

COMPLIANCE INVESTIGATION IN BRAZIL: 2020 | YEAR-IN-REVIEW

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COMPLIANCE & INVESTIGATION IN BRAZIL: 2020 - YEAR-IN-REVIEW

1. INTRODUCTION

The year 2020 has been marked by a once in a century health crisis. The COVID-19 pandemic has claimed millions of lives and impacted people and businesses all over the world, imposing a quick adaptation to a now called “new normal”. Social distancing policies, interruptions to international travel and other measures caused world-wide disruption to business in several industries.

Compliance departments have been particularly challenged during 2020. With profound changes happening seemingly overnight and business continuity at risk, compliance officers had to navigate an environment of heightened risk and often growing pressure for more flexibility.

At the government level, several countries around the world needed to procure pandemic-related goods with urgency and in high volumes, specially health care supplies sometimes offered by limited number of vendors. In addition, allegations of corruption in connection with the pandemic were the target of investigations in many jurisdictions, including Brazil, where authorities have started probes into the conduct of eight state governors most of which based on Federal Law No. 13,979/2020 – the “Covid Law”, a law enacted during the pandemic to make public procurement more flexible.

The once mighty Operation Car Wash, ongoing in the country since 2014, has faced strong challenges both politically and in courts. Brazil’s Prosecutor-General, Augusto Aras, has on several occasions declared his skepticism with the Operation and has been challenging some of its influence and privileges within the Federal Prosecution Office.

At the same time, a Technical Cooperation Agreement, coordinated by Brazil’s Supreme Court, aiming at enhancing coordination among authorities when negotiating leniency agreements, avoiding conflicts, and facilitating the possibility of a single solution between companies and federal authorities was signed by Brazilian authorities active in anti-corruption enforcement (except for the Federal Prosecution Office).

At the regional level, an agreement to improve cooperation in fighting cross-border organized crime signed between Brazil and its Mercosur partners went into effect.

Despite the immense challenges of the year, 2020 has shown that companies continue to benefit from a strong, well-structured compliance area, and that anti-corruption enforcement continues to be a focus of authorities in Brazil.

Through this article, TozziniFreire’s Compliance team expects to provide useful reading, with brief and essential information.

2. 2020 IN A GLANCE

2.1. 2020 in Numbers

Despite the decreasing number and amounts in the context of leniency agreements signed by Brazilian authorities, 2020 remained an important year in terms of combating corruption. The Federal Prosecution Office (“MPF”), the Office of the Comptroller General (“CGU”) and the Brazilian Administrative Council for Economic Defense (“CADE”), signed at least **eight** leniency agreements totaling approximately **BRL 580 million** in financial penalties with companies from different business sectors, based on publicly available official sources.

If the number of leniency agreements dropped, the numbers and amounts related to collaboration agreements signed by the MPF continued to rise, with **21** new agreements signed with individuals, mostly related to the infrastructure sector. The amount of the collaboration agreements involved almost **BRL 63 million**, only lower than 2017.

In this sense, Operation Car Wash continued to be the main front in the fight against corruption in Brazil. In 2020 alone, Operation Car Wash was responsible for launching **15** new operations, with **225** search and seizure procedures, **61** preventive and/or temporary detentions, in addition to **127** individuals being formally charged and **6** new administrative improbity lawsuits being filed.

Furthermore, there was an alarming number of police investigations in Brazil regarding potential irregularities during public bidding for products and services directly related to the fight against the pandemic of the new Coronavirus (“COVID-19”): based on publicly available information, there were **76** police operations related to COVID-19, which will be further analyzed in section 3.

2.2. Enforcement Trends

Healthcare Sector

During the year, most of the authorities’ attention was focused on potential irregularities in the public bidding for products and services related to the fight against the pandemic.

Number of leniency agreements signed by the MPF, CGU and CADE

2018	2019	2020
18	23	8

Number of collaboration agreements signed by MPF

2018	2019	2020
14	28	21

Number of Operation Car Wash related operations

2018	2019	2020
21	23	15

Number of Operation Car Wash preventive/temporary detentions

2018	2019	2020
228	84	21

Total amount of fines applied by the MPF and CGU in leniency agreements*

2018	2019	2020
5.8	9.6	0.5

Total amount of fines applied by the MPF in collaboration agreements**

2018	2019	2020
6	14	63

Number of Operation Car Wash search and seizure procedures

2018	2019	2020
538	341	225

Number of Operation Car Wash individuals’ charges

2018	2019	2020
262	341	127

* Numbers in BRL billion

**Numbers in BRL million

Due to the emergence of COVID-19, there was a need to declare a state of public calamity and to loosen up formalities of public bidding rules. This flexibilization led to the purchase of emergency supplies without a regular bidding process, increasing the risk of fraud, corruption, overpricing and misuse of public resources.

By late April 2020, the Federal Police started their first pandemic-related enforcement action.¹ It investigated the overpriced acquisition of schoolbooks with money from the National Health Fund, by a city in the Northeast Region of Brazil. By May, the CGU had already received over 400 complaints related to the pandemic.² As of December, the Federal Police had launched 61 investigations of irregularities in public contracts, bid rigging, overpricing and fraud, in the context of the pandemic. The investigated contracts amounted to almost BRL 2 billion.³

CADE also acted in the context of the fight against the pandemic. On March 18, 2020, CADE opened an investigation to ascertain whether companies in the medical-pharmaceutical sector were arbitrarily increasing the prices of their products in view of the high demand for their products due to the pandemic.

The authorities' efforts have also focused on producing guidelines for assisting public entities in acquisitions made in the context of the pandemic. For example, in May 2020, the Federal Court of Accounts ("TCU") and the NGO Transparency International launched guidelines on the disclosure of data related to contracts carried out without a regular public tender.

In July 2020, CGU launched a panel aiming at monitoring expenses incurred by public entities in relation to COVID-19. The panel does not point out irregularities or fraudulent contracts, instead it provides data and

1 Source: <https://politica.estadao.com.br/blogs/fausto-macedo/pf-investiga-superfaturamento-de-livros-comprados-sem-licitacao-sob-o-pretexo-do-coronavirus/>

2 <https://valor.globo.com/politica/noticia/2020/05/12/cgu-ja-apura-446-denuncias-relacionadas-a-covid-19.ghtml>

3 Source: <https://www.cnnbrasil.com.br/nacional/2020/12/17/quase-r-2-bilhoes-relembre-operacoes-da-pf-contra-desvios-na-pandemia>

price reference for governmental acquisitions during the pandemic, assisting them in obtaining the best purchase.

As the fight against the pandemic continues in 2021, the purchase of healthcare products by public entities and hospitals is expected to remain on the authorities' radar.

Infrastructure Sector

Operation Car Wash and related investigations have unveiled millions of Brazilian Reals in bribe payments, being the largest corruption scandal in the country's history. Operation Car Wash was launched in March 2014 in Curitiba (state of Paraná) and currently has developments in three other states (Rio de Janeiro, São Paulo and Distrito Federal), in addition to inquiries and legal actions being pursued before the Superior Court of Justice ("STJ")⁴ and the Federal Supreme Court ("STF").⁵

With a strong initial focus on the infrastructure sector, Operation Car Wash had under its scrutiny irregularities involving the hiring of contractors by state-owned companies. These developments in the infrastructure sector continued to have repercussions in 2020. The Federal Police carried out operations focusing on potential irregularities in governmental contracts of infrastructure and the MPF also, with the same focus, signed leniency agreements with legal entities and plea bargain with individuals from this sector.

In March, August and December 2020, Operation "Rota BR-090" launched by the Federal Police in cooperation with the CGU and the MPF was responsible for several arrest warrants and search and seizure warrants for individuals allegedly involved in a fraud of more than BRL 500 million in contracts between construction companies and the National Department of Transport Infrastructure ("DNIT") for road works in Minas Gerais.

In June 2020, Operation "Fiat Lux" launched by the Federal Police and the MPF served 12

4 STJ is the highest court for non-constitutional matters in Brazil.

5 STF is the highest court for constitutional matters in Brazil.

arrest warrants and 18 search and seizure warrants for a former federal deputy, a former Minister of Mines and Energy, businessmen and former executives from Company *Eletronuclear*, as well as other individuals allegedly involved in embezzlement of funds and money laundering in contracts with it.

As a result of the leniency agreements and the collaboration agreements signed by the MPF with legal entities and individuals, new fronts of investigation are already in progress and the infrastructure sector is expected to remain on the authorities' radar.

On October 21, Operation "India" launched by the Federal Police executed 19 search and seizure warrants in five states (São Paulo, Rio de Janeiro, Bahia, Paraná and Rio Grande do Norte) in connection with individuals allegedly involved in fraud in public tenders in the areas of lounge and food kiosks at the airports of Congonhas (São Paulo) and Santos Dumont (Rio de Janeiro) during the years of 2016 and 2018.

On October 30, 2020, the MPF formally charged four former directors and two former employees of Companhia Docas do Estado de São Paulo ("Codesp") for the alleged practice of embezzlement and for allegedly allowing illegal changes in contracts signed between 2013 and 2016 at the Port of Santos, in the State of São Paulo.

The Ministry of Infrastructure announced in July 2020, the "*Selo Infra + Integridade*" (Integrity and Infrastructure Stamp),⁶ an award for companies with infrastructure-related contracts with the Public Administration within the past 5 years that knowingly developed best practices in corporate governance, compliance, integrity, social responsibility, fraud and corruption prevention and environmental sustainability. According to the Ministry, the award aims not only to inspire and raise awareness to such matters, but also to assist in fight against crimes such as those mentioned above.

