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The International Comparative Legal Guide to:

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A practical cross-border insight into corporate investigations

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1 The Decision to Conduct an Internal Investigation

1.1 What statutory or regulatory obligations should an entity consider when deciding whether to conduct an internal investigation in your jurisdiction? Are there any consequences for failing to comply with these statutory or regulatory regulations? Are there any regulatory or legal benefits for conducting an investigation?

The Brazilian legal system does not have specific laws to regulate corporate investigations. Therefore, the limits, boundaries and obligations related to private internal investigations are set by a group of more general laws, such as the Brazilian Constitution, the Penal Code and other criminal laws, Civil Code, Labour Code, antitrust laws, etc. Federal Law no 12.846/2013, known as the Anti-Corruption Act, provides for a possibility of companies involved in acts of corruption entering into leniency agreements with public authorities. In order to enter into the agreement, the company must fulfil certain obligations, such as admitting its participation in the offence, ceasing the illegal activity immediately, identifying other parties involved, providing information and documents that can be used as proof of the offense, and cooperating fully and permanently with the investigation. Failure to fulfil these conditions will prevent the company from obtaining the legal benefits of the agreement. Finally, the Anti-Corruption Act also states that one of the factors taken into consideration by the authorities to determine the amount of the sanction imposed is the existence of compliance mechanisms (internal investigations, encouragement for whistle blowing, effective application of ethics code, etc.). As a result, conducting an internal investigation may result in benefits such as being able to sign leniency agreements and receiving lighter penalties.

1.2 What factors, in addition to statutory or regulatory requirements, should an entity consider before deciding to initiate an internal investigation in your jurisdiction?

By deciding not to perform an internal investigation of a possible serious offence, a company faces a serious risk of being perceived as an entity that concurred, consented or at least was very negligent in relation to the offence. This circumstance exposes the entity to criminal, administrative, and civil liabilities, as well as damage to its reputation.

1.3 How should an entity assess the credibility of a whistleblower's complaint and determine whether an internal investigation is necessary? Are there any legal implications for dealing with whistleblowers?

The common practice for an entity to assess the credibility of a complaint and determine whether an internal investigation is necessary is to perform a preliminary fact-check. Unless the complaint can be easily ruled out, any likelihood that it may be true should lead to a further probe. There are no direct legal implications for dealing with whistleblowers. However, ignoring or mishandling a complaint may lead to a complaint being made to public authorities, exposing the entity to the risks described in question 1.2 above.

1.4 How does outside counsel determine who "the client" is for the purposes of conducting an internal investigation and reporting findings (e.g. the Legal Department, the Chief Compliance Officer, the Board of Directors, the Audit Committee, a special committee, etc.)? What steps must outside counsel take to ensure that the reporting relationship is free of any internal conflicts? When is it appropriate to exclude an in-house attorney, senior executive, or major shareholder who might have an interest in influencing the direction of the investigation?

Outside counsel's commitment should be to the division or department, within the company, that hired him. Obligations of reporting findings and maintaining confidentiality should be previously established and documented. It is also recommended to include contractual provisions and mechanisms to ensure that the outside counsel will be able to conduct the investigation without interference (e.g. allowing him to be dismissed from his contractual obligations if his professional independence is hindered or threatened). The exclusion of anyone who attempts to interfere should occur at the slightest sign of such intent.

2 Self-Disclosure to Enforcement Authorities

2.1 When considering whether to impose civil or criminal penalties, do law enforcement authorities in your jurisdiction consider an entity's willingness to voluntarily disclose the results of a properly conducted internal investigation? What factors do they consider?

As explained in question 1.1 above, the willingness to disclose the results of an internal investigation is one of the conditions for a company to enter into a leniency agreement with public authorities. This type of agreement is foreseen in a few different laws (the aforementioned Anti-Corruption Act, antitrust laws), may result in a significant penalty reduction for companies. The main factor that the public authorities consider is the effectiveness of the company's cooperation (i.e. amount and quality of proof handed over) for convicting other parties involved in the offence.

