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Brazil

WHITE COLLAR CRIME

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This country-specific Q&A provides an overview of white collar crime laws and regulations applicable in Brazil.

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BRAZIL

WHITE COLLAR CRIME



1. What are the key financial crime offences applicable to companies and their directors and officers? (E.g. Fraud, money laundering, false accounting, tax evasion, market abuse, corruption, sanctions.) Please explain the governing laws or regulations.

Among the crimes commonly imputed to business owners are crime offenses related to the non-payment of taxes due to the State, such as tax evasion (article 1 of Law No. 4729/65) and smuggling (article 334 of the Penal Code), which is the entry of goods into Brazil without the corresponding payment of taxes, as well as bribery (article 333 of the Penal Code). Recently, under new guidance from the Brazilian Supreme Court, declared but unpaid sales and services taxes can also constitute criminal practice. The phenomenon of globalization made international trade very frequent, with which there was also a considerable increase in the crime of illegal transfer of funds abroad (article 22 of Law No. 7492/86). Also significant are cases of money laundering (article 1 of Law No. 9613/98) and the involvement of officers in activities described as racketeering (Law No. 12850/13). Not infrequent, however, are the crimes described in Law No. 9279/96, such as unfair competition (article 195), infringement of patents (articles 183/186), industrial designs (articles 187/188) and trademarks (articles 189/190), as well as fraudulent obtaining of financing (article 19 of Law No. 7492/86). Finally, we can highlight the crimes against the environment described in Law No. 9605/98.

2. Can corporates be held criminally liable? If yes, how is this determined/attributed?

No. In Brazil, except for environmental crimes (Law No. 9605/98), legal entities, including companies, have no criminal liability. Thus, the Brazilian Criminal Law, except for environmental crimes, remains faithful to the principle of the Roman Law: *societas delinquere non potest*. Legal entities are civilly and administratively

liable only for the damage they cause and for non-compliance with current legislation.

3. What are the commonly prosecuted offences personally applicable to company directors and officers?

In addition to crimes against the environment, directors and officers of companies are directly liable for crimes against the tax system, since they have a legal obligation to verify the actual payment of taxes arising from business operations. In addition to these, all crimes mentioned in the question number 1 are subject to imputation to directors and officers of the companies, when there is actual participation of them.

4. Who are the lead prosecuting authorities which investigate and prosecute financial crime and what are their responsibilities?

There are three main authorities in the criminal prosecution of so-called white-collar crimes.

The Judicial Police, which at the federal level is exercised by the federal police, and at the state level is responsibility of the civil police. It has constitutional jurisdiction (article 144) to investigate criminal offenses, and may act upon their own initiative or when requested by other state agencies, or even by individuals who become aware of crime offenses. The police bodies are controlled by a chief of police, who as a police authority is free to not initiate a police investigation if he does not see the occurrence of a crime (except if there is a judicial or prosecutorial determination to proceed with the investigation), but he cannot fail to investigate and initiate the respective investigative procedure when there is a crime offense. It should be noted that police authorities do not have jurisdiction to dismiss police investigations either, whose competence is of the Prosecution Office.

The Prosecution Office, consisting of federal prosecutors in Federal Courts and by district attorneys

and state prosecutors in State Courts, holds the ownership of the criminal prosecution and, therefore, it is responsible for initiating criminal proceedings against the perpetrators of crimes, as well as proposing settlements to avoid lawsuits. The law grants Prosecutors the discretionary power in the formation of the *opinio delicti* and in the examination of the convenience of replacing the procedural uncertainty by a settlement with the suspect, all within the limits of legal rules.

The judge, who is the authority with jurisdiction to judge criminal proceedings and to ratify settlements made between the Prosecution Office and the suspect, may be a federal judge, when the crime offense is committed to the detriment of goods, services or interests of the Federal Government, or a state judge, in other cases. The choice of the judge to evaluate a certain crime offense results from legal provisions that deal with jurisdiction, with the general rule being that of the place where the crime was committed.