6 Source: <https://www.gov.br/infraestrutura/pt-br/acao-a-informacao/conteudo-radar-anticorrupcao/selo-integridade>

Basic Sanitation Sector

On July 15, 2020, President Jair Bolsonaro approved Law No. 14,026, known as the New Legal Framework for Basic Sanitation, which aims to universalize basic sanitation in Brazil, providing for sewage collection for 90% of the population and for the supply of potable water for 99% of the population by the end of 2033. This new law makes it mandatory to open a public tender in which state-owned and private legal entities may participate.

The new regulation was welcomed as a great opportunity to attract private investments to the basic sanitation sector, and together with the potential increase in public tenders, a close oversight by enforcement authorities is expected due to irregularities, fraud and corruption risks.

3. INVESTIGATIONS AND ENFORCEMENT ACTIONS

In 2020, Operation Car Wash managed to maintain its impact and significance as the main ongoing investigation in Brazil, but not without its own share of turmoil. In the past, the mighty Operation seemed so powerful and independent its jurisdiction of origin became known as "The Republic of Curitiba". Lately, however, the enforcement task force has been facing serious challenges and controversies and, as informed by Prosecutor-General Augusto Aras in December, the task forces still ongoing in Curitiba and Rio de Janeiro should be ended in 2021.⁷

In April, former Car Wash judge Sergio Moro, who joined Bolsonaro's administration in 2019 as the Minister of Justice, stepped down⁸ in the midst of controversies involving the President and the management of the Federal Police.

7 Source: <https://noticias.uol.com.br/politica/ultimas-noticias/2020/12/12/pgpr-substituir-forcas-tarefas-da-lava-jato-por-gaeco.htm>

8 Source: <https://www.bbc.com/news/world-latin-america-52415863>

In June, Prosecutor-General Augusto Aras, appointed by President Bolsonaro in late 2019, sent a deputy-prosecutor to Curitiba to access some of the data gathered by Operation Car Wash's task force.⁹ The database includes sensitive confidential information, including data of 38 thousand individuals.¹⁰ Aras declared that the data was accessed to investigate if any irregularities were committed by the task force during the Operation.¹¹

The task force publicly opposed to the access of the database and as a consequence of the dispute, prosecutors working under Aras in Brasília resigned from their positions.¹²

In September 2020, the chief prosecutor of the Curitiba task force, Deltan Dallagnol, resigned from his position for personal reasons.¹³ In that same month, as detailed below, the whole São Paulo task force team also resigned.

Despite all the turbulence, Aras announced that the Rio de Janeiro task force was extended until January 2021 and the Curitiba task force, until October 2021.^{14,15}

In December, news regarding the lack of formal requests for international cooperation in six criminal lawsuits involving former President Luis Inácio Lula da Silva were published. Previously, in July, it was revealed that Deltan Dallagnol, then head of the Curitiba task force, had devised an informal partnership with the FBI in the United States of America, to whom the task

9 Source: <https://www.correiobraziliense.com.br/politica/2020/12/4895012-aras-quer-dados-da-lava-jato-compartilhados-com-demais-membros-do-mpf.html> and <https://jovempan.com.br/noticias/politica/fim-da-lava-jato-cinco-fatos-que-mostram-a-perda-de-forca-da-operacao-que-levou-lula-a-prisao.html>

10 Source: <https://www.conjur.com.br/2020-jul-29/lava-jato-curitiba-dados-38-mil-pessoas-aras>

11 Source: <https://valor.globo.com/politica/noticia/2020/11/19/forca-tarefa-da-lava-jato-tera-que-entregar-dados.ghtml>

12 Source: <https://www1.folha.uol.com.br/poder/2020/06/corregedoria-vai-investigar-acao-de-aliada-de-aras-na-lava-jato.shtml>

13 Source: <https://www.reuters.com/article/idUSKBN25S61Q>

14 Source: <https://jovempan.com.br/noticias/politica/fim-da-lava-jato-cinco-fatos-que-mostram-a-perda-de-forca-da-operacao-que-levou-lula-a-prisao.html>

15 Although the Curitiba task force was extended until October 2021, on February 3, 2021 the MPF informed that it was terminated two days before, on February 1st. The Car Wash investigations in Curitiba will now be conducted by a few of the same prosecutors, but within a pre-existing group: The Organized Crime Special Enforcement Division in the State of Paraná ("GAECO"). Sources: <https://g1.globo.com/pr/parana/noticia/2021/02/03/forca-tarefa-da-lava-jato-no-parana-deixa-de-existir-diz-mpf.ghtml> and <https://www.reuters.com/article/us-brazil-corruption-idUSKBN2A4o68>

force made direct requests for cooperation, allegedly bypassing legal cooperation requirements. Lula's defense team announced in the end of November that they would request courts to annul the lawsuits, holding that the lack of formalities meant the investigations and the evidence gathered were tainted by undue foreign influence.¹⁶

But Operation Car Wash was not the only enforcement action making the headlines in 2020. Along with the COVID-19 crisis, large sums of money and donations had to be deployed in the fight against the pandemic, which, in some cases (also true for the rest of the world), opened the gate for fraud and corruption. A CGU-led task force has been very active in fighting the crisis-related scandals.

A higher level of cooperation among the different anti-corruption and compliance enforcement authorities also marked 2020. In the beginning of the year, CADE, responsible for antitrust enforcement, signed a cooperation agreement with the MPF and strengthened the entities partnership in combating antitrust violations.¹⁷

Other cooperation initiatives to investigate violations and fight corruption in Brazil included several local agreements executed by State Public Prosecution Offices with either the state police departments,¹⁸ the state governments¹⁹ or with other State Public Prosecution Offices.²⁰ The cooperation measures included (i) creating specific police groups to enforce measures required by the Public Prosecution Office;²¹ and (ii) sharing information among other public entities.²² The Federal Government also issued a decree providing for the cooperation

16 Source: <https://valor.globo.com/politica/noticia/2020/11/30/lava-jato-nao-formalizou-pedido-de-cooperacao-internacional-diz-governo.ghtml>

17 Source: <http://www.mpf.mp.br/pgr/noticias-pgr/mpf-e-cade-firmam-acordo-de-cooperacao-tecnica-para-atuacao-em-repressao-as-praticas-de-cartel> and <http://www.cade.gov.br/noticias/cade-e-mpf-firmam-acordo-de-cooperacao-tecnica>

18 Source: <https://www.mpmg.mp.br/comunicacao/noticias/acordo-entre-mpmg-e-policia-civil-vai-incrementar-combate-a-corrupcao-em-todo-o-estado.htm>

19 Source: <https://agencia.ac.gov.br/estado-e-ministerio-publico-se-unem-no-combate-a-corrupcao/>

20 Source: <https://www.mpba.mp.br/noticia/53283>

21 Source: <https://www.mpmg.mp.br/comunicacao/noticias/acordo-entre-mpmg-e-policia-civil-vai-incrementar-combate-a-corrupcao-em-todo-o-estado.htm>

22 Source: <https://agencia.ac.gov.br/estado-e-ministerio-publico-se-unem-no-combate-a-corrupcao/> and <https://www.mpba.mp.br/noticia/53283>

measures among Mercosur countries to investigate and fight crime in Latin America.²³

3.1. Operation Car Wash

Despite the recurrent speculation of an abrupt end, Operation Car Wash vigorously continued its 6th year. Authorities launched 123 operations (including all task forces) through 78 phases, conducted 1,910 dawn raids, issued 211 arrest warrants, filled 245 criminal lawsuits, charged 1,162 individuals, and convicted 219 different individuals. Aside from the impressive numbers, authorities secured 256 collaboration agreements with individuals and 22 leniency agreements with legal entities, totaling BRL 14.8 billion paid in compensatory fines.²⁴

Some of the most relevant Operation Car Wash actions in 2020 included charging the former TCU Minister, Vital do Rêgo, for receiving BRL 4 million for not summoning executives from construction company OAS to testify before *Petrobras*' Parliamentary Investigation Committee ("CPI"), which was chaired by Rêgo between 2011 and 2014.²⁵ Marco Maia, the *Petrobras* Committee's rapporteur has also been charged in 2019 for receiving bribes in connection with his position at the Committee.²⁶

In September, former President Lula was once again charged along with former Minister Antonio Palocci and Paulo Okamoto, former president of *Instituto Lula* (Lula's personal foundation). The charges hold that *Instituto Lula* was used for laundering BRL 4 million of donations made by Odebrecht between 2013 and 2014, which were in fact bribe payments.²⁷

Moreover, authorities deepened investigations into corrupt practices within *Petrobras* with eight new Operation Car Wash

A higher level
of cooperation
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2020

²³ See more in Section 5.

