

Brazil Announces New Anti-Corruption Cooperation Framework; MPF's 5th Chamber Opposes It

August 14, 2020

On August 6, 2020, Brazilian enforcement authorities announced a technical cooperation agreement focused on leniency agreements under the country's Anti-Corruption Law (the "TCA").¹ The Comptroller-General's Office (the "CGU"), Attorney-General's Office (the "AGU"), Ministry of Justice and Public Security (the "MJSP"), and Federal Court of Accounts (the "TCU") already have executed the TCA, which the Supreme Court (the "STF") mediated. The Federal Prosecution Service (the "MPF") is listed also as a signatory and discussed in various provisions, but has not yet executed the TCA. Four days later, the Permanent Advisory Commission on Leniency and Collaboration Agreements of the MPF's 5th Chamber of Coordination and Revision (the "5th Chamber")—which focuses on anti-corruption efforts—issued a detailed Technical Note advising the head of the MPF against doing so.²

In recent years, the MPF, CGU, and AGU all have played important roles in anti-corruption enforcement, including relying on leniency agreements in settling numerous corruption-related matters. Companies, the defense bar, and regulators alike have highlighted challenges posed by the multiplicity of Brazilian enforcement agencies that, until more recently, showed limited signs of coordinating.³ Although the TCA is

¹ Federative Republic of Brazil, "Acordo de Cooperação Técnica que Entre si Celebram o Ministério Público Federal, a Controladoria-Geral da União (CGU), a Advocacia Geral da União (AGU), o Ministério da Justiça e Segurança Pública (MJSP) e o Tribunal de Contas da União (TCU) em Matéria de Combate à Corrupção no Brasil, Especialmente em Relação aos Acordos de Leniência da Lei No. 12.846, de 2013" [Technical Cooperation Agreement Among the Federal Prosecution Service, Comptroller-General's Office (CGU), Attorney General's Office (AGU), Ministry of Justice and Public Security (MJSP), and Federal Court of Accounts (TCU) Regarding Anti-Corruption in Brazil, Particularly Leniency Agreements Under Law No. 12.846 of 2013] (Aug. 6, 2020), <http://www.stf.jus.br/arquivo/cms/noticiaNoticiaStf/anexo/Acordo6agosto.pdf>.

² Federal Prosecution Service, 5th Chamber of Coordination and Revision—Anti-Corruption Enforcement, Permanent Advisory Commission on Leniency and Collaboration Agreements, "Nota Técnica No. 2/2020" [Technical Note No. 2/2020] (Aug. 10, 2020), <http://www.mpf.mp.br/pgr/documentos/NotaTecnicaAcordodeCooperacaoFinal.pdf>.

³ See, e.g., Andrew M. Levine, Kara Brockmeyer, and Daniel Aun, "Latin America's Evolving Anti-Corruption Landscape: Brazil in Flux and Regional Reverberations," FCPA Update, Vol. 11, No. 3 (Oct. 2019), <https://www.debevoise.com/insights/publications/2019/10/fcpa-update-october-2019>.

premiered largely on addressing that challenge,⁴ the Technical Note concluded that the TCA, as drafted, fails to reflect the MPF's authority, is inconsistent with the goal of promoting systematic inter-agency cooperation, and does not increase legal certainty.⁵ Looking ahead, whether the MPF agrees to join the TCA likely will impact meaningfully what comes next in Brazil.

THE TCA

The TCA articulates various principles intended to govern the agencies' collective efforts, outlines the pillars of leniency agreements under the Anti-Corruption Law, and requires its signatories to take certain concrete actions. Depending on whether and how the TCA is implemented, it potentially could alter dramatically important aspects of Brazil's anti-corruption enforcement framework.

Most significantly, the TCA provides that the CGU and AGU will be responsible for negotiating and executing leniency agreements under the country's Anti-Corruption Law.⁶ If the Federal Police, MPF, or TCU identify companies involved in wrongdoing, they shall inform the CGU and AGU, which can seek to hold the companies liable under the Anti-Corruption Law.⁷ Conversely, if the CGU identifies individuals involved in misconduct under the Anti-Corruption Law, it shall inform the MPF and Federal Police, which can seek to hold the individuals criminally liable, as well as the AGU and MPF, which can seek to hold the individuals liable under the Administrative Improbability Law.⁸ The provisions requiring the involvement of other agencies apply if doing so does not put ongoing activities at risk.⁹ The TCA further provides that the CGU, AGU, MPF, and Federal Police shall seek to coordinate their efforts in negotiating corporate leniency agreements and potentially parallel individual collaboration agreements; the goal is to resolve simultaneously matters involving corrupt practices under the Anti-Corruption and Administrative Improbability Laws and related criminal statutes.¹⁰

Additionally, under the TCA, after the execution of a leniency agreement, the AGU (relying on evidence before it) and MPF (relying on evidence shared with it), either together or separately, may seek to hold other entities or individuals who took part in

⁴ See Supreme Court, Chief Justice José Antonio Dias Toffoli, Speech Regarding the TCA (Aug. 6, 2020), at 1-3, <http://www.stf.jus.br/arquivo/cms/noticiaNoticiaStf/anexo/discursoACTleniencia.pdf>; see also TCA, *supra* note 1, Preamble, at 3-5.

⁵ Technical Note, *supra* note 2, at 7-8, 10-12, 44-46.

⁶ TCA, Second Operational Action, *supra* note 1, at 11.

⁷ *Id.*, First Operational Action, Sub-Item (1), *supra* note 1, at 10.

⁸ *Id.*, First Operational Action, Sub-Item (2), *supra* note 1, at 10.

⁹ *Id.*, First Operational Action, Sub-Items (2)-(3), *supra* note 1, at 10.

