreements and their legal and political background

The landmark statute on corrupt acts and corporate compliance is Law No. 12,846 dated 8.1.2013 (the Anticorruption Act, or the Act). Pursuant to its article 1, the Act "addresses strict administrative and civil liability of legal entities for the practice of acts against the national or foreign public sector." The Anticorruption Act does not regulate criminal liability and does not apply to individuals.

Article 16, § 10, of the Act vests the CGU with standing to enter into anticorruption/compliance leniency agreements with wrongdoers at the federal level. However, the Act lacks any language to the effect that the CGU determination is binding upon the AGU, TCU and MPF so as to block any further prosecution, or even to the effect that they must be consulted and sign off on the relevant draft agreements[2].

In addition, several companies have reached out to the CGU to negotiate leniency agreements but according to media reports the MPF has recently asked that the CGU freeze the talks to prevent interference with ongoing criminal investigations. As a result, despite being the only authority expressly empowered to strike a deal with wrongdoers under the Anticorruption Act, the CGU is yet to finalize its first deal[3].

Meanwhile, the MPF itself has gained ground and settled a number of claims with entities and individuals investigated in "Operation Car Wash". It has named those settlements "leniency agreements", and the media has referred to them as such, despite the fact that article 16, § 10, of the Act has not expressly vested the MPF with standing to sign those agreements alongside the CGU[4].

The MPF has affirmed its jurisdiction to cut these deals based on interpretation of an array of different rules that allow the MPF to: (a) file civil collective lawsuits under the Act seeking the imposition of civil and administrative penalties upon wrongdoers (articles 19 to 21 of the Act); (b) settle any civil collective suits to which it is a claimant (article 5, § 6, of Law 7,347/1985); and (c) enter into plea bargains with individuals who collaborate with law enforcement officials in the context of certain high-profile criminal charges (article 1, § 5, of Law No. 9,613 dated 3.3.1998, articles 13 to 15 of Law No. 9,807 dated 7.13.1999, articles 4 to 7 of Law No. 12,850 dated 8.2.2013, article 26 of the 2000 United Nations Convention against Transnational Organized Crime – Palermo Convention, and article 37 of the 2003 United Nations Convention against Corruption – Merida Convention).

Each of the AGU and TCU, in turn, has stated that: (a) its jurisdiction has grounds on the Constitution, and as such it may not be disallowed by the initiatives of the MPF (or even the CGU) from enforcing the law against wrongdoers; (b) the amounts settled by the MPF are mere estimates whereas the government and Petrobras must be reimbursed in full for their losses; and (c) the MPF does not have the power to waive administrative penalties such as temporary ban from the federal procurement process.

[2] The legal framework for leniency agreements related to cartels and other competition-related wrongdoings is different, leaner and clearer under Law No. 12,529 dated 11.30.2011 (the Competition Act). The Competition Act has express language to the effect that (a) the Administrative Council for Economic Defense ("*Conselho Administrativo de Defesa Econômica*" – CADE) is the authority with the power to adjudicate on antitrust matters at the administrative level, (b) a legal entity may enter into a leniency agreement with the CADE, and (c) a deal with the CADE will statutorily halt any official criminal and administrative charges.

[3] In 2016, the CGU entered into a leniency agreement with SBM Offshore in the context of "Operation Car Wash". Parties accorded that the agreement would only be enforceable upon validation by the MPF. The MPF has not validated it on the grounds that more investigation must be carried out.

[4] MPF settlements must be homologated in court, so the Judiciary may theoretically also interfere with the content and scope of the bargains.

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The TCU took concrete action and issued Ruling ("*instrução normativa*") No. 74 dated 2.11.2015, pursuant to which it affirmed its own jurisdiction to review and green-light ex ante facto each step of the anticorruption leniency program under the Act, from the wrongdoer's initial offer to settle to the final report on the results of leniency following complete performance of the settlement. Pursuant to Ruling No. 74/2015, other authorities involved in the negotiations of a leniency agreement are required to timely forward all drafts, final agreements, reports and any supporting documentation to the TCU, subject to a fine[5].

This convoluted picture is in stark contrast with the United States anticorruption leniency program. The United States is an important jurisdiction for comparison because, as is widely commented, its law enforcement authorities have successfully shifted the paradigm for resolution of corruption probes from prosecution towards leniency and compliance over the course of the past fifteen years.

The Foreign Corrupt Practices Act (15 U.S.C. § 78dd-1 *et seq.* – the FCPA) is the foundational statute on prevention and punishment of corruption in the U.S., and is subject to dual enforcement: roughly speaking, the Securities and Exchange Commission (SEC) is responsible for civil enforcement against issuers of securities and their agents, while the Department of Justice (DOJ) is responsible for criminal enforcement in general and civil enforcement against wrongdoers other than issuers and their agents.