²⁴ Source: <http://www.mpf.mp.br/grandes-casos/lava-jato/resultados>

²⁵ Source: <https://valor.globo.com/politica/noticia/2020/08/26/ministro-do-tcu-e-denunciado-por-corrupcao.ghtml>

²⁶ Source: <https://g1.globo.com/pr/parana/noticia/2020/08/25/policia-federal-deflagra-73a-fase-da-lava-jato-com-15-mandados-de-busca-e-apreensao-em-brasilia-e-paraiba.ghtml>

²⁷ Source: <https://noticias.uol.com.br/politica/ultimas-noticias/2020/09/14/mpf-denuncia-ex-presidente-lula-por-lavagem-de-dinheiro-via-instituto.htm>

phases launched between June and November 2020.²⁸

In addition to the compensatory fines, Car Wash authorities were able to secure reimbursement for much of the damage caused by corruption. By December 2020, over BRL 4.8 billion had been restituted to *Petrobras*, of which over BRL 500 million was a result of leniency agreements signed by Braskem²⁹ and the Technip Group³⁰ with Brazilian authorities.³¹ By November 2020, BRL 1.1 billion had been restituted to the federal treasury.³²

In March 2020, Braskem was the first Brazilian company to fulfill its last requirements related to external monitorship agreed with the Securities and Exchange Commission (“SEC”) and the Department of Justice (“DOJ”) back in 2017.³³ Following Braskem, Odebrecht also had its external monitorship finalized by the SEC and the DOJ in November 2020,³⁴ and in December, Odebrecht announced that it would rebrand, and adopted the new name “Novonor.” The change was meant to reflect a shift in strategy and an effort by Odebrecht to move past the scandal.³⁵

In 2020 Operation Car Wash has also continued with its international impact, with authorities cooperating with several foreign government authorities. An example is the cooperation with the United Kingdom Serious Fraud Office (“SFO”), which settled for GBP 1.2 million, in November, with former SBM Offshore executive, Julio Faerman. Faerman had previously collaborated with Brazilian authorities in the Car Wash in-

28 Source: <https://valor.globo.com/politica/noticia/2020/10/07/pf-apura-possivel-esquema-de-corrupcao-em-diretoria-de-da-petrobras.ghtml>

29 Source: <https://www.jornalgrandebahia.com.br/2020/06/petrobras-recebe-r-265-milhoes-por-acordo-de-leniencia-da-braskem/>

30 Technip Brasil and Flexibras: <https://politica.estadao.com.br/blogs/fausto-macedo/petrobras-recupera-r-2651-milhoes-desviados-em-corrupcao-envolvendo-grupo-technip/>

31 Source: <https://valor.globo.com/empresas/noticia/2020/12/29/petrobras-recebe-r-2326-milhes-aps-acordo-de-leniencia-da-vitol.ghtml>

32 Source: <https://www.gazetadopovo.com.br/republica/breves/r-11-bi-retornaram-aos-cofres-da-uniao-em-2020-diz-agu/>

33 Source: <https://valor.globo.com/empresas/noticia/2020/05/14/autoridades-encerram-monitoria-na-braskem.ghtml>

34 Source: <https://valor.globo.com/empresas/noticia/2020/11/18/odebrecht-monitoramento-independente-do-departamento-de-justia-dos-eua-encerrado.ghtml>

35 Source: <https://fcpablog.com/2020/12/22/odebrecht-completes-monitorship-looks-to-future-with-new-name/>

vestigations and the settlement between him and the SFO has reportedly resulted from the collaboration between Brazilian and British authorities.³⁶

3.1.1 São Paulo Task Force Resigned

São Paulo’s task force was created in June 2017 in order to file, in the State of São Paulo, lawsuits originated from the State of Paraná, where the Operation Car Wash was originally launched. Over these three years, the São Paulo task force was responsible for starting 11 criminal complaints, three improbity lawsuits and signing one leniency agreement with Company Andrade Gutierrez, which resulted in the restitution of BRL 214 million to the public treasury.

If the Curitiba and the Rio de Janeiro task forces have been historically leading enforcement actions in Operation Car Wash, the São Paulo task force had been recently gaining traction. In July, the São Paulo task force conducted dawn raids and charged Senator José Serra for allegedly receiving payments from Odebrecht while he was the Governor of the State of São Paulo.³⁷ The payment was allegedly made to favor Odebrecht in a construction contract with the state of São Paulo. Serra’s daughter, Veronica, who was allegedly responsible for receiving and controlling the payments via an offshore account, was also charged by the task force, among other individuals.

Also in July, another former governor of São Paulo, Geraldo Alckmin, was charged of corruption, money laundering and fraudulent misrepresentation. Alckmin allegedly received approximately BRL 11.3 million from Odebrecht in unofficial campaign donations. According to the State Public Prosecution Office, the donations were made in the 2010 (BRL 2 million) and 2014 (BRL 9.3 million) elections. Payments would have been made through Odebrecht’s structured operations department and the alleged purpose of the payments was to maintain

36 Source: <https://www.jdsupra.com/legalnews/uk-settlement-highlights-international-69867/>

37 Source: <https://g1.globo.com/sp/sao-paulo/noticia/2020/07/03/pf-cumpre-mandados-da-lava-jato-em-sao-paulo.ghtml>

Odebrecht's influence in Alckmin's government.³⁸

Notwithstanding these achievements, a group of seven prosecutors from the São Paulo task force resigned in September. The group claimed to have “irresolvable incompatibilities” with the performance of the local chief prosecutor.³⁹ A month after the initial resignation, other prosecutors from the São Paulo task force followed the same steps, bringing the task force to an end.

3.1.2 Operations in Rio de Janeiro Continue to Spike

The State of Rio de Janeiro has been facing a dramatic and lasting political turmoil. In the last four years alone, six current and former governors were arrested or removed from office.⁴⁰ The latest addition to this list was Governor Wilson Witzel, removed from office in August 2020 facing allegations of corruption and money-laundering in the health sector.

The first Federal Police operation targeting Witzel was held in May 2020. According to media reports,⁴¹ Witzel took advantage of emergency contracts required to fight COVID-19, to grant overpriced contracts to friendly contractors, who then allegedly retained the law firm of Witzel's wife. One of the implicated companies signed a BRL 850 million contract with Rio de Janeiro's State Government to build field hospitals. In December,⁴² federal prosecutors charged Witzel and 12 others with corruption and money-laundering.

According to media reports, on April 10,⁴³ only a month after the World Health Organization called it a pandemic, the State

38 Source: <https://g1.globo.com/sp/sao-paulo/noticia/2020/07/23/alkmin-e-denunciado-por-falsidade-eleitoral-corrupcao-passiva-e-lavagem-de-dinheiro.ghtml>

39 Source: <https://g1.globo.com/sp/sao-paulo/noticia/2020/09/29/lava-jato-de-sp-encerra-forca-tarefa-apos-saida-de-procuradores-do-grupo.ghtml>

40 Source: <https://g1.globo.com/rj/rio-de-janeiro/noticia/2020/08/28/witzel-e-o-6-governador-do-rj-na-mira-da-justica-em-menos-de-4-anos.ghtml>

41 Source: <https://g1.globo.com/rj/rio-de-janeiro/noticia/2020/05/26/agentes-da-pf-estao-no-palacio-laranjeiras-residencia-oficial-do-governador-do-rj.ghtml>

42 Source: <https://noticias.uol.com.br/politica/ultimas-noticias/2020/12/15/mp-f-denuncia-witzel-e-pastor-everaldo-por-corrupcao-e-lavagem-de-dinheiro.htm>

43 Source: <https://g1.globo.com/rj/rio-de-janeiro/noticia/2020/04/10/governo-do-rj-gasta-r-1-bilhao-em-contratos-sem-licitacao-para-combate-a-covid-19.ghtml>

of Rio de Janeiro had already paid BRL 1 billion in emergency contracts in connection with the crisis without any bids.

But corruption scandals are not restricted to the state-level. On December 22, 2020,⁴⁴ the Mayor of the City of Rio de Janeiro, Marcelo Crivella, was arrested amid corruption and money laundering allegations, only nine days before the end of his term. According to media reports, the Mayor was held to be the leader of a bribery scheme in connection with contracts awarded by the city.

Furthermore, as mentioned above, Operation Car Wash's task force in Rio de Janeiro continued to investigate corruption associated with *Petrobras*.⁴⁵ In September,⁴⁶ the task force launched an operation targeting law firms allegedly used to divert public funds from state-owned entities. According to the prosecutors, the public entities (part of the taxpayer-funded autonomous social service organizations known as “Sistema S”) would enter into sham contracts with law firms through Fecomércio, a private class entity for commerce, in order to divert funds to the criminal organization. The scheme allegedly diverted over BRL 355 million. In October, an operation launched by Federal Police targeted corruption in *Petrobras*' commercial department. According to the authorities, *Petrobras*' employees received bribes to favor certain suppliers of bunker fuel (oil for vessels).

3.2. Pandemic-Related Initiatives and Operations

The COVID-19 crisis has been all-encompassing in Brazil since March 2020, when the first death due to the new virus was registered in the country and the World Health Organization characterized the health emergency as a pandemic. There were several measures that attempted to try and help the country in fighting the pandemic

44 Source: <https://g1.globo.com/rj/rio-de-janeiro/noticia/2020/12/22/prefeito-marcelo-crivella-e-presos-em-operacao-da-policia-e-do-mp-rj.ghtml>

45 Source: <https://g1.globo.com/pr/parana/noticia/2020/10/07/lava-jato-cum-pre-mandados-da-76a-fase-no-rio-de-janeiro.ghtml>

46 Source: <https://noticias.uol.com.br/politica/ultimas-noticias/2020/09/09/entenda-o-esquema-envolvendo-advogados-o-poder-judiciario-e-o-sistema-s.htm>

and different agencies and entities contributed to the cause.

