

Corporate criminal liability under Law of Environmental Crimes

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Introduction

According to Brazilian law, legal entities cannot be held criminally liable as a rule, except in the case of environmental crimes. In this sense, in terms of economic and corruption-related crimes, corporations cannot generally be held criminally liable for the conduct of their directors, officers or employees, as these individuals must respond personally for their acts, provided that they, by action or omission:

- personally engaged in illegal conduct;
- contributed to the commission of an illegal act by a third party; or
- failed to prevent the commission of an illegal act.

Law of Environmental Crimes

Historically, corporate criminal liability has not existed under Brazilian law. However, in 1998 Congress – inspired by the earlier French legal reform – passed the Law of Environmental Crimes.⁽¹⁾ Article 3 of the law provides for the sole provision regarding legal entities' liability:

Legal entities shall be administratively, civilly and criminally liable under the provisions of this law, provided that the infraction is committed by decision of the entity's legal or contractual representative or by its board and is aimed at its interest or benefit.

This clause intended to help to increase legal certainty by restricting the circumstances under which a company may be held criminally liable to those where there is evidence of wilful misconduct by its senior executives or board. Thus, a company should not be held liable for misconduct which takes place on its premises or refers to its activities or personnel.

Court practice

However, an examination of court practice shows that many federal and state prosecutors have failed to comply with these legal requirements and there have been cases in which the mere existence of an environmental crime linked to a business activity was seen as grounds to indict a company, either alone or alongside a potentially culpable individual. As the courts have toughened their views on business crimes over the past decade, this has become another field (in addition to the notable cases relating to Operation Carwash and other anti-corruption investigations) that prosecutors have found ways to bend the laws to create what they consider to be a more efficient enforcement policy.

The indictment of corporations under the Law of Environmental Crimes was facilitated by an August 2013 Supreme Court decision (RE 548.181), which allowed prosecutors to charge companies without

simultaneously charging the respective culpable individuals. However, what the justices could not foresee in that decision was the tendency of some prosecutorial agencies to disregard the legal criteria of imputations and ultimately distorted this strict liability against corporations – an activity which has by no means been accepted in Brazilian criminal law.

While the courts have accepted many of these improper indictments, there have been few criminal convictions of corporations to date. This suggests that these indictments are being used to encourage pre-trial settlements rather than to strictly apply the law.⁽²⁾ Further, the negligent use of these settlements may harm defendants, as pre-trial settlements cannot be used within five years of an agreement⁽³⁾ – something which should raise concern for companies that focus on risky activities.

Comment

This complex reality means that companies doing business in Brazil should not only be alert to what the law sets out in terms of corporate criminal liability, but also to:

- the mindset of local enforcement agents;
- the way in which federal and state prosecutors have acted before the courts; and
- the different judicial views in this regard.

Knowledge of their legal power – both on an advisory and litigation level – may enable companies to successfully challenge potential charges before the higher courts, reducing or preventing undue liabilities and adding significant value to their businesses.

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<!--[if !supportEndnotes]-->**Endnotes**<!--[endif]-->

(1) Federal Law 9,605/1998, which sets out environmental crimes between Articles 29 and 69-A, including:

- crimes against fauna;
- crimes against flora;
- pollution;
- crimes against the urban planning and cultural heritage; and
- crimes against government environmental management.

Both the company and its board members, auditors, managers and agents, as well as any in-house environment experts, can be indicted and convicted for an environmental crime. The penalties that can be imposed on legal entities under criminal law are:

- fines;
- total or partial prohibition from continuing with their activities;
- temporary interdiction of facilities, activities and construction works;
- a prohibition on entering into contracts with public entities or receiving subsidies, grants or donations for no more than 10 years; and
- community service.

Government entities, in turn, cannot be held criminally liable in whatever situation.

(2) Unfortunately, there are no available statistics on the subject.

(3) See Federal Law 9,099/1995, Article 76, § 2, Item II.

Corporations and law enforcement

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Introduction

Law enforcement

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Introduction

A recent article⁽¹⁾ examined the corporate criminal liability set out in the Law of Environmental Crimes (9,605/1998) and addressed its restrictive regulation and the expansive way in which prosecutors and courts have tended to apply it. This is the sole regard in which Brazil's legal system – which has long been focused on individuals – establishes a regime of corporate criminal liability.

However, that assertion does not mean that in the wake of criminal proceedings targeting individuals, companies may not be subject to certain precautionary measures undertaken by law enforcement authorities and regulated in different sections of the Code of Criminal Procedure. Indeed, some inflictive measures (eg, search and seizure of documents and freezing of assets, phone or other communications wiretapping and breach of bank and tax secrecy) can be ordered against a legal entity in the context of criminal investigations or lawsuits against individuals whose personal or (more especially) business relationships connect them to the company and suggest that it has benefited from – or been used as a means to commit – alleged misconduct.

Law enforcement

Depending on the sector to which a company belongs, it may also have to deal with requests and orders issued by chiefs of police, federal and state prosecutors and judges aimed at obtaining data relating to individuals under investigation. This can be a tricky issue in a country whose public servants have shown a considerable level of undue activism, and it has particularly affected technology companies (eg, internet and email providers and social networks), telecoms companies, power distribution companies and hotel chains, among others. Brazil's recent General Law of Data Protection (13,709/2018) is expected to play a crucial role in this field when it enters into force in early 2020.

