



Brazil - Global bribery offenses guide

11 January 2022

By: Ricardo Caiado Lima | Ana Júlia Andrade Vaz de Lima

1) What is the legal framework governing bribery in Brazil?

The Brazilian legal framework governing bribery encompasses three major areas of the legal system: criminal, civil, and administrative. It is mainly composed of the following legislation:

- Brazilian Penal Code (Decree-Law No. 2,848 of 1940);
- Brazilian Public Procurement Law (Law No. 8,666 of 1993 and Law No. 14,133 of 2021);
- Brazilian Administrative Improbity Act (Law No. 8,429 of 1992);
- Brazilian Antitrust Act (Federal Law No. 8.884/1994 and Federal Law No. 12,529/2011);
- Brazilian Clean Company Act (Law No. 12,846 of 2013); and
- Federal Decree No. 8,420 of 2015 (Brazilian Clean Company Act Decree).

2) What constitutes a bribe?

A bribe is an undue advantage that can be defined as an advantage not authorized by law, represented by a benefit or interest that is obtained through a corrupt act.

Bribery under Brazilian law demands that one of the parties is a public official as corruption between private individuals is not yet regulated in Brazil.

3) What are the principal offenses under this legal framework?

Criminal sphere: corruption is a crime governed by the Criminal Code and is divided between passive and active forms. It is defined as:

- any public official who directly or indirectly requests or receives an improper advantage, or accepts the promise of such an advantage, for himself or others, even if this occurs outside the function of the official's office or before the office has been assumed; and
- any private person who offers or promises an improper advantage to a public official to induce the latter to perform, omit or delay any official act.

Administrative and civil spheres: bribery can be described as offering, promising, or giving, directly or indirectly, an improper advantage to a public official, or to a third party related to them. It is important to mention that the Brazilian Clean Company Act does not define what an "improper advantage" is, so the interaction with public official must be carried out with the necessary attention.

4) What is the jurisdictional reach of the legal framework?

Individuals can be criminally liable for offenses concerning Brazilian public entities (ie federal government, states, counties, public or semi-public companies and other public entities) regardless of where the offense took place, the citizenship of the offender or their place of residence, as set forth in article 7, I, b and c of the Brazilian Penal Code.

Brazilian and foreign companies with a business structure in Brazil can be administratively and/or civilly liable for bribery due to the practice of wrongdoing set forth in the Brazilian Clean Company Act against national or foreign Public Administration.

5) Who may be liable for bribery? (public officials, private individuals, legal entities etc.)

- Private individuals, public officials and all Brazilian corporate forms, including all subsidiaries of multinational companies;
 - Note that, under the Brazilian system, legal entities are not subject to criminal liability, except in respect of environmental crimes. Nevertheless, members of management, employees and representatives in general of legal entities may be civilly and criminally liable for acts of corruption or bribery involving the legal entity;
 - Besides criminal liability, public officials may also be subject to the Brazilian Administrative Improbability Act. Any private entity/person who instigates, participates or benefits from the illicit act can also be subject to the penalties set forth in the Act.
 - Companies that commit a bribery act may be subject to the penalties set forth in the Brazilian Clean Company Act, regardless of whether the act was committed in conjunction with a public official or not;
 - According to the Brazilian legal framework, a public official is anyone who holds, even if transitorily or without remuneration, a public function or employment, as well as anyone who holds a post, employment or function in government agencies, or in foundations, public companies and mixed economy companies, and other entities that are, directly or indirectly, controlled by the Public Administration;
- foundations;
- associations of entities or individuals; and
- foreign companies with headquarters, branches or representation in Brazil.

6) Can a parent company be liable for its subsidiary's involvement in bribery?

Yes. The Brazilian Clean Company Act provides that joint and several liability for fines and the restitution for damages extends to the parent company, controlled entities of the company, affiliates, and joint venture partners.

Liability will attach to a legal entity's officers and shareholders with management roles, whenever the legal entity is used to facilitate, conceal, or disguise the illicit conduct.

7) Are facilitation payments (i.e. small payments to speed up routine governmental action) considered bribes?

Yes, the Brazilian anticorruption legal framework does not allow facilitation payments. Provided they meet the criteria, therefore, facilitation payments can be considered bribery as an "improper advantage" (as indicated in question No 3), no matter how small the amount.

8) Does the legal framework restrict political and charitable contributions?

According to Law No. 9,504/97, individuals can make political contributions in an amount that does not exceed 10% of the person's gross income.

In 2015, the Brazilian Supreme Court prohibited corporations from making political contributions based on the argument that the limits set forth by the Brazilian legislation on political donations were insufficient to curb the capture of the politician by economic power. Later, the Brazilian National Congress incorporated this decision into the electoral legislation and now legal entities are prohibited from making political donations.