2.2 When, during an internal investigation, should a disclosure be made to enforcement authorities? What are the steps that should be followed for making a disclosure?

Besides the willingness to take responsibility and cooperate fully, another condition for the leniency agreement is that the company must be the first to seek the authorities and express the intention of doing so. Therefore, the sooner the disclosure is made, the greater the chances of a company obtaining the legal benefits of an agreement. This urgency, however, must be considered alongside the fact that a poorly carried out or incomplete investigation may also expose the company to risks. Providing false or inaccurate information to enforcement authorities may cause them to void the leniency agreement. For this reason, the company must find an ideal balance between the urgency of disclosing information to the authorities and the quality of the investigation.

2.3 How, and in what format, should the findings of an internal investigation be reported? Must the findings of an internal investigation be reported in writing? What risks, if any, arise from providing reports in writing?

There is no specific law or provision establishing the format in which the findings must be reported. It can be done in writing or verbally. In any case, the enforcement authorities will produce a document containing the findings. This document is normally kept under secrecy while the investigation of the authorities is underway and is later revealed to the companies or individuals being prosecuted. The risks of providing reports in writing are mainly of a document being leaked to the press, which, unfortunately, happens often in Brazil.

3 Cooperation with Law Enforcement Authorities

3.1 If an entity is aware that it is the subject or target of a government investigation, is it required to liaise with local authorities before starting an internal investigation? Should it liaise with local authorities even if it is not required to do so?

An entity aware that it is under government investigation is not required to liaise with authorities. The entity may receive official requests for documents or information from authorities and decide whether or not to comply. Not complying with a request can expose the entity to measures such as a search and seizure raid. Compliance, on the other hand, may result in self-incrimination. These matters normally determine the entities decision to reach out to the authorities, even though it is not required by law to do so.

3.2 Do law enforcement entities in your jurisdiction prefer to maintain oversight of internal investigations? What level of involvement in an entity's internal investigation do they prefer?

In general, Brazilian enforcement authorities prefer not to get involved with private internal investigations until the findings are presented. Once this happens authorities may get slightly involved, usually by requesting additional information/documents or clarifications.

3.3 If regulatory or law enforcement authorities are investigating an entity's conduct, does the entity have the ability to help define or limit the scope of a government investigation? If so, how is it best achieved?

Entities do not have the ability to help define or limit the scope of government investigations in any way.

3.4 Do law enforcement authorities in your jurisdiction tend to coordinate with authorities in other jurisdictions? What strategies can entities adopt if they face investigations in multiple jurisdictions?

The Brazilian Government has engaged in several bilateral and multilateral cooperation agreements with other nations. In recent years, the mechanisms of international cooperation have become more efficient and this type of coordination between national and foreign authorities has increased significantly. Two departments connected to the Brazilian Ministry of Justice are responsible for supervising and carrying our international cooperation matters. The Department of Foreigners (DEEST) handles extradition requests and transfers of convicted persons, while the Department of Asset Recovery (DRCI) handles all other cooperation requests. Entities that face investigations in multiple jurisdictions should retain specialised legal assistance in all of them and appoint one person or assemble a team (in-house or external) to concentrate the decision-making process and coordinate the actions of the lawyers from different countries. This is essential, since actions taken in one jurisdiction may affect the case in another jurisdiction.

4 The Investigation Process

4.1 What unique challenges do entities face when conducting an internal investigation in your jurisdiction?

The first challenge that entities face in Brazil is the fact that there are no specific laws to regulate the matter, as explained in question 1.1 above. The lack of adequate legislation brings a level of uncertainty that both private entities and public authorities must work to overcome. There are no rules that determine, for example, if an employee under internal investigation has the right to be assisted by a lawyer and how public authorities will evaluate the results of the investigation if the employee is denied the right to an attorney.