On March 21, 2020, Federal Prosecutors from the Operation Greenfield task force requested that J&F, the Brazilian holding company that agreed to pay BRL 10.3 billion to authorities as part of a leniency agreement, anticipated the leniency agreement debt payment. The purpose would be to direct these funds to help fighting COVID-19. Nonetheless, J&F denied the request a couple days later, on the basis that it did not have financial capability to do so, but that it would present a counterproposal.⁴⁷

In April 2020, a Federal Court signed off on an agreement between the MPF and J&F.⁴⁸ The agreement guaranteed the immediate transfer of BRL 27.5 million from J&F to Fundação Oswaldo Cruz, a Brazilian research institute, with the specific purpose of acquiring COVID-19 tests. Also in April, the Health Ministry and the MPF discussed types of cooperation with health agents aiming at fundraising to the pandemic cause.⁴⁹ The Prosecutor-General, Augusto Aras, requested funds from fines paid by companies in lawsuits to be sent to the Health Ministry.⁵⁰ The Attorney-General's Office ("AGU") requested issuing a Provisional Measure to create a fund concentrating resources being sent by judicial entities to assist the COVID-19.⁵¹ To date, however, the fund has not been created.

In parallel, while the government struggled with the pandemic, some companies also struggled to fulfill its financial obligations arising from leniency agreements and pleaded with the CGU to renegotiate amounts previously settled.⁵² The CGU remained open to renegotiate terms consider-

47 Source: <https://oglobo.globo.com/brasil/jf-recusa-pedido-para-antecipar-pagamento-de-acordo-de-leniencia-para-combater-coronavirus-24323349> and <https://www.jota.info/tributos-e-empresas/mpf-pede-que-jf-pague-divida-acordo-de-leniencia-para-combater-coronavirus-21032020>

48 Source: <https://www.jota.info/justica/jf-de-brasil-homologa-acordo-que-destina-r-268-milhoes-da-jf-para-fiocruz-02042020>

49 Source: <https://www.correiobraziliense.com.br/app/noticia/brasil/2020/04/02/interna-brasil,841962/ministerio-da-saude-e-mpf-discutem-parcerias-para-combater-covid-19.shtml>

50 Source: <https://ricardoantunes.com.br/procurador-augusto-aras-quer-r-10-bi-de-multas-repassados-para-o-ministerio-da-saude/>

51 Source: <https://valor.globo.com/politica/noticia/2020/04/17/agu-quer-fundo-para-concentrar-recursos-da-justica-ao-combate-da-pandemia.ghtml>

52 Source: <https://valor.globo.com/politica/noticia/2020/06/29/empresas-que-rem-rever-leniencias-em-funcao-da-pandemia-diz-ministro.ghtml>

ing the actual situation of each company in terms of lower income expectations and assured that the analysis would be on a case-by-case basis.

Furthermore, even though the Federal Government approved the Covid Law in February 2020,⁵³ once the virus reached the country there was confusion on how to react at all levels of government. To address the situation, the Federal Government changed the law in March to simplify public procurement rules for pandemic-related purchases, through Provisional Measure No. 926.⁵⁴ The Provisional Measure allowed, for example, previously debarred companies to bid for governmental contracts.

In this context, the CGU, in April, and the Transparency International with the TCU in May, launched guidelines with recommendations for transparency and ethical behavior in public-private interactions during the pandemic⁵⁵ and in emergency procurement processes.⁵⁶ The CGU also launched, in July, a panel to assist in the COVID-19 control.⁵⁷ It indicates all expenses, from all levels of government (municipal, state and federal), with supplies necessary for dealing with the COVID-19. More of these initiative in details can be found in Section 5, below.

As it could be expected, and as also true in many other countries, during the first half of 2020 Brazilian officials were scrambling to procure personal protective equipment ("PPEs") and respirators. Sadly, and despite all recommendations and control mechanisms installed by government entities, pandemic-related purchases and procurement processes led several public officials to be later investigated for corruption in such purchases. More specifically,

53 Source: <https://g1.globo.com/politica/noticia/2020/02/06/bolsonaro-sancciona-lei-com-regras-sobre-quarentena-e-medidas-contra-coronavirus-diz-pla-nalto.ghtml>

54 Source: <https://valor.globo.com/brasil/noticia/2020/03/21/insumos-usados-no-combate-ao-coronavirus-podero-ser-comprados-sem-licitao.ghtml>

55 Source: <https://www.gov.br/cgu/pt-br/centrais-de-conteudo/publicacoes/integridade/arquivos/cartilha-integridade-covid.pdf>

56 Source: <https://comunidade.transparenciainternacional.org.br/asset/86:tibr-recomendacoes-de-contratacoes-emergenciais-covid19?stream=1>

57 Source: <https://economia.estadao.com.br/noticias/governanca,painel-da-cgu-divulga-referencias-de-precos-de-produtos-contratados-para-combate-a-covid-19,70003367134>

eight state governors were investigated, including the Amazonas, Pará and Rio de Janeiro governors.⁵⁸

The first operation of the Federal Police that investigated misuse of public resources in the context of the fight against the pandemic was Operation “Alchemy”, which took place on April 23, 2020 and found signs of irregularities in the purchase of books by the Aroeiras City Hall, in the countryside of the State of Paraíba, with resources from the National Health Fund. According to the Federal Police, the books were purchased without a public tender, under the argument of helping to disseminate information to fight the COVID-19. The Federal Police said that books and booklets similar to those purchased by the city of Aroeiras were already available for free on the Ministry of Health’s website. In addition, according to the Federal Police, the CGU pointed out that one of the books was acquired by the Municipality of Aroeiras for about 330% above the value sold on the internet, which generated an overpricing of BRL 48,272.00.

After Operation “Alchemy” dozens of other Federal Police operations took place, many in cooperation with other authorities, such as the CGU and the MPF. As previously mentioned, as of December, the Federal Police had launched 61 investigations in

58 Source: <https://veja.abril.com.br/brasil/suspeitas-de-fraudes-em-contratos-da-area-da-saude-atingem-dezoito-estados/>

the context of the pandemic, with contracts amounted to almost BRL 2 billion.⁵⁹

To assist in identifying all these irregularities, the São Paulo State Prosecution Office launched a platform called “*Corruptovirus*” that allows individuals to report deviations or irregularities in the COVID-19 context. By November, the platform received 80 reports from 22 states.⁶⁰

4. LENIENCY AND COOPERATION AGREEMENTS

Contrary to 2019, in which the MPF signed seven leniency agreements, which are related to the total amount of BRL 2 billion in fines and disgorgement, 2020 was a more modest year regarding numbers. The MPF signed a total of five leniency agreements and the total amount within fines and disgorgement was of almost BRL 350 million. In addition, CGU signed one leniency agreement, one Term of Acceptance (that included Eletrobras in the Camargo Correa’s leniency agreement) and imposed fines to two companies based on the Brazilian Clean Companies Act - Law No. 12,846/2013 (“BCCA”).

59 Source: <https://www.cnnbrasil.com.br/nacional/2020/12/17/quase-r-2-bilhoes-relembre-operacoes-da-pf-contra-desvios-na-pandemia>

60 Source: <https://www.otempo.com.br/politica/aparte/plataforma-permite-denunciar-desvios-de-recursos-de-combate-a-pandemia-1.2409357#>

2020 LENIENCY AGREEMENTS

IN NUMBERS

5

LENIENCY AGREEMENTS WERE SIGNED BY THE FEDERAL PROSECUTOR’S OFFICE

RS 347.712.013,00

IS THE TOTAL AMOUNT AGREED BETWEEN THE PARTIES

IN 2 STATES

3 IN SÃO PAULO
2 IN RIO DE JANEIRO

RS 762.200,76

IS THE TOTAL AMOUNT AGREED BETWEEN THE PARTIES

1

LENIENCY AGREEMENTS WAS SIGNED BY THE CGU

4.1. TCA - Technical Cooperation Agreement

On August 6, 2020, CGU, AGU, TCU and the Ministry of Justice signed the Technical Cooperation Agreement (“TCA”), under coordination of the Brazilian Supreme Court. The Brazilian Authorities drafted the TCA to coordinate the negotiations between the parties and all the competent authorities, which should avoid any conflicts among them and will lead to the signing of a single leniency agreement. Although the MPF has still not joined the TCA, this agreement has the potential to significantly impact the leniency agreement process.

TCA sets forth that all competent authorities will be involved in the leniency agreement process and defines each authorities’ role. It establishes that CGU and AGU are responsible for conducting the negotiations. CGU and AGU also must inform the TCU regarding any information disclosed during the negotiations that is related to damage and disgorgement. The CGU, AGU and TCU should jointly define the methodology for disgorgement calculation to be paid by the lenient company. CGU and AGU will communicate the disgorgement amount to TCU and then has 90 days to either agree or not agree with the amount and issue an opinion if ongoing procedures are going to be initiated or not to the disgorgement collection and If the TCU does not issue its opinion within the 90 days, the CGU and AGU are authorized to sign the leniency agreement in the proposed terms.

TCA also establishes that the MPF, TCU and Federal Police should inform the CGU and AGU whenever a company is involved in wrongdoings in the scope of ongoing investigations, unless the information sharing jeopardizes the investigation. Moreover, TCA also states that CGU should inform the MPF whenever individuals are involved in the conducts reported in the course of the leniency agreement negotiations, which will contribute to the MPF takes the necessary measures related to the criminal matters and the Improbability Act Law (Law No. 8.429/1992). In this context, TCA also allows the CGU and AGU to share information with other public local authorities (state or municipal).