5. Which courts hear cases of financial crime? Are trials held by jury?

Although in the past the Jury Trial also evaluated crimes of an economic nature, and today there is no constitutional obstacle to the law once again giving broader jurisdiction to the Jury. Currently, in Brazil, the Jury Trial is reserved for the trial of intentional crimes against life. Thus, financial crimes are tried exclusively by court judges.

Except in cases of jurisdiction by prerogative of function, the trial of financial crimes is carried out by a trial, state or federal judge depending on the legal interested affected by the crime. The appeal filed against the decision will be heard by the Court of Appeals (if at state level) or the Federal Regional Appellate Court (if at federal level). After the appellate decision, a special appeal to the Superior Court of Justice and/or an extraordinary appeal to the Brazilian Supreme Court will exceptionally be possible, if the judgment is in disagreement with federal laws or the Constitution, respectively.

6. How do the authorities initiate an investigation? (E.g. Are raids common, are there compulsory document production or evidence taking powers?)

Crimes involving business activities are, for the most part, of such importance that the corresponding investigations occur by criminal prosecution, meaning

that the State can curb it on its own initiative, regardless of the victim's will. The information of a crime offense of this nature suffices for the police authority to initiate the investigation it deems capable of explaining the crime and identifying its perpetrators. Only for those investigations in which there is a reservation of jurisdiction, such as the violation of domicile, telephone interception/surveillance and pre-trial detention, the police authority needs prior judicial authorization, to be requested by such police authority.

7. What powers do the authorities have to conduct interviews?

Article 6 of the Code of Criminal Procedure gives the chief of police the power to "collect all the evidence" that serves to explain the facts, including the hearing of the victim, the suspect and witnesses. The police authority may also-when necessary to listen to the victim and witnesses-compel the attendance of those who refuse to appear. However, as precedent of the Brazilian Supreme Court, the suspect cannot be compelled to attend.

8. What rights do interviewees have regarding the interview process? (E.g. Is there a right to be represented by a lawyer at an interview? Is there an absolute or qualified right to silence? Is there a right to pre-interview disclosure? Are interviews recorded or transcribed?)

In the Brazilian legal system, the silence of the suspect or the defendant has the nature of a right (article 5, item LXIII of the Federal Constitution and article 186 of the Code of Criminal Procedure), which is why its exercise must be respected, and it does not cause them any harm. The interview of the defendant will be mandatorily carried out (article 185 of the Code of Criminal Procedure) in the presence of an attorney-lawyer or public defender-under penalty of nullity. In the police investigation, which has an inquisitive nature, the presence of the attorney (which is not mandatory) depends on the will of the suspect. If he wishes to be interviewed in the presence of an attorney, he cannot be denied that right, even there.

On the contrary, the victim and the witness have no right to silence, but are obliged to say everything they know under penalty of committing the crime of perjury (article 342 of the Penal Code). And, although they are always heard in the presence of the defendant's attorney, they will only testify in the presence of their respective lawyers if they so wish.

All these hearings are always recorded, both in the police phase of the criminal prosecution and in court. The form of recording the content of the testimonies varies according to the location, and can be written or recorded (as a rule, with recording by the audiovisual system).

9. Do some or all the laws or regulations governing financial crime have extraterritorial effect so as to catch conduct of nationals or companies operating overseas?

Article 7, item I, subitem a, of the Penal Code subjects to Brazilian law crimes committed abroad and that attack “against the assets or public faith of the Federal Government, the Federal District, States, Territories, Municipalities, state-owned companies, state-controlled companies, agencies or a foundations created by the Government”. Thus, although the financial crime reaches one of these legal entities governed by public law, there may be criminal liability in Brazil for crimes committed abroad. The Brazilian law also applies to all crime offences committed abroad by a Brazilian citizen and to the investigation of crimes against which Brazil has committed to repress under treaties or conventions. In addition, in cases of illegal transfer of funds abroad, the maintenance of assets abroad not declared to Brazilian authorities constitutes a crime offense.

