

Anticorruption enforcement in Brazil: getting closer to a “complete” leniency agreement



Summary

In a landmark decision issued on March 15 by the Federal Court of Accounts (the TCU), Brazil got close to reach the first precedent in which a leniency agreement in a corruption investigation was signed off by every Government agency that claims competence over this matter.

The facts

In October 2015, MullenLowe and FCB. reached an agreement with the Office of the Federal Prosecutors in Brazil (the MPF), to pay a fine of almost USD 13 million in connection with payments made to André Vargas, a former Congressman arrested in the beginning of 2015.

The case is connected to “Operation Car Wash”, a massive investigation into a price-fixing scandal involving accusations that Brazilian construction companies and other suppliers have allegedly over-charged state-controlled oil company Petrobras, bribed Petrobras executives and paid large amounts of money to politicians.

According to the MPF, the payments made by MullenLowe and FCB to Mr. Vargas had the purpose of securing that the two advertising agencies won government accounts from the Health Ministry, Caixa Economia Federal (a Federal bank) and Petrobras. Following dawnraids in the agencies’ offices in Brasilia and Sao Paulo, MullenLowe and FCB approached the MPF and signed a leniency agreement, by means of which they would pay the Brazilian Government 50 million reais, the equivalent of approximately USD 12.85 million.

To be effective, however, the leniency agreement needed approval by the Ministry of Transparency, Oversight and Office of the Comptroller General (the CGU), the Office of the Attorney General (the AGU) and the abovementioned TCU.

The legislation in discussion

The anticorruption leniency agreement, set forth by Law No. 12,846/2013 (the Anticorruption Law), is an important instrument against bribery and frauds. Among the benefits for private companies that have incurred in corruption practices, it is worth mentioning the reduction of the applicable fines in up to 2/3 of the original amount and the possibility continuing to participate in public tender bids.

However, since the Anticorruption Law came into force, in the beginning of 2014, there has been an intense discussion about which government agency has competence to execute leniency agreements. While the CGU and the AGU claimed their competence based on the Federal Constitution (articles 74 and 131) and the Anticorruption Law itself (article 16), the TCU argued that its competence was also set forth by the Federal Constitution (articles 70 and 71); finally, the MPF also stated that the Federal Constitution (at article 129) assured that federal prosecutors should be involved in the negotiation of leniency agreements.

Such an overlap of powers resulted in a true “battle of agencies” in Brazil, and the few precedents by the Brazilian High Courts about this matter were not conclusive to indicate which agency has powers to sign leniency agreements, on behalf of the Brazilian Government, in corruption investigations.

Final words

In the decision issued on March 15, the TCU cleared the signature of the leniency agreement with MullenLowe and FCB, subject to the inclusion of relatively small changes in the draft that had already been cleared by the CGU, the AGU and the MPF. More importantly, the TCU agreed with the amount of the fine that had already been negotiated with other government agencies. As soon as the agreement is signed, Brazil will have taken one of its most important steps towards reducing the bureaucracy for companies engaged in corruption practices to settle the investigation quickly.



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