According to the TCA, the authorities will take into consideration the preservation of the company’s business and the jobs generated by it, the wealth produced by the company’s activities and its social and economic impact. Based on that, the TCA sets forth that the authorities shall impose reasonable obligations and sanctions, that should be proportional with the public interest and recovery of assets. Thus, TCA reinforces that the signing of leniency agreements shall not result in *bis in idem* of sanctions, allowing for the possibility of compensation of values that: (i) have the same legal nature and (ii) are related to the same misconducts.

TCA Execution Protocol No. 1

On November 20, 2020, Brazilian Authorities issued the TCA Execution Protocol No. 1 defining the TCA operational procedures regarding the leniency agreement process. The TCA Cooperation Protocol No. 1 established the following internal divisions of CGU, AGU and Federal Police to be responsible for the management of information and evidence collected during the leniency agreements: Leniency Agreement Division (*Diretoria de Acordos de Leniência da Secretaria de Combate à Corrupção - DAL*) and Public Property and Probiity Department (*Departamento de Patrimônio Público e Probidade da Procuradoria-Geral da União - DPP*) and Coordination against Corruption, Money Laundering and Organized Crime Division (*Coordenação-Geral de Repressão à Corrupção e à Lavagem de Dinheiro da Diretoria de Investigação e Combate ao Crime Organizado - CGRC*) respectively.

There are relevant provisions of the TCA Execution Protocol No. 1 that ensure the exchange of information among these public authorities. For example, the protocol states that the leniency commission, during the negotiations period, can request information to the Federal Police to contribute to the negotiations.

In case the leniency agreement is signed by the parties, documents and information will be forwarded to the competent police authority with the purpose of assessing cooperation by individuals.

Also, during the negotiations, if company's executives intend to enter into a collaboration agreement, the leniency commission will communicate the DAL to, together with the DPP, guide the executives to CGRC to coordinate and assess the possibility of a plea bargain.

The protocol also sets internal controls to avoid *bis in idem* of compensation of values. It has the same legal nature in cases that individual and company sign collaboration and leniency agreements related to the same allegation. Thereupon, all the divisions (DAL, DPP, CGRC) will implement internal protocols to preserve and ensure the safety and confidentiality of all documentation and information received.

4.2. MPF Settlements

The MPF signed five leniency agreements in 2020. Although Brazilian media mentioned Vitol as one of the companies involved in the agreements, the MPF released information about only two out of the five agreements: the agreements with *J. Malucelli* and Philips Medical Systems Ltda. ("Philips"). Therefore, the other three signed agreements remain under secrecy.

J. Malucelli Companhia Paranaense

On May 25, 2020, company *J. Malucelli* signed a leniency agreement with the MPF through its companies: *Companhia Paranaense de Construção S.A.*, *MLR Locações de Máquinas S.A.* and *Televisão Icarai Ltda.* This leniency agreement was signed by the State Prosecutor of Paraná and two internal divisions of the MPF (Paraná and Federal District).

J. Malucelli agreed to report bribe schemes used by the company to obtain public contracts since 2009. According to the Brazilian newspapers, *J. Malucelli* decided to cooperate to investigations related to the Federal Police Operations (Car Wash, "Sépsis", "Piloto", "Integração") and to the Paraná State Police Operation ("Rádio Patrulha"). The State investigation ascertains improper payments by *J. Malucelli* representatives to public agents to obtain public contracts which the scope was maintaining rural highways. Other facts that are linked to this leniency agreement are the

TCA sets forth that all competent authorities will be involved in the leniency agreement process and define each authorities' role

conducts of bid rigging in public tenders of Federal Highways, in the State of Paraná, resulting from these Federal Police operations.

The company agreed to pay BRL 100,000,000.00, in which Paraná State will receive 27% while the Federal Government will receive 73% of the total amount, being divided into eight annual installments. The company admitted the illegal acts committed and compromised to provide full cooperation regarding the misconducts in the scope of the agreement.

Philips

On September 24, 2020, MPF and *Philips* signed a leniency agreement in the amount of BRL 59,910,421.18 that was homologated by the 7th Federal Court of Rio de Janeiro and is related to the Car Wash Operation in Rio de Janeiro. One of its highlights is that the FPO is paying attention to the company's ability to pay and adding a section related to the Philips' financial condition. This section demands that: Philips must have its financial records organized; must be audited by an independent audit company and must forward the financial statements with the audit opinion to the FPO within 180 days after the end of the financial year. Two other requirements are that Philips must focus in improving its profitability and financial condition and primarily pay the amount agreed with the FPO.

Philips agreed to report and fully cooperate with the Rio de Janeiro Division of the FPO regarding the schemes that its employees and executives were involved. In accordance to Brazilian newspapers, the agreement's scope is related to the bid rigging involving Sérgio Cortes, former Rio de Janeiro Health Secretary, Israel Masiero, representative of *Dixtal Biomédica*, and representatives of the reseller of Philips' products, *Rizzi Comércio, Importação, Exportação e Representação Ltda.* Furthermore, other facts that are under this agreement are the bid rigging in public tenders organized by the Health Secretary of Paraíba State and Health Secretary of São Paulo State, as well as the bid rigging involving the public tenders n° 120/2009, 125/2009 and 126/2009 of the Ministry of Health.

4.3. CGU Settlements and Cross-Border Enforcement

In 2020, CGU and AGU signed only one leniency agreement regarding a voluntary self-disclosure with *Car Rental Systems do Brasil* ("Car Rental Systems"). Nevertheless, CGU and AGU also agreed to include *Eletrobras* in a leniency agreement and CGU imposed fines to two companies: *Telefonica Brasil S.A.* ("VIVO") and *Madero Indústria e Comércio S.A.* ("Madero") in the scope of two Administrative Proceedings for Liability ("PAR").

Car Rental Systems

On August 25, 2020, CGU and AGU signed the only leniency agreement of 2020 with Car Rental Systems.⁶¹ The company made a thorough internal investigation and discovered punctual irregularities related to undue payments to public agents 2010. In 2016, the Car Rental Systems made a voluntary report to CGU regarding the discovery and providing all the necessary information to the case.

The high spot in this agreement is the concurrent liability issue. In 2016, Car Rental Systems was already negotiating with the CGU regarding the misconducts. However, in 2017, Car Rental Systems was acquired by Localiza Fleet S.A. ("Localiza") and the negotiations continued to advance although Localiza did not have any link to the misconducts. The outcome of these negotiations is that Car Rental Systems agreed to pay BRL 762.200,76 related to the fine and undue payments, and Localiza signed the agreement as an intervening party. Likewise, Localiza also agreed to implement a Compliance Improvement Plan to enhance its compliance controls, which will be monitored for a period of 18 months.

Eletrobras signed a Term of Acceptance with CGU and AGU in the Camargo Correa's leniency agreement

On October 26, 2020, Eletrobras released a material fact stating that signed a Term of Acceptance with CGU and AGU in the Camargo Correa leniency agreement, because Eletrobras was financially harmed by Camargo Correa in the scope of the Car Wash Operation.

⁶¹ Source: <https://www.gov.br/cgu/pt-br/assuntos/noticias/2020/08/cgu-e-agu-assinam-acordo-de-leniencia-com-a-car-rental-systems-do-brasil>

Moreover, Eletrobras will be reimbursed in the amount of BRL 166,899,000.00 by Camargo Correa and its subsidiaries, and the financial resources will be allocated in undertakings and projects in which Eletrobras participates it, directly or indirectly.

Eletrobras disclosed the material fact to its shareholders asserting that decided to allocate the amount of money in different companies that are part of Eletrobras Group. Thus, the company should allocate BRL 28,899,890.67 to Chesf, allocate BRL 38,498,514.62 to *Eletronorte*, allocate BRL 20,601,123.36 to Furnas and, finally, BRL 28,899,890.67 to Eletrobras itself.

CGU penalties

On October 16, 2020, CGU published in the Federal Official Gazette two decisions imposing fines in the PAR of *Telefonica Brasil S.A.* (“VIVO”)⁶² and *Madero Indústria e Comércio S.A.* (“Madero”).⁶³

CGU brought this PAR against VIVO with the allegation of distributing tickets for 2014 World Cup to public officials resulting in company’s strict liability. CGU imposed a fine in the amount of BRL 45,747,320.64 and the penalty of the extraordinary publication of its decision in one of the four newspapers with the largest national circulation.

On October 16, 2020, CGU commenced a PAR against Madero due to offering improper advantages in cash and food to public agents from the Ministry of Agriculture, designated to inspect Madero’s facilities. CGU imposed a fine in the amount of BRL 442,690.00, as well as the penalty of the extraordinary publication of its decision in one of the four newspapers with the largest national circulation.

4.4. Global Settlements

In addition to the local settlements, some Brazilian companies and Brazilian subsidiaries that are part of foreign companies’ group were targeted by cross-border settlements and/or international companies settled for Brazilian related matters.

62 Source: <https://www.in.gov.br/web/dou/-/decisao-de-15-de-setembro-de-2020-283218062>

63 Source: <https://www.in.gov.br/web/dou/-/decisao-de-15-de-setembro-de-2020-283217967>

J&F Investimentos S.A.

On October 14, 2020, the DOJ published a press release informing that *J&F Investimentos S.A.* (“J&F”) Brazil-based investments company signed a plea agreement. In this agreement, J&F admitted that it used its executives New York bank accounts to facilitate a corruption scheme and bribe payments, including buying an apartment in Manhattan as a bribe.