10. Do the authorities commonly cooperate with foreign authorities? If so, under what arrangements?

Economic crimes and organized crime are very sensitive to the phenomenon of globalization, which is why government efforts to prevent them effectively need to be combined. Aware of such reality, Brazilian authorities have been making efforts to cooperate with and obtain assistance from foreign authorities both at police and prosecution levels. Cooperation commonly takes place by exchanging information and seizing assets that may be the product or profit of crime, or even assets that serve to repair the damage caused by the crime. There is also—although less frequently—the enforcement of provisional remedies such as imprisonment, which aim to ensure that the perpetrator of the crime be prosecuted in the country of the crime.

11. What are the rules regarding legal professional privilege? Does it protect

communications from being produced/seized by financial crime authorities?

Article 7, item III of Law No. 8906/94 assures lawyers the right to “communicate with their clients, personally and privately”, while the respective item II guarantees them “the inviolability of their office or workplace, as well as their work instruments, written, electronic, telephone and telematics correspondence, provided that they relate to the practice of law”.

12. What rights do companies and individuals have in relation to privacy or data protection in the context of a financial crime investigation?

The Federal Constitution, in item XII of article 5, ensures the confidentiality of data communications, which can only be violated with a court order. In turn, the data stored are protected and regulated in Law No. 13709/18, which even makes restrictions on the processing of data by the controller itself, differentiating merely personal data from sensitive personal data. However, regardless of the crime offense investigated, access to all stored data can be legally authorized.

13. Is there a doctrine of successor criminal liability? For instance in mergers and acquisitions?

No. As explained in the answer to question number 2, in Brazil there is no criminal liability of a legal entity for financial crimes. Consequently, the successor company, whether as a result of a merger or acquisition, does not inherit any criminal liability, which, incidentally, no longer existed for the acquired or merged company. Moreover, criminal liability is not transmitted even between individuals, as well as the penalty does not exceed the convicted person (article 5, item XLV of the Federal Constitution).

14. What factors must prosecuting authorities consider when deciding whether to charge?

The Prosecutor (authority with power to initiate criminal proceedings) will bring charges (complaint that performs the accusation) if there is evidence of a criminal fact and probable cause. Once their *opinio delicti* is formed, the state prosecutor or the federal prosecutor (in charge of criminal proceedings in the State and the Federation,

respectively) may choose Bargaining Justice and propose a plea bargain (article 76 of Law No. 9099/95) if the crime offense is a misdemeanor, or a non-prosecution agreement (article 28-A of the Code of Criminal Procedure) if the minimum penalty for the crime is less than 4 years.

15. What is the evidential standard required to secure conviction?

In terms of evaluation of the evidence, Brazil adopts the system of rational persuasion, by which the judge, although he must decide on the basis of the evidence collected, is free to evaluate it. Therefore, and because the judge decides according to social values, not based on personal concepts, the conviction assumes that the evidentiary standard for the conviction is the certainty that the crime was committed by the defendant, according to a collective concept.

16. Is there a statute of limitations for criminal matters? If so, are there any exceptions?

Although there is no systematization of obstacles to the investigation and punishment of financial crimes, the legislation establishes hypotheses that avoid criminal conviction, such as the statute of limitations, which is based on the Latin principle of *dormientibus non succurrit jus*, the payment of the tax evaded, the pardon, etc.

17. Are there any mechanisms commonly used to resolve financial crime issues falling short of a prosecution? (E.g. Deferred prosecution agreements, non-prosecution agreements, civil recovery orders, etc.) If yes, what factors are relevant and what approvals are required by the court?

Yes. The legal institute, initially only provided for violations committed by adolescents, began to be applied to suspects with the enactment of Law No. 9099/95, which provided for the "plea bargain" for offenses of maximum penalty not exceeding 2 years (article 76). For the most serious offenses, with a minimum penalty of less than 4 years, there is the "non-prosecution agreement", which also avoids criminal proceedings and prevents the enforcement of imprisonment (article 28-A of the Code of Criminal Procedure). There is also, for an even broader spectrum

of crimes, the "deferred prosecution agreement" system, from Law No. 12850/13, whereby the penalty of "imprisonment" can be replaced by one restricting rights, reduced by up to 2/3, or even forgiven, in exchange for information allowing the identification of codefendants, the redress of damage, the dismantling of a criminal organization, the prevention of other crime offenses or the release of a victim (articles 3-A to 7).