¹⁰ *Id.*, First Operational Action, Sub-Item (4), *supra* note 1, at 10-11.

misconduct revealed by a corporate cooperator liable in court for administrative improbity acts.¹¹ Similarly, the CGU (relying on evidence before it) and TCU (relying on evidence shared with it) may seek to hold others involved in disclosed misconduct liable at the administrative and external control domains.¹²

Among other things, the TCA also:

- Discusses the TCU's involvement in the assessment of damages and in leniency negotiations;¹³
- Addresses the sharing of information and evidence among the signatories and the potential use of such against corporate cooperators and third parties;¹⁴
- States that the CGU, AGU, and TCU shall seek to adopt “standardized parameters” regarding the methodology for assessing damages payments due in connection with leniency agreements;¹⁵
- Provides that the signatories shall seek to establish “mechanisms to offset and/or deduct” certain types of payments, namely fines paid by companies in connection with conduct captured by more than one law or damages paid to the same “aggrieved entity” arising out of the same facts;¹⁶ and
- Outlines some of the benefits or protections to be afforded to cooperating entities.¹⁷

Additionally, the TCA's signatories expressed the intention to revise their internal rules and procedures to reflect the terms of the TCA and to seek to adjust previously executed leniency agreements and ongoing proceedings.¹⁸

¹¹ *Id.*, Fifth Operational Action, *supra* note 1, at 10-11.

¹² *Id.*, Fifth Operational Action, *supra* note 1, at 11.

¹³ *Id.*, First Operational Action, Sub-Item (3), *supra* note 1, at 10; *id.*, Second Operational Action, Sub-Items (2)-(4), *supra* note 1, at 11.

¹⁴ *Id.*, Third Systemic Action, Sub-Items (1)-(3), *supra* note 1, at 9-10; *id.*, Third Operational Action, *supra* note 1, at 11-12; *id.*, Fourth Operational Action, *supra* note 1, at 12.

¹⁵ *Id.*, Second Operational Action, Sub-Item (1), *supra* note 1, at 11.

¹⁶ *Id.*, Sixth Operational Action, *supra* note 1, at 13.

¹⁷ *E.g., id.*, Third Systemic Action, Sub-Item (3), *supra* note 1, at 10; *id.*, Fourth Operational Action, *supra* note 1, at 12.

¹⁸ *Id.*, Third Systemic Action, *supra* note 1, at 9.

THE 5TH CHAMBER'S TECHNICAL NOTE

The Technical Note objects strongly to the TCA.¹⁹ In particular, the Technical Note asserts that it is unconstitutional to exclude the MPF from negotiating and executing leniency agreements under the Anti-Corruption Law.²⁰ Relatedly, the Technical Note states that the TCA misinterprets the Anti-Corruption Law and does not properly recognize the MPF's legal role and authority to negotiate and execute such agreements.²¹ Moreover, the Technical Note objects to the TCA's reference to the CGU's and AGU's involvement in negotiating individual collaboration agreements parallel to corporate leniency agreements.²²

Other criticisms of the TCA in the Technical Note include:

- The failure to include and account for other potentially relevant government agencies, such as the Central Bank, Administrative Council for Economic Defense ("CADE"), and Securities & Exchange Commission ("CVM");²³
- The lack of a centralized body, for example to coordinate relevant activities among the various enforcement agencies and to issue guidelines;²⁴
- The substance of particular provisions of the TCA, including regarding evidence sharing,²⁵ releases to corporate cooperators for damages payments,²⁶ and other possible benefits to cooperators under leniency agreements;²⁷
- The possibility of adjusting prior leniency agreements to the TCA's terms, which may cause "unbearable legal uncertainty";²⁸

¹⁹ On August 12, 2020, the Prosecution Service of the State of Paraná (the "MPPR") publicly endorsed the 5th Chamber's Technical Note and opposed the TCA. See Prosecution Service of the State of Paraná, "MPPR Manifesta-se Sobre Cooperação Técnica para Acordos de Leniência" [Prosecution Service of the State of Paraná Expresses Its Views About Technical Cooperation for Leniency Agreements] (Aug. 12, 2020), <https://mppr.mp.br/2020/08/22860.10/MPPR-manifesta-se-sobre-cooperacao-tecnica-para-acordos-de-leniencia.html>.

²⁰ Technical Note, *supra* note 2, at 7-8, 10, 12, 17, 20, 44.

²¹ *Id.* at 7-8, 11-12, 18-20, 45.

²² *Id.* at 40.

²³ *Id.* at 13-15, 27, 44-45.

²⁴ *Id.* at 22, 45.

²⁵ *Id.* at 31-32, 34-35, 37, 40-41, 43, 46.

²⁶ *Id.* at 24-28, 41, 45-46.

²⁷ *Id.* at 32-34, 46.

²⁸ *Id.* at 28-31, 46.

- The MPF’s reliance on the CGU and AGU, following the execution of a leniency agreement, to provide evidence for the MPF to pursue improbity actions against entities and individuals involved in misconduct revealed by a corporate cooperator;²⁹ and
- The legal basis for the TCA and the STF’s mediating role.³⁰

The Technical Note concludes that the TCA does not bind the MPF and that the MPF’s leniency agreements remain in force.³¹ The 5th Chamber also expressed a preference for its earlier proposal to create a “collegiate body”—with representatives of all TCA signatories, as well as the MPF, Central Bank, CADE, and CVM—that would coordinate leniency efforts and issue related guidelines.³²

To date, the head of the MPF has not yet issued a public statement regarding the Technical Note.

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We will continue to monitor relevant developments.

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²⁹ *Id.* at 44.

³⁰ *Id.* at 15-16, 22-24, 45.

³¹ *Id.* at 47.

³² *Id.* at 7, 17-18, 20-22, 45.