The scheme involved high-level Brazilian government officials and also high-ranking executives from *Banco Nacional de Desenvolvimento Econômico e Social* (“BNDES”) and *Caixa Econômica Federal*, both controlled by Brazilian government. Furthermore, J&F executives also made corrupt payments to high-ranking executives from Petros - *Fundação Petrobras de Seguridade Social*, a Brazilian state-controlled pension fund in order to obtain benefits in a merger.

J&F has agreed to pay a criminal penalty in the amount of U\$256,497,026 regarding the Foreign Corrupt Practice Act (“FCPA”) violations.

Vitol Inc.

On December 3, 2020, the DOJ also announced⁶⁴ that Vitol Inc., a U.S. affiliate of the Vitol group, signed a plea agreement with U.S. authorities in order to resolve the investigation of FCPA violations committed by the company and its executives. In the same day, MPF announced that Vitol Inc.⁶⁵ signed a leniency agreement and agreed to pay BRL 232,000,000.00. However, this leniency agreement remains confidential. Vitol Inc. schemes consisted in the company executives paying bribes to public officials in Brazil, Ecuador and Mexico. Specifically, in the Brazil scheme, Vitol Inc. offered and paid U\$ 8 million in corruption payments to Brazilian officials and obtained business from *Petrobras*, as well as confidential information regarding the purchase and sale of oil products.

Vitol Inc. plead guilty and agreed to pay U\$ 135,000,000.00 to the DOJ. Furthermore, Vi-

64 Source: <https://www.justice.gov/opa/pr/vitol-inc-agrees-pay-over-135-million-resolve-foreign-bribery-case>

65 Source: <http://www.mpf.mp.br/pr/sala-de-imprensa/noticias-pr/ministerio-publico-federal-assina-acordo-de-leniencia-com-a-trading-company-no-ambito-da-operacao-lava-jato>

tol also agreed to disgorge more than \$12.7 million to the Commodity Futures Trading Commission (“CFTC”), regarding a related matter and to pay the CFTC a penalty of \$16 million related to trading activity that was not covered by the agreement with the DOJ.

5. LEGISLATION, JURISPRUDENCE AND GUIDELINES

As anti-corruption and white-collar enforcement continues to grow in Brazil, the applicable laws and rules are constantly brought into discussions by the legislators, courts and commentators, helping to develop them. This is particularly important to newer laws, such as the BCCA, which have not been sufficiently tested or argued before court yet.

In this sense, 2020 has had prolific discussions and reviews of new legislation, jurisprudence and guidelines from enforcement authorities. For the latter, the CGU and the MPF have not only made efforts to publish guidelines to assist companies and government entities to deal with the COVID-19-related risks, but also, to publish guidelines focusing on clarifying possible interpretations of the BCCA and of Law No. 8,666/1993, providing further internal resources for fighting corruption and with recommendations for structuring an effective integrity program.

All of these initiatives brought more legal certainty to the table, helping companies and individuals to navigate in the Brazilian anti-corruption landscape. Below are the highlights of the main legislation, jurisprudence and guidelines in 2020.

5.1. Legislation

Approval of the Anti-Crime Package – January 23, 2020

In February 2019, former Minister of Justice, Sergio Moro, presented a legislative reform to amend several criminal laws in Brazil, aiming at fighting corruption, organized

crime and violent crimes (the “Anti-Crime Package”). Throughout 2019, the original package was subject to several amendments (exclusions and additions), mainly due to political pressure and compromises.

The Anti-Crime Package was finally enacted on December 24, 2019 and entered into force (partially) in January 23, 2020, introducing relevant changes on compliance and criminal matters, such as changes to Federal Law No. 13,608/18 (“Whistleblower Act”) providing for non-retaliation measures to protect whistleblowers and even providing whistleblowers a potential reward of up to 5% of the amount recovered.

The Anti-Crime Package also brought relevant changes to improbity claims by expressly allowing the execution of settlement agreements for non-civil prosecution in relation to civil lawsuits under the Administrative Improbity Act (“AIA”). As leniency agreements in corruption matters were formally introduced by the BCCA, it was not clear whether this tool was also available solely for AIA violations, considering the lack of express legal provision in the BCCA and that the AIA previously prohibited civil agreements for improbity violations.

Furthermore, the Anti-Crime Package also provides for several criminal law changes that strengthen the prosecution and enforcement of serious crimes, improve the police investigation tactics, among others.

Decree No. 10,452 – August 10, 2020⁶⁶

President Bolsonaro, enacted the text of the “Framework Cooperation Agreement” between the Mercosur Countries and Associated States for the creation of a joint investigation team, which Brazil signed in 2010, in San Juan, Argentina.

Under the Agreement, Mercosur members Argentina, Brazil, Paraguay, Uruguay and Associated States might create a joint in-

⁶⁶ Source: <https://www.in.gov.br/en/web/dou/-/decreto-n-10.452-de-10-de-agosto-de-2020-271464920>

investigation team whenever the competent authorities of one of the countries understand that the investigation in their territory is related to wrongdoings and/or criminal acts that require the coordinated action of more than one party to the Agreement.

Thus, Mercosur countries intend to optimize and coordinate the fight against crimes such as drug trafficking, corruption, money laundering, human trafficking, arms trafficking, terrorism and other crimes that are part of transnational organized crime.

Law No. 13,709/2018 Brazilian General Data Protection Law (“LGPD”) – September 18, 2020⁶⁷

The long-awaited LGPD (inspired by the European General Data Protection Regulation - GDPR) finally went into force in September. Even though the National Authority for Data Protection (“ANPD”), responsible for regulating the LGPD, has still not started its activities, the rights of data owners may already be enforced. Despite its youth, the LGPD, has already been having an impact in the day-to-day business and in the compliance area in Brazil.

The LGPD impacts compliance activities as companies need to ensure, among other things, that the internal policies, procedures and contracts all comply with the new law and that their employees comply with LGPD.

The LGPD has also significantly impacted internal investigations, as companies now need to make sure its employees know their work tools might be monitored by the company, if needed. This is especially important since all use of personal data must be justified under one of the categories set forth by the LGPD (such as, but not limited to: (i) legitimate interest; (ii) consent; (iii) compliance with the company’s legal or regulatory obligations and (iv) credit protection).

⁶⁷ Source: <https://www12.senado.leg.br/noticias/materias/2020/09/18/lei-geral-de-protecao-de-dados-entra-em-vigor>.

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Companies also need to be aware to the fact that whenever it needs to disclose documents to third parties (even to authorities in the scope of leniency negotiations), all personal information must be redacted, unless its disclosure is permitted under one of the LGPD's categories. Brazilian authorities have been generally understanding the new disclosure limitations imposed by the LGPD.

Bill of the New Public Procurement Law – December 11, 2020⁶⁸

After a long process, the Congress approved the Bill for the new Public Bidding Law. The Bill establishes general rules for bids and contracts for the direct and indirect Public Administration within the federal, state and municipal levels and repeals the current Bidding Law (Law No. 8,666/1993) and the Auction Law (Law No. 10,520/2002). The Bill is now pending Presidential approval. The President may also veto totally or partially the text approved by the Congress.

The Bill aims at modernizing the current bidding rules, creating new contracting modalities, defining the requirement of insurance-guarantee for major construction works and inserting a new chapter in the Criminal Code creating public bid-related crimes, which contributes to the reduction of unfinished works in Brazil. Under the Bill, the RFPs for major construction or services will also require the bid winner to implement a compliance program within six months after the public contract is signed.

Moreover, the Bill sets out that public officials will be jointly and severally liable for potential damages caused to the public treasury as a result of misconduct, fraud or gross error in governmental contracts signed without a public tender (such as in emergency cases). Furthermore, public procurement processes will be subject to continuous and permanent risk management and preventive control practices by the competent public agency.

68 Source: <https://valor.globo.com/politica/noticia/2020/12/11/lei-de-licitacoes-passa-no-senado-e-segue-para-a-sancao-presidencial.ghtml>

5.2. Jurisprudence

FEDERAL SUPREME COURT – STF

STF analyzes the debarment of companies by the TCU after signing leniency agreements with the CGU, AGU, MPF and CADE – May 26, 2020⁶⁹

The STF began analyzing four writs about the possibility of the TCU to debar companies that have already signed leniency agreements with other institutions (CGU, AGU, MPF and CADE). Even though the judgment was related to four companies involved in the construction of a specific nuclear power plant, it is part of a broader discussion over the multidisciplinary effects of leniency agreements.

Many companies have already questioned TCU's debarment decisions after leniency agreements have been signed with other institutions. In this specific case, *Andrade Gutierrez* and UTC claimed that the TCU's debarment sanctions made it impossible to comply with the leniency agreements signed with the CGU and the MPF. The companies also argued that, the leniency agreements signed with other authorities provided for the non-prosecution by the TCU. *Queiroz Galvão* stated that it had signed a leniency agreement with CADE and that it was negotiating an agreement with the TCU directly and in spite of that, the TCU decided to debar the company. The company *Artec* claimed that the TCU's debarment was exclusively based on a telephone interception previously deemed illegal by the STF.