While the FCPA does not mandate that the DOJ and SEC work together and while they may adopt different strategies from time to time, the DOJ and SEC seek to coordinate their FCPA-related enforcement and settlement efforts whenever applicable. For instance, each has a dedicated FCPA unit and those units issued a joint guide to the FCPA in 2012 – which mitigates wrongdoers' uncertainty upon negotiating deferred-prosecution agreements with the DOJ and SEC[6].

In other words, three key characteristics of the anticorruption leniency program in the U.S. are (a) existence of two main law enforcement authorities, (b) fairly clear allocation of responsibilities between them, and (c) voluntary cooperation between them as a standard. None of those characteristics is present in Brazil.

Coordination attempts

The relevant Brazilian actors have realized that the country's dysfunctional legal framework is far from ideal and must be redesigned. Efforts have been made with lackluster results so far. Initially, former President Dilma Rousseff issued Executive Order ("*medida provisória*") No. 703 dated 12.18.2015 to amend the Anticorruption Act with a view to encourage involvement of the MPF, CGU and AGU in the negotiation and validation of leniency agreements.

The mechanism had some flaws (for instance, involvement of the MPF was not mandatory) and at any rate the Executive Order expired on 5.29.2016 as Congress failed to review it within 120 days, as required under article 62, §§ 3, 4 and 7, of the Constitution.

Then, the CGU and AGU issued Joint Directive ("*portaria interministerial*") No. 2,278 dated 12.15.2016, with guidelines for cooperation between those two authorities in the process of drafting and negotiating leniency agreements under the Act, as follows: (a) the CGU will inform the AGU about any new leniency agreement offer; (b) a joint workgroup will be formed with two or more CGU servants and one or more AGU attorneys; (c) the workgroup and the wrongdoer will sign a memorandum of understanding and then engage in negotiations of the terms and conditions of the leniency agreements; (d) the AGU members will appraise the pros and cons of the proposed terms and conditions vis-à-vis

[5] A political party filed a direct suit for unconstitutionality ("*ação direta de inconstitucionalidade*") to challenge Ruling No. 74/2015 before the Supreme Court shortly after its issuance (case records No. ADI 5,294). Both the MPF and AGU have filed briefs in support of the TCU rule. An opinion is yet to be entered by the Court.

[6] See "A resource guide to the U.S. Foreign Corrupt Practices Act", available on https://www.sec.gov/spotlight/fcpa/fcpa-resource-guide.pdf.

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the prospects of judicial action against the wrongdoer; (e) the workgroup will issue a report to the CGU and AGU; (f) both the Comptroller General and Attorney General will decide whether to sign the leniency agreement; and (g) the CGU will monitor the performance of the agreement.

Joint Directive No 2,278/2016 is currently in force, but no case has been settled thereunder yet, and it does not contemplate any participation of the MPF and TCU in the process.

More recently, news emerged that the TCU and MPF have been trying to coordinate their own efforts informally. Upon ruling on the fraudulent bidding process for construction of thermoelectric power station Angra 3 on 3.22.2017, the TCU (a) prohibited some construction conglomerates who have not settled with the MPF (like Queiroz Galvão and Techint) from bidding for and entering into contracts with the federal government for five years but (b) decided that it would not impose the same penalty upon Odebrecht, Camargo Corrêa (CC) and Andrade Gutierrez (AG) for the time being. The TCU took into consideration their previous leniency agreements with the MPF (and which reportedly did not involve Angra 3) as a sign that Odebrecht, CC and AG are willing to collaborate with law enforcement. It granted them additional 60 days to amend the existing leniency agreements in a way that settles the Angra 3 claim and provides for their collaboration with the TCU as well.

This coordination may prove ineffective eventually and still needs to be battle-tested. The CGU and AGU have been alienated from the process so their reaction to any TCU settlement is uncertain. In addition, the TCU could in principle reject any amendment to the MPF settlement after all and as result still prohibit any of Odebrecht, CC and AG from participating in the federal procurement process for five years regardless of the negotiation efforts with the other authorities.

Conclusion

Thanks to a very defective and illogical constitutional and legal structure, there is a hodgepodge of overlapping jurisdictions to take action in corruption probes and at the same time there is no rule to coordinate those actions.

Incentives continue to be misaligned, and each of the MPF, TCU, CGU and AGU is seemingly competing for the right to settle and to punish wrongdoers.

All authorities purport to defend and safeguard the public interest, but their conflicting actions may end up having the opposite result and cause large construction conglomerates – which employ thousands of workers and pay hundreds of millions of reais in taxes every year – to go bankrupt. The risk is real: all this uncertainty surrounding the Brazilian anticorruption leniency program already hurts their credit ratings and in practice prevents them from getting financings, and may soon also block their access to the federal procurement process, which is a vital source of revenue for them.

The underlying problem extends well beyond, though. It may discourage any entities investigated in any other probes from settling – be it with the MPF or the other relevant authorities. This will serve no one, and certainly not the public interest in the first place.

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