White Collar Crime - Brazil

Reform of the Money Laundering Law

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Introduction

Brazil has long been active in the global effort to fight money laundering. In 1991, three years after democracy was reintroduced into the country via the 1988 Constitution, Brazil adopted the Vienna Convention against drug trafficking through an act of Congress (which was further reinforced by an executive order). The convention set the basis for the pursuit of money laundering activities in relation to profit resulting from drug trafficking.

At almost the same time, in 1989 the Financial Action Task Force on Money Laundering (FATF) was created in Paris by the G7 - a group created in 1976 and initially formed of the United States, Canada, Japan, Italy, the United Kingdom, France and Germany. In the following years, several other countries joined FATF, which today has more than 33 members, including Brazil. The FATF, through its recommendations, plays an enormous international role in setting the directions regarding the combatting of money laundering, influencing both governments and legislators.

1998 law

It was in this climate that Brazil passed Law 9.613/1998, which defined the crime of money laundering for the first time and granted the authorities several criminal procedure measures by which they could enforce the law and seize illicit products in relation to the following crimes (Article 1):

- drug trafficking;
- terrorism and its financing;
- smuggling or trafficking of guns and ammunition;
- extortion via kidnapping;
- crimes against the Public Administration, such as public servants' and politicians' corruption and extortion committed by public servants;
- crimes against the Brazilian financial system;
- crimes committed by criminal organisations; and
- crime against foreign public administrations, such as international corruption.

On its introduction, the law was criticised by those who considered it too restricted, adding that in Brazil - which has a Roman-Germanic law system - there was no formal law at that time defining 'criminal

organisation' or 'terrorism crimes'. Furthermore, the Brazilian Penal Code does not mention crimes in relation to criminal organisations, instead referring to a similar, but different crime called 'gang' crime (Article 288), which only demands the association of more than three people in order to commit crimes. As a result, money laundering related to crimes such as robbery or embezzlement, for instance, did not fall within the range of this law, even when committed by a well-structured 'criminal organisation' or related to 'terrorism'.

Jurisprudence

Some years later, Brazil subscribed to the 2000 Palermo Convention against transnational organised crime, which was approved by Congress by a 2003 act, and enforced by Executive Order 5.015/2004. Although legislative acts (such the ratification of a international treaty) and executive orders cannot be considered formal laws under the Constitution (which clearly distinguishes laws from administrative acts or orders), in February 2011 a majority vote of the Supreme Court accepted that Executive Order 5.015 was sufficient to make it possible for the authorities to pursue any criminals that had recycled money originating in organised criminal activities perpetrated after March 15 2004 (in the Brazilian system, no law that defines a crime can be enforceable in relation to facts that occurred before it was enacted).(1)

However, because (as stated above) a law differs from an executive order or legislative act, and according to the Constitution only a formal law can define crimes, on June 12 2012 the Supreme Court declared that (contrary to its previous decision) Executive Order 5.015 was not enough to enforce the money laundering law in relation to money originating from organised crime activities.(2)

New law

In the middle of this jurisprudence conflict, Congress voted on - and President Dilma Roussef signed - Law 12.683 of July 12 2012, bringing about reform of the Money Laundering Law (9.613/1998) for the first time in 14 years. This recent reform brought a number of significant changes.

In particular, the new law amended Article 1 of Law 9.613, removing any reference to the above-mentioned list of crimes as a precondition to the crime of money laundering. The Supreme Court discussion regarding the definition of 'organised crime' is therefore no longer relevant to future cases. From now on, the products of any criminal offence can be considered as the object of a money laundering investigation. In this decision, Congress has followed the directions of the FATF, in particular Recommendation 40, which proposed opening up of the range of conduct that may constitute crimes in relation to money laundering.

Comment

This will arguably lead to an increase in new criminal charges in Brazil, giving public prosecutors, police officials and judges strong measures to combat crime, as well as the illegal financial or material benefits obtained through criminal activity.

It is likely to become common for criminal procedures to be opened charging someone for embezzlement and, at the same time, for money laundering if he or she tries to use and dissimulate the illegal money obtained. It is also likely to lead to discussions of whether a perpetrator of money laundering can be the same person that committed the previous criminal offence. Furthermore, as the new law does not place any restrictions on the criminal offences committed before the money laundering occurred, discussions may arise as to whether such punishments may be unreasonable, as the penalty for the money laundering offence (ie, three to 10 years in jail) may be more severe than the original criminal offence.

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Endnotes

(1) Supreme Court, *Inquérito* 2786, Justice Ricardo Lewandowski, plenary, February 17 2011.

(2) *habeas corpus* 96.007, Justice Marco Aurélio Mello, June 12 2012.

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