Justice Gilmar Mendes granted all companies' requests to suspend the debarment imposed by the TCU. Justice Edson Fachin granted only *Andrade Gutierrez's* request to suspend the debarment and held that UTC did not act in good faith, since UTC signed the leniency agreement with the CGU after being debarred

69 Source: <https://www.conjur.com.br/2020-mai-26/stf-analisa-inidoneidade-empresas-declarada-leniencia>

by the TCU. Regarding *Queiroz Galvão*, Justice Fachin argued that it was not up to the STF to enforce the TCU to sign a leniency agreement. As for Artec, Justice Fachin held that the TCU's decision was not based solely on the illegal telephone interception and is, therefore, valid.

The judgment was suspended after Justices Mendes and Fachin voted and does not have a date to continue.

The STF does not have jurisdiction to oversee leniency agreements signed with the MPF and approved by another court – March 17, 2020⁷⁰

The STF held that it does not have automatic jurisdiction to supervise leniency agreements signed with the MPF and validated by a different court. By majority of votes, the STF dismissed *Odebrecht's* appeal, which intended to suspend an administrative proceeding launched by the government of the Federal District to determine the company's responsibility in a public-private partnership construction. The company required the suspension of the administrative proceeding because it was initiated without prior adherence to the leniency agreement.

Odebrecht argued that the STF had jurisdiction for ruling over the matter since the court had previously approved the collaboration agreements signed by *Odebrecht* executives and because *Odebrecht's* leniency agreement contains information from the collaboration agreements.

However, Justice Edson Fachin held that the STF's approval of the collaboration agreements happened because the *Odebrecht* executives had jurisdictional prerogatives and that the STF does not have automatic jurisdiction to oversee a leniency agreement that was previously validated by a different

70 Source: <https://www.migalhas.com.br/quentes/322035/stf-nao-tem-competencia-para-supervisionar-acordo-de-leniencia-com-mpf-homologado-por-outro-juizo> and <https://jusdecisum.com.br/2a-turma-afasta-competencia-do-stf-para-supervisionar-acordo-celebrado-com-o-mpf-e-homologado-por-outro-juizo/>

court. *Odebrecht's* leniency agreement was originally validated by Curitiba's Court.

Therefore, the fact that the leniency agreement was signed based on information obtained through the collaboration agreements of *Odebrecht* executives (validated by the STF) does not imply the STF's jurisdiction to oversee the leniency agreement, as it was signed by a different court and for different legal reasons.

SUPERIOR COURT OF JUSTICE – STJ

Dawn raid annulled by the STJ – June 30, 2020⁷¹

The STJ annulled a dawn raid carried out by the Federal Police within Operation Pacemaker, which investigated fraud in public tenders and overprice in surgeries conducted through the public health system. The dawn raid took place at one of the investigated companies and at the house of one of its partners. The STJ ruled that the raid in the company was legal because of the vast evidence of its involvement in criminal activities. However, the STJ saw no evidence of the participation of the company's partner and decided "*it is not possible to authorize the entry into someone's home based only on the circumstance of being a partner of a company investigated for fraud (...)* Home is sacred and must not be invaded, even judicially, based on such a weak statement" (being a partner of an investigated company).

Tax evasion is a BCCA violation and may result in a company judicial wind up – September 22, 2020⁷²

The STJ unanimously upheld a decision holding that a shell company created for evading tax can be compulsorily winded

71 Source: https://migalhas.com.br/quentes/329985/operacao-marcapasso-stj-anula-busca-e-apreensao-ocorrida-na-casa-de-um-dos-investigados?U=oEoE8AA2_D36&utm_source=informativo&utm_medium=1161&utm_campaign=1161

72 Source: <https://www.jota.info/tributos-e-empresas/tributario/lei-anticorrupcao-dissolver-empresa-sonegacao-271435-21092020>

up judicially under the BCCA. The Group Líder Group was accused of creating shell companies to conceal financial transactions and evade taxes and the Federal Revenue Services. The Federal Court of the 5th Region (“TRF5”) concluded that a company owned by the Group Líder, never actually operated and “*was uniquely and simply created to hide and blur its real gains, evading and deceiving the Federal Revenue*”.

To support its decision of winding up the shell company, the TRF5 ruled that evading tax can be a BCCA violation under Article 5, V. This Article establishes as a wrongful act under the BCCA to “*hinder investigations or inspections carried out by public agencies, entities or officials, or to interfere with their work*”.

The STJ Judge Herman Benjamin also held that filing a judicial lawsuit directly, without undergoing through an administrative proceeding first, does not constitute a breach to the due process and to the party’s rights for defense. Judge Benjamin claimed that the defendant had plenty of time to exercise its defense before TRF5.

Accessing WhatsApp messages sent to a corporate email does not violate the individual’s intimacy – September 15, 2020⁷³

The STJ upheld a decision holding that judicial authorization is not a requirement to obtain evidence from the records of WhatsApp messages sent to a corporate email on a work computer that belongs to the company.

In the matter, a woman sent incriminating messages to her own corporate email, indicating that her husband and her would have embezzled assets from the company. Paraná State Court (“TJ-PR”) had convicted the couple for crimes

73 Source: <https://www.stj.jus.br/sites/portalt/Paginas/Comunicacao/Noticias/22092020-Mensagem-para-e-mail-corporativo-pode-ser-usada-como-prova-sem-autorizacao-judicial--decide-Sexta-Turma.aspx#:~:text=%E2%80%8B%E2%80%8B%E2%80%8BPara,trabalho%2C%20propriedade%20da%20empresa>

against property and qualified theft. The defense requested the annulment of the lawsuit on the grounds that the evidence obtained was illegal and that it violated the defendants’ privacy. However, TJ-PR decided that conversations between husband and wife found on the company’s server, which was the victim of misappropriation of values from their accounts, could be used as evidence and would not violate the individuals’ intimacy.

An NGO director who received public funds is a public official under the AIA - December 1, 2020⁷⁴

The STJ decided that a director of an NGO that received governmental subsidy, benefit or incentive is equivalent to a public official and, therefore, may be liable under the AIA. The matter started as a lawsuit filed by the Union against the director of an NGO, who had allegedly been negligent in managing the entity’s accounts.

According to the STJ, the AIA expands the concept of public official while holding that managers of entities that receive a subsidy, benefit or incentive, tax or credit, from a public body can be considered as public agents.

FEDERAL COURTS

Company signatory of a leniency agreement cannot remain as a defendant in an administrative improbity proceeding – May 19, 2020⁷⁵

The Federal Court of the 4th Region (“TRF4”) ruled that a company that enters into a leniency agreement cannot remain as a defendant in an improbity lawsuit. The TRF4 held that the leniency agreement already determines full compensation for material and moral damage. The decision terminated a public civil lawsuit brought by the AGU against the construction company *UTC Engenharia*.

74 Source: <https://www.conjur.com.br/2020-dez-02/cabe-acao-improbidade-particular-gere-verba-publica>

75 Source: <https://www.conjur.com.br/2020-jun-01/acordo-leniencia-afasta-acao-improbidade-trf>

5.3. Guidelines, Administrative Rulings and Efforts

CGU

Ordinance No. 830/2020 – April 05, 2020⁷⁶

The CGU issued Ordinance No. 830/2020 creating Special Actions Units (“*Núcleos de Ações Especiais*”) within its regional divisions in Brazil. The Ordinance defines as Special Actions confidential fraud investigations and auditing activities carried out in partnerships with other public entities and aim at detecting and investigating illegal, illicit or irregular acts and facts, practiced against the Public Administration and related to federal matters.

The Special Actions Units are part of the CGU’s regional divisions and are entitled to, among other things: (i) plan, execute and monitor the actions and results of CGU’s unit and coordinate with state-level authorities’ operations; (ii) act together with CGU’s partners in the respective state aiming at developing joint efforts related to special operations; (iii) analyze information disclosed to the CGU in leniency agreements under the category of investigative leverage (the CGU usually requests lenient companies to disclose all facts that may assist uncovering illicit facts in the future. Whenever a fact is inconclusive—but has a potential of being conclusive in the future, it is disclosed as investigative leverage. None of the facts disclosed as investigative leverage are subject to fines/disgorgement by the CGU within the leniency agreement); (iii) identify potential illicit acts under the BCCA; (iv) carry out technical, economical, accounting and financial analysis to support the CGU’s Leniency Agreement Division within negotiations of leniency agreements and (v) crosscheck sensitive information necessary for planning investigations aimed at fighting corruption.

The Special Action Units are intended to help the CGU combatting corruption in a faster and more effective fashion. Its main purpose is to create regional specialized units focused on the detection of illegal acts and increasing CGU’s investigative capacity and law enforcement.

⁷⁶ Source: <https://www.in.gov.br/en/web/dou/-/portaria-n-830-de-5-de-abril-de-2020-251490348>.

Technical Note No. 671/2020 – April 06, 2020⁷⁷

The CGU issued Technical Note No. 671/2020 clarifying its understanding that the BCCA does not apply for wrongdoings committed within a public tender or a governmental contract before the BCCA’s efficiency (i.e., before 2014) even if the amendments of such public contract extend the contract’s period or are signed after the BCCA’s efficiency—as long as new wrongdoings do not specifically involve the amendments itself and after the BCCA’s efficiency. I.e., if a company obtains a governmental contract through bribes, the fact that the contract is legally amended does not constitute a continuation or a new violation.

Manual with good integrity practices in public-private relations during the pandemic – April 28, 2020⁷⁸

The CGU issued recommendations to companies that conducted transactions with the public sector based on measures exceptionally adopted due to the COVID-19 pandemic. The manual provides companies with guidelines for ensuring that any relationship with public entities during the pandemic follows the due standards of publicity and integrity.