Lack of proper regulation is a constant source of uncertainty, which encourages Brazilian lawmakers to start discussing the matter.

4.2 What steps should typically be included in an investigation plan?

Preliminary fact-checking, formal launching of the investigation, assembling of the investigation team and assignment of responsibilities, determining the scope of the investigation, taking measures to prevent documents from being destroyed, collecting and analysing documents, interviewing witnesses and suspects, producing a report with the conclusions, presenting the conclusions internally to management, deciding whether or not to disclose the findings to the public authorities, discussing and implementing measures to repair the damages caused by the misconduct, and finally, discussing and implementing measures to prevent the misconduct from happening again.

4.3 When should companies elicit the assistance of outside counsel or outside resources such as forensic consultants? If outside counsel is used, what criteria or credentials should one seek in retaining outside counsel?

The decision to utilise outside counsel or assistance in internal investigations mostly depends on a company's structure, capability and expertise to conduct the investigation internally. Any aspect that is lacking should be brought from outside. The sought credentials should be the outside counsel's reputation and reliability, as well as expertise. Unlike other jurisdictions, where it is common to have former prosecutors, district attorneys and police investigators that become lawyers specialised in internal investigations, the core of specialised professionals in Brazil consists of lawyers and consultants that come from the private sectors. Public officials do not show a strong tendency to migrate to the private sector early (before retiring from public service).

5 Confidentiality and Attorney-Client Privileges

5.1 Does your jurisdiction recognise the attorney-client, attorney work product, or any other legal privileges in the context of internal investigations? What best practices should be followed to preserve these privileges?

Attorney-client privilege is recognised by Brazilian laws in the context of internal investigations. The work produced by an attorney in favour of his client is always protected, unless it is understood and proven that the attorney was intentionally participating in criminal activities. The best practice to preserve the privilege is placing disclaimers in all documents and communications exchanged between the attorney and the client.

5.2 Do any privileges or rules of confidentiality apply to interactions between the client and third parties engaged by outside counsel during the investigation (e.g. an accounting firm engaged to perform transaction testing or a document collection vendor)?

Aside from the attorney-client privileges, Brazilian law also provides a more general type of protection for information detained by an entity. In this sense, Article 154 of the Penal Code states that it is a crime to reveal sensitive information (i.e. information capable of causing damage) that the offender had access to while practising his/her profession.

5.3 Do legal privileges apply equally whether in-house counsel or outside counsel direct the internal investigation?

Yes, legal privileges apply equally to in-house or outside counsel.

5.4 How can entities protect privileged documents during an internal investigation conducted in your jurisdiction?

Aside from placing disclaimers in all privileged documents and communications, the entity should require all service providers (e.g. IT professionals, auditors, accountants, etc.) and employees that will have access to the documents to sign confidentiality agreements.

5.5 Do enforcement agencies in your jurisdictions keep the results of an internal investigation confidential if such results were voluntarily provided by the entity?

Brazilian law does not provide any guarantee that results voluntarily provided by entities to public authorities will be kept confidential. If the results provided to authorities are used to launch or support official investigations and/or lawsuits against third parties, their defences must, inevitably, be granted access to the results by force of the Brazilian Constitution. Moreover, since the publicity of administrative acts is the general rule in the Brazilian legal system, there is the possibility of results being made public, with the exception of specific types of information and/or documents that will remain protected by law (tax and financial information, whistleblowers' identities, etc.).

6 Data Collection and Data Privacy Issues

6.1 What data protection laws or regulations apply to internal investigations in your jurisdiction?

The main data protection laws in the Brazilian legal system are: Article 5, XII of the Constitution which establishes that all written, telephone or telematics communications are inviolable and can only be accessed with a court order granted in a criminal investigation; Articles 151 and 152 of the Penal Code which protect written, telephone and telematics communications; Article 198 of the Tax Code which protects tax information; Quasi-constitutional Law nº 105/2001 which protects banking and financial information; Federal Law nº 9.296/96 which further protects telephone and telematics communications; and Federal Laws nº 12.737/12 and 12.965/15 which further protect information stored in computers and transmitted through the internet. It is important to note that there are strong precedents in the sense that information exchanged through tools or contained in equipment provided by the employer (e-mail accounts, computers, mobile phones, etc.) can be accessed by the employer and used as evidence.