Moreover, corporations subject to the Anti-money Laundering Act (9,613/1998) must put policies and procedures in place to prevent money laundering – which includes the identification and maintenance of accurate records of customers and of their transactions – and report suspicious transactions to the relevant regulators. The Anti-money Laundering Act applies primarily to:

- financial institutions;
- brokerage firms;
- stock markets;
- insurance companies;
- leasing companies;
- factoring companies;
- real estate agents; and
- traders of jewellery and other luxury goods.

Despite the fact that corporate criminal liability is limited in Brazil, companies can be held liable at the administrative and civil levels for criminal offences that also amount to violations of antitrust

and anti-corruption laws, not to mention other legal areas (eg, banking and securities regulations and environmental laws).

Comment

It should be noted that Brazilian law's limited establishment of corporate criminal liability does not mean that companies cannot be seriously affected by criminal law enforcement and subject to an extensive range of substantive and procedural matters. Companies' executive boards are not always prepared for such matters, which – especially when criminal investigations attract considerable media attention – can also raise serious and costly reputational issues. As such, it is now more important than ever that companies in all corporate sectors implement effective compliance programmes and – above all – seek permanent and highly skilled legal advice.

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Endnotes

(1) For further details please see "[Corporate criminal liability under Law of Environmental Crimes](#)".

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Corporate liability for economic crimes

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Introduction

Antitrust Law

Anti-corruption Law

Comment

Introduction

Following a recent review of the limited application of corporate criminal liability in Brazil (for further details please see "[Corporate criminal liability under Law of Environmental Crimes](#)") and the indirect legal consequences that companies may face following criminal investigations targeting individuals (for further details please see "[Corporations and law enforcement](#)"), it is necessary to examine some of the possible penalties under Brazilian law. Corporations may face harsh administrative and civil penalties for business crimes which, in Brazil, only individuals can be held liable for.

A variety of legal statutes in Brazil establish tough penalties for legal entities, which are comparable to the criminal penalties set out in jurisdictions where corporate criminal liability is more widely accepted. In the wake of Brazilian enforcement actions over the past decade, this article discusses the anti-corruption legal regime currently in effect.

Antitrust Law

The Antitrust Law (Law 2,529/11) subjects corporate defendants to fines for anti-competitive behaviour ranging from 0.1% to 20% of the gross revenues registered by the company, group or conglomerate in the fiscal year prior to the launch of the investigation into the line of business in which the infringement occurred. In addition to fines, corporate defendants may be subject to penalties, including (among others):

- a prohibition from participating in public procurement procedures and obtaining tax benefits and funds from public financial institutions for a certain time;
- compulsory licensing of IP rights; and
- publication of the decision in a major newspaper or on the company's website.

Anti-corruption Law

The Anti-corruption Law (also known as the Clean Company Act) sets out civil and administrative penalty regimes, many of which are as strict as corporate criminal liability regimes. Penalties under the Anti-corruption Law include:

- fines of up to 20% of the company's gross revenues (which should never be less than the advantage obtained through the unlawful act);
- public reprimand;
- the seizure of assets obtained from the illegal activity;
- a partial suspension of or prohibition from undertaking certain activities;
- the compulsory dissolution of the company; and
- a prohibition on receiving donations, grants, subsidies or funding from public entities and financial institutions.

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In addition, companies found guilty under the Anti-corruption Law may have to pay compensation for any damages arising from the illegal conduct. The Anti-corruption Law also establishes a controversial mechanism of strict liability, which means that authorities may impose penalties without proof of fault or wilful misconduct by the company; therefore, corrupt intent is not required.

Clearly following the successful introduction of the leniency programme (Articles 86 and 87 of Law 12,529/11) in the antitrust field, the Anti-corruption Law introduced⁽¹⁾ a cooperation mechanism which offers reduced penalties for companies that cooperate with enforcement authorities and meet other requirements.

Nevertheless, the enforcement authorities' lax rules and the persistent lack of coordination among different regulators and enforcers have, in recent years, left much room for legal uncertainty regarding this type of settlement, particularly with reference to the cooperation mechanism established by the Anti-corruption Law. In light of this, companies should seek expert advice from individuals with solid experience in handling complex and multi-disciplinary (and often multi-jurisdictional) matters.

In relation to anti-corruption enforcement, the international legal community is well aware that companies doing business in Brazil should be alert to the risks which may arise from foreign laws with extraterritorial reach. These include the US Foreign Corrupt Practices Act and the UK Bribery Act, which have both influenced other legal reforms in a number of countries and have clearly influenced the culture and – to the extent possible – the practices of Brazilian enforcers.

Comment

Although legal entities cannot be held criminally liable under Brazilian law (except in the case of environmental crimes), corporations can be seriously affected in many ways by the interactions between criminal law enforcement and administrative regulatory and disciplinary bodies. This is especially true where cross-border investigations in the anti-corruption sphere and foreign anti-corruption laws, policies and international treaties result in white collar crime regulations becoming increasingly denationalised and tougher than ever before.

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Endnotes

(1) Article 16 of the Anti-corruption Act.

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