18. Is there a mechanism for plea bargaining?

Law No. 12850/13 establishes the form of deferred prosecution agreements, starting with the proposal for an agreement by the cooperating defendant (who must be supported by an attorney), the acceptance of the agreement by the legal authority (the Prosecution Office or the police authority, with statements of the former in the latter case), the execution of a non-disclosure agreement by both parties and the forwarding of the agreement for court ratification.

19. Is there any requirement or benefit to a corporate for voluntary disclosure to a prosecuting authority? Is there any guidance?

Yes. Pursuant to Laws No. 12529/11 and No. 12846/13, the company that first volunteers to cooperate with the Government and completely ceases its involvement in the violation of the economic, competitive or bidding system, as well as fully cooperates with the investigations, identifying the others involved and indicating proof of the existence of the criminal fact, may enter into a leniency agreement with Cade (Administrative Council for Economic Defense), the Office of the Federal Controller General - CGU, within the scope of the federal Executive Branch, or with the maximum authority of the public body or entity, and benefit itself and the other legal entities of the business group, with the dismissal of the punitive action, or with the reduction of the penalty by up to 2/3, as long as it admits the criminal practice before its participation is demonstrated and attends, at its own expense, to the procedural acts for which it is requested (Law No. 12529/11 and Law No. 12846/13). It must be pointed out that the leniency agreement does not exempt the contracting party from fully redressing the damage.

20. What rules or guidelines determine sentencing? Are there any leniency or discount policies? If so, how are these

applied?

The decision aims at the application of the law in the reality of life, which is why the judge must strictly comply with the rules in force and the evidence existing in the records. It cannot reflect personal or political concepts of its judge.

Within the scope of administrative and tax law, there are advantages established, including those of an economic nature, to be granted to the beneficiary of a financial offense that repents and is willing to redress the damage. The quantification of this financial benefit depends on the peculiarities of the specific case, including the identification of the public entity affected, which issues its own rules, or the entity governed by private law that was harmed.

In the field of Criminal Law, the penalty to be imposed on the individual offender is expressly provided for by law, and is calculated according to the nature of the offense, the circumstances of the crime and the nature of the convicted person, pursuant to article 59 of the Penal Code. However, the law grants some discretion to judges, within the parameters specified therein, in order to allow the adequacy of the judicial response to the circumstances of the specific case, and to ensure more humanity to the trial. Thus, it is up to the judge to evaluate both the conduct that precedes the unlawful practice, as well as the reasons of the crime and the defendant's background, and also the behavior after the crime, such as the confession or the search for the mitigation of the consequences of the crime, in the establishment of the State response to the perpetrator of the offense.

21. In relation to corporate liability, how are compliance procedures evaluated by the financial crime authorities and how can businesses best protect themselves?

Corporate liability does not occur in the sphere of the Economic Criminal Law, either because a legal entity is not the perpetrator of a crime in the Brazilian legal system (with the exception of environmental crimes), or because there is no criminal strict liability among us.

However, compliance procedures are taken into account by authorities handling corruption crimes, mitigating the fines of companies that have directors or officers accused of perpetrating crimes of this nature.

22. What penalties do the courts typically

impose on individuals and corporates in relation to the key offences listed at Q1?

Legal entities are usually punished by Brazilian courts with fines, obligation to redress the damage caused, compensatory damages, restrictions on free trade and even the compulsory termination of their operations.