6.2 Is it a common practice or a legal requirement in your jurisdiction to prepare and issue a document preservation notice to individuals who may have documents related to the issues under investigation? Who should receive such a notice? What types of documents or data should be preserved? How should the investigation be described? How should compliance with the preservation notice be recorded?

Yes; it is common practice to issue document preservation notices, especially since destroying documents and destroying evidence (Articles 305, 347, and 356 of the Brazilian Penal Code), can be considered crimes and may subject the offender to precautionary imprisonment, depending on the circumstances (Article 312 of the Penal Procedure Code). The notices are preferably issued to the largest possible number of people (in many cases, the entire company). There is no need to describe the investigation in great detail. Ideally, the company should require the employees to "agree" to comply with the order by digitally or physically signing a document.

6.3 What factors must an entity consider when documents are located in multiple jurisdictions (e.g. bank secrecy laws, data privacy, procedural requirements, etc.)?

When documents that are of interest to the internal investigation are located in multiple jurisdictions, the entity must first consider in which jurisdiction(s) the findings of the internal investigations may potentially be disclosed. Once this is established, the investigation team should take precautions to ensure that the local laws of the jurisdiction(s) where disclosure may take place are being followed during the collection of the documents. This precaution should avoid local authorities from questioning or even nullifying documents obtained abroad under different (less rigorous) laws.

6.4 What types of documents are generally deemed important to collect for an internal investigation by your jurisdiction's enforcement agencies?

The documents that are most commonly deemed important are contracts, payment orders/approvals, communications through corporate devices (e-mail, instant messages), video or audio surveillance.

6.5 What resources are typically used to collect documents during an internal investigation, and which resources are considered the most efficient?

Collecting and analysing communications exchanged by company employees through corporate devices (emails, instant messages) and payment orders or approvals have consistently proven to be the most efficient elements of corporate investigations.

6.6 When reviewing documents, do judicial or enforcement authorities in your jurisdiction permit the use of predictive coding techniques? What are best practices for reviewing a voluminous document collection in internal investigations?

The use of technology for reviewing documents is very widespread in Brazil. There are no legal restrictions for the use of predictive coding techniques and results obtained through the use of such techniques have been accepted by Brazilian Courts. While technology represents a very important tool for reviewing documents, it is essential to have lawyers with specific knowledge of the case analysing the search results.

7 Witness Interviews

7.1 What local laws or regulations apply to interviews of employees, former employees, or third parties? What authorities, if any, do entities need to consult before initiating witness interviews?

There are no specific regulations for such interviews. Employees, former employees and third parties have no legal obligation of participating in internal investigations. If they willingly agree to participate, the entity does not need to consult or notify any public authorities. The conditions and procedures for the interviews (e.g. if the interviewee can be assisted by an attorney, if the answers will be registered in writing or the interview will be recorded, etc.) can be agreed upon by the parties. Existing general laws (the Brazilian Constitution, Penal Code, Labour Code, etc.) apply for situations such as harassment by the employer, defamation, etc.

7.2 Are employees required to cooperate with their employer's internal investigation? When and under what circumstances may they decline to participate in a witness interview?

There are no legal provisions that require employees to cooperate with an internal investigation. They are absolutely free to decline to participate. Although Labour Courts would not consider refusal to participate in an internal investigation as just cause for termination, the employer is generally free to dismiss employees at any time without justification (there are a few exceptions, e.g. pregnancy, occupational diseases, etc.).

7.3 Is an entity required to provide legal representation to witnesses prior to interviews? If so, under what circumstances must an entity provide legal representation for witnesses?