The CGU specifically recommended companies to: (i) ensure their leadership is orienting its employees to comply with the companies’ ethical and integrity standards; (ii) duly register all its acts through minutes and reports; (iii) make its business transactions public; (iv) monitor the execution of its contracts; (v) report any potential illicit acts related COVID-19.

Ordinance No. 1,214 – June 08, 2020⁷⁹

The CGU Ordinance No. 1,214 regulates the rehabilitation of individuals or companies debarred within CGU’s procedures under Law No. 8,666/1993.

⁷⁷ Source: https://repositorio.cgu.gov.br/bitstream/1/44788/8/Nota_Tecnica_671_2020.pdf

⁷⁸ Source: <https://www.gov.br/cgu/pt-br/centrais-de-conteudo/publicacoes/integridade/arquivos/cartilha-integridade-covid.pdf>

⁷⁹ Source: <http://www.in.gov.br/web/dou/-/portaria-n-1.214-de-8-de-junho-de-2020-260787863>

The Ordinance establishes that a debarred individual or company may request its rehabilitation by cumulatively fulfilling the following requirements: (i) end of the two-year debarment period with no contracts with the Public Administration; (ii) fully disgorgement of the damages caused to the public treasury in connection with the wrongdoing; and (iii) adoption of measures that demonstrate the company has overcome the issues that lead the company to debarment, including the adoption of an integrity program. The Ordinance should positively impact and enhance compliance in Brazil and facilitate the recovery of debarred companies.

Normative Instruction No. 15/2020 – June 10, 2020⁸⁰

The Normative Instruction No. 15/2020 amends the previous CGU Normative No. 13/2019 regarding the PAR under the BCCA, for determining the administrative liability of legal entities.

Among other things, Normative Instruction No. 15/2020 grants to legal entities the possibility of providing the CGU with additional information and evidence to support the CGU's analysis in a PAR, such as for the analysis of parameters used in the calculation of fines. In doing so, the new Normative Instruction enables companies to participate more actively in the fine calculation process, favoring collaborative behavior and reducing the risk of arbitrary sanctions. Another effect of the Normative Instruction is to reduce the risk of legal actions taken against BCCA PARs.

Specifically (and among other things), Normative Instruction No. 15/2020: (i) extended the use of information and supporting documentation provided by the defending entity for calculation of fines and (ii) established a reassessment of the PAR's regularity after CGU submits its final report.

Guidelines for evaluation of integrity programs in the scope of leniency agreements – July 2020⁸¹

⁸⁰ Source: <https://www.in.gov.br/web/dou/-/instrucao-normativa-n-15-de-8-de-junho-de-2020-261039558>

⁸¹ Source: https://www.gov.br/cgu/pt-br/centrais-de-conteudo/publicacoes/integridade/arquivos/acordo-de-leniencia_orientacoes-as-empresas.pdf

The guidelines issued by the CGU provide further recommendations and information on relevant aspects that to be assessed by the CGU while evaluating a company's integrity program and its respective profile and integrity reports, which are mandatory submitted by companies negotiating leniency agreements.

The CGU highlighted the importance of companies to take into account the following aspects while preparing the integrity report: (i) evidence of how the measures for mitigating risks are applied in the company's routine; (ii) submit documents with their approval date and with the proper signatures; (iii) not submit minutes and documents that are pending approval; (iv) submit the most recent versions of policies and procedures, with date of signature and date of disclosure to internal and external public; (v) present evidence of the application of monitoring policies and procedures within the last 24 months; (vi) submit all documents in Portuguese, as a rule.

FEDERAL PROSECUTION OFFICE – MPF

Technical Note No. 01/2020⁸²

On March 06, 2020, the MPF's 5th Chamber of Coordination and Revision issued the Technical Note No. 01/2020, a guideline for the terms of adherence or subscription to leniency agreements by individuals that are somehow related to companies that have signed leniency agreements, and therefore joining the terms agreed by the company. The Terms of Adherence or Subscriptions are extensions of leniency agreements and are submitted to the 5th Chamber of Coordination and Revision for approval.

The scope of the Note is to guide the MPF's proceedings while negotiating with adherents, in order to assure isonomy between the rights granted to collaborators and to adherents. The Note also standardizes procedures adopted by the MPF in leniency agreements and provides for concentrating investigations in a single prosecutor.

Technical Cooperation Agreement between the Brazilian Securities and

⁸² Source: <https://valor.globo.com/legislacao/noticia/2020/06/09/mpf-quer-uniformizar-acordos-de-leniencia.ghtml>

Exchange Commission - CVM and MPF **- August 26, 2020⁸³**

The TCA is intended to regulate the technologies, knowledge and database exchange (i.e., exchange of sensitive data) between the CVM and the MPF.

Under the Agreement, the MPF will provide technical support to CVM regarding information received and processed through the Banking Transactions Investigation System (“SIMBA”). SIMBA is a system and database developed by the AGU for data exchange between financial institutions and government agencies. SIMBA was created with the purpose of speeding up the analysis of investigative procedures involving classified information of investigated individuals, such as financial and tax information. Now, CVM will also have access to SIMBA.

Despite the cooperation, the MPF and CVM have undertaken not to transfer data to third parties, under penalty termination of the cooperation.

Civil Non-Prosecution Agreements **Guideline⁸⁴**

The MPF’s 5th Chamber of Coordination and Revision issued a guideline to regulate the enforcement of civil non-prosecution agreements (“ANPC”). The ANPCs were introduced to the Brazilian legal system by the Anti-Crime Package, which among other things, allowed the execution of leniency agreements under the AIA—previously not permitted.

The MPF’s Guideline highlights that the ANPC purpose is to: (i) encourage negotiations; (ii) provide effectiveness to the resolution of corruption cases; (iii) prevent and repress illicit acts; and (iv) ensure compensation for damages.

According to the Guidelines, in order to sign the ANPC, the parties must present documents and information regard-

⁸³ Source: http://www.cvm.gov.br/export/sites/cvm/convenios/anexos/MPF_SIMBA.pdf

⁸⁴ Source: <http://www.mpf.mp.br/pgr/noticias-pgr/camara-de-combate-a-corrupcao-do-mpf-expede-orientacao-sobre-acordo-de-nao-persecucao-civil>

ing the offenses and illegal acts related to the scope of the ANPC. In exchange, the ANPC may provide proportional benefits to the collaborator, according to its contribution. The benefits that may be provided include, among others: exemption and reduction of penalties, such as exemption of public positions, fine, debarment, partial suspension or interdiction of the activities of the legal entity, compulsory wind-up of the company and prohibition of receiving incentives, subsidies or loans from public agencies or entities. However, penalties related to compensation of damages to the treasury and forfeiture of assets and rights that are the product of the illegal act cannot be reduced.

The Guidelines establishes that the MPF must consult the public entity damaged, under the AIA, before signing an ANPC. The consultancy allows the public entity to express its opinion on the execution of the ANPC.

OTHER ANTI-CORRUPTION AND ETHICS INITIATIVES

Petrobras approves an ethics guideline for suppliers⁸⁵

In October, *Petrobras* issued a guideline on expected ethical values and behaviors for its suppliers. The guideline reaffirms *Petrobras*’ “zero tolerance for any and all forms of fraud and corruption” and demands the same standards from *Petrobras*’ suppliers. According to the guideline, suppliers must promote decent and safe working conditions for employees, combat child and slave labor, promote diversity, gender and racial equality and the inclusion of disabled people.

Federal Government Anti-Corruption Plan⁸⁶

On December 09, 2020, the Federal Government published the Anti-Corruption Plan for the period of 2020 to 2025.

⁸⁵ Source: <https://petrobras.com.br/data/files/C9/83/CA/8B/D6A65710A-9CBFF47D438E9C2/Guia%20de%20conduta%20etica%20para%20fornecedores.pdf>

⁸⁶ Source: www.gov.br/anticorruptcao

The plan is structured in two phases: (i) diagnosis of entities that compose the Interministerial Committee to Fight Corruption and (ii) elaboration of a plan with actions to be implemented in short and medium terms. The diagnosis was developed along three different work fronts, which enabled the Federal Executive branch to verify the status of implementation of the proposals, identify needs for improvement and analyze the commitment to international recommendations.

The scope of the Plan is to prevent and detect corrupt-related conducts and to charge individuals and entities involved in corrupt offenses. Moreover, the action plan comprehends 142 measures to be executed by bodies such as the AGU, the Brazilian Central Bank, CADE, CGU, the Ministry of Economy, the Ministry of Justice, the Federal Police and the Brazilian Federal Revenue's Office.

Some of the most relevant actions in the Plan, that should be implemented and completed between 2020 and 2025, include:

- CGU Action 76: cooperation between CGU and National Congress for suggestions (by the first) and approval (by the latter) of bills intended to strengthen the prevention and fight against corruption. The CGU intends to offer its inputs on bills involving integrity, liability of legal entities, public tenders and contracts.
- CGU Action 74: within the scope of leniency agreements, propose regulations establishing criteria regarding the application of a discount of up to 2/3 of the fine's total amount.
- Ministry of Justice Action 4: create policies aiming at the fight against corruption, money laundry and organized crime, in order to increase technical and operational capacity within the states.
- Ministry of Economy Action 5: define indicators to monitor the performance of public entities that receive public resources. ■

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