As for individual business owners, the law provides for the penalty of imprisonment for the crimes of tax evasion (article 1 of Law No. 4729/65), smuggling (article 334 of the Penal Code), bribe-paying (article 333 of the Penal Code), illegal transfer of funds abroad (article 22 of Law No. 7492/86), money laundering (article 1 of Law No. 9613/98), racketeering (Law No. 12850/13), illegal competition (article 195 of Law No. 9279/96), infringement of patents (articles 183/186 of Law No. 9279/96), industrial designs (articles 187/188 of Law No. 9279/96), or trademarks (articles 189/190 of Law No. 9279/96), fraudulent obtaining of financing (article 19 of Law No. 7492/86), among others. And not infrequently Brazilian Courts impose a long imprisonment on the perpetrator of a financial crime, either because some of such offenses are repeatedly perpetrated, extending the criminal practice, or by the sum of the penalties of different crimes committed in the same context. In the event of misdemeanors, depending on the personal circumstances of the convicted person, imprisonment may be replaced by a penalty restricting rights, such as the provision of services to the community or payment of a fine.

23. What rights of appeal are there?

The Pact of San José, Costa Rica (American Convention on Human Rights), to which Brazil is a signatory, provides for the need for a double degree of jurisdiction, which is why the judgment is always appealable. Judgments can be appealed and the judgment of the latter in the second degree of jurisdiction (by the Court of Appeals, if it is a state cause, or the Federal Regional Appellate Court, if it is a federal cause) can have a special appeal, if there is a violation of federal legislation, or an extraordinary appeal, if the offense is to the Federal Constitution). Further, it should also be pointed out that it is possible to re-examine interlocutory decisions, as a general rule by the "appeal in the strict sense", "appeal" and "partial correction", and that there are autonomous actions of challenge, such as the writ of mandamus, criminal review and habeas corpus.

24. How active are the authorities in tackling financial crime?

Today the authorities involved in tackling financial crime have proven to be much more active than in recent previous years. And this is not only because the degree of awareness of the evils that offenses of this nature cause has increased, but also because the experience gained in previous fights against economic crime has strengthened the links between police officers or prosecutors and bodies capable of providing means for the precise explanation of the facts, such as Coaf, the Central Bank, etc.

25. In the last 5 years, have you seen any trends or focus on particular types of offences, sectors and/or industries?

In recent years, especially after the so-called "Operation Car Wash", there has been an increase in police and intelligence activities in the Brazilian state aimed at curbing money laundering and corruption in public-private contracts. At the same time, in the financial segment, the COVID-19 pandemic increased e-commerce and the use of payment platforms for Fintechs and Digital Banks, which facilitated the commission of crimes via the Internet, alarmingly increasing the rates of fraud against companies and money laundering resulting from this type of offenses. However, for the latter type of crime, Brazilian police authorities are still structuring themselves to create specialized police stations and to establish new parameters for the investigation of digital crimes, both in cases of fraud and financial crimes per se.

26. Have there been any landmark or notable cases, investigations or developments in the past year?

Last year, the Brazilian Supreme Court, by majority, reinforced the understanding that the definitive constitution of the tax credit is essential for the opening of an inquiry to investigate the crime of tax evasion, reinforcing the content of Legal Precedent 24, which sets forth that "there is no consummated crime against the tax system, as provided for in article 1, items I to IV of Law 8137, of December 27, 1990, before the definitive assessment of the tax".

27. Are there any planned developments to the legal, regulatory and/or enforcement framework?

There is no expectation, in the short term, for significant changes in the legislation related to financial crimes, as well as there is no signs of State actions aimed at improving the fight against such criminal offenses. Therefore, there is a great effort by the private sector to improve its investigation techniques and registration of evidence that can be decisive in the trials of the causes already filed and reduce the possibilities of recurrence.

28. Are there any gaps or areas for improvement in the financial crime legal framework?

Society is constantly evolving and, consequently, economic relations undergo daily changes in a capitalist country, especially in view of the use of information technology in business relations. New systems of payment, bank transfers, formalization and registration of covenants require legislative improvements, but also impose enhancements in compliance procedures, new procedures on security systems and constant technical consultations in order to prevent unnecessary, undesired risks.

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