There are no legal provisions that require an entity to provide legal representation to witnesses.

7.4 What are best practices for conducting witness interviews in your jurisdiction?

Witness interviews in internal investigations should ensure the same amount of legal certainty that they would have before public authorities. Practices such as allowing employees and other witnesses to be assisted by lawyers, to refuse to answer questions, to review their statements, etc. are highly recommended. This reduces the entity's exposure to future allegations of wrongdoing (e.g. harassment, defamation, etc.) and increases the reliability of the investigation's results. Finally, there are several ways of documenting a witness interview (e.g. writing, audio recording, video recording, having a public notary present, etc.), that vary according to the circumstances of the case, especially privacy issues. It is always preferable to choose the most accurate means of documenting an interview, among those that satisfy the other necessities.

7.5 What cultural factors should interviewers be aware of when conducting interviews in your jurisdiction?

Due to the fact that the Brazilian legal system has historically overprotected employees in labour relations, trust issues are a major cultural factor in Brazil. These issues are replicated in the relations between companies and class unions, which may interfere in internal investigations.

7.6 When interviewing a whistleblower, how can an entity protect the interests of the company while upholding the rights of the whistleblower?

The best way to ensure the protection of the company's interests while upholding the whistleblower's rights is to make sure that he is assisted by an independent counsel. Having outside counsel assisting the company is also recommended to ensure neutrality of the investigation.

7.7 Is it ever appropriate to grant "immunity" or "amnesty" to employees during an internal investigation? If so, when?

In Brazil, it is possible for an entity to grant immunity or amnesty to its employees during an internal investigation. The main criteria for doing so should be the value of the employee's cooperation (e.g. providing information or documents that the investigators would otherwise not be able to obtain) to the objectives and final results of the investigation.

7.8 Can employees in your jurisdiction request to review or revise statements they have made or are the statements closed?

There are no specific regulations that require entities to allow employees to review their statements. These conditions can be agreed upon by the parties, since witnesses have no legal obligation to participate.

7.9 Does your jurisdiction require that enforcement authorities or a witness' legal representative be present during witness interviews for internal investigations?

There are no specific regulations that require public authorities or legal representatives to be present. These conditions can be agreed upon by the parities, since witnesses have no legal obligation to participate.

8 Investigation Report

8.1 Is it common practice in your jurisdiction to prepare a written investigation report at the end of an internal investigation? What are the pros and cons of producing the report in writing versus orally?

In Brazil, it is common practice to prepare a written report at the end of an internal investigation. The pros of a written report are avoiding misunderstandings and misinterpretations that may result from an oral presentation. On the other hand, a written document, even with legal attorney-client privilege, can be leaked to the press, authorities or competitors, causing damage to the company.

8.2 How should the investigation report be structured and what topics should it address?

The report should briefly cover all the steps of the investigation (question 4.2), explaining, when applicable, what motivated certain decisions (e.g. the decision to document the witness statements in writing as opposed to recording). Most importantly, the report should clearly indicate: 1) if there was a misconduct; 2) who was responsible for the misconduct; 3) if the misconduct could have been detected earlier and if there were any failures in the compliance mechanisms; 4) possible actions to repair the damages caused by the misconduct; and 5) possible actions to improve compliance mechanisms.

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Zanoide de Moraes, Peresi, Braun & Castilho has been engaged in criminal law practice for over 20 years, notably in the field of business and corporate crimes. Guided by an unswerving sense of ethics, the firm stands out by combining a legal practice focused on the relentless defence of its clients' interests with strategies that are in tune with the most up to date theories being discussed in the higher courts and in the legal field. The firm is prepared to handle criminal cases all over the country with its highly-qualified team of lawyers and also through partnerships with other law firms, in order to deliver prompt and efficient services. In recent years, the firm has expanded its activities by working alongside legal departments and foreign law firms in matters involving the relationship between criminal law and compliance rules for both national and multinational companies.

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