There are no specific legal restrictions on charitable contributions, but the best practices and the guidelines issued by Brazilian Law Enforcement agencies establishes that compliance programs must encompass rules over charitable and

any other sort of contributions.

9) Does the legal framework place restrictions on corporate hospitality?

Brazilian legislation does not establish specific restrictions on corporate hospitality given to public officials.

There are, however, restrictions on similar topics, like gifts. The Code of Conduct for the High Federal Administration (Code of Conduct), for instance, contains a set of guidelines and ethical principles to be observed by some federal public officials.

This Code is only applicable to public officials and not to private entities, but it has been commonly used as a basis to set parameters that aim to assess the appropriateness of conduct towards a public official regarding gifts, hospitalities and entertainment. According to the Code of Conduct, public officials from the High Federal Administration must refrain from accepting presents or other benefits when the person offering the present or benefit is any individual or company that:

- is subject to the regulatory jurisdiction of the agency for which the public official works;
- has any personal, professional or corporate interest with the public official;
- maintains a business relationship with the agency to which the official provides services; or
- represents third parties that have interests with the agency in which the official is employed.

The Code of Conduct also establishes that public officials may accept small free gifts given for advertisement or for celebration of events of a historical and cultural nature. The commercial value of the gift from the same company cannot exceed BRL100 per year. Moreover, its distribution must be generalized (i.e. it should not be exclusively targeted to a specific public official), and the gift must not be offered more than once every 12 months to the same public official.

After the enactment of the Brazilian Clean Company Act, states and municipalities have also been creating rules on the interactions between public officials and private entities. Brazilian Trade Associations have also been enacting guidelines on hospitalities that its members must abide by.

10) Are there any defenses for bribery offenses?

Defenses against criminal charges are normally based on arguments of expiration of the statute of limitation and/or allegations that defendants were victims of extortion practiced by the public official involved. *Ne bis in idem* (double jeopardy) is usually used as a defense for reducing fines imposed due to the varied dimensions of liability under different statutes. Procedural errors and illegality of evidence are also often alleged.

In the administrative and civil spheres, the existence of a compliance program in the implicated legal entity can mitigate sanctions that it can be subject to. According to the Brazilian Clean Company Act, “the existence of internal mechanisms and procedures of integrity, audit and incentive for the reporting of irregularities, as well as the effective enforcement of codes of ethics and of conduct within the scope of the legal entity” will be taken into consideration when applying sanctions. And, according to the Federal Decree No. 8,420 of 2015 (which regulates the Brazilian Clean Company Act), having a compliance program could represent a higher reduction on the potential sanction imposed against the company – from 1% up to 4% of the fine.

11) What are the key regulatory or enforcement bodies with regard to bribery?

Enforcement in the criminal sphere is conducted by the state police, the federal police, and the state and federal public prosecutor office. They have the power to investigate and prosecute – respectively – crimes related to bribes.

Enforcement of the Brazilian Clean Company Act against legal entities which commit acts of corruption lies with the highest authorities of each entity of the executive, legislative and judiciary powers. The federal government, the states, the federal district, the municipalities and the public prosecutor office are the authorities that can prosecute acts of corruption and apply civil sanctions.

At federal level, the main relevant agencies are: (i) the General-Comptroller Office: promotes general regulation and enforcement of actions against corruption practices in the federal government; (ii) the General-Attorney Office: defends the interests of the federal powers (Executive, Legislative and Judiciary) in judicial proceedings in which they are the author, defendant or interested third party and (iii) the Federal Court of Auditors: conducts external control of the federal

government, assisting the House of Representatives in the mission of monitoring the budgetary and financial execution of the country.

The Brazilian Public Procurement Act establishes criminal and administrative liability. The aggrieved public administration can impose administrative sanctions and the Public Prosecutor Office is responsible for filing the criminal action.

The enforcement of the Brazilian Administrative Improbity Act can be conducted especially by the aggrieved public administration, by the Public Prosecutor Office and by the Courts of Auditors. The aggrieved public administration can impose administrative sanctions and, as for civil penalties, Public Prosecutor Office and the General-Attorney Office are entitled to file a legal action.

12) What are the legal consequences of being found guilty of bribery offenses?

Individuals can be subject to penalties of (i) a fine; (ii) imprisonment of up to 12 years; (iii) suspension of political rights up to 10 years; (iv) and loss of compensation.

According to the Brazilian Clean Company Act, companies can be subject to administrative and judicial penalties, as follows:

- Administrative:
 - A fine of 0.1% to 20% of the gross revenue in the last year prior to the start of the administrative proceedings; if such criteria cannot be used, the fine will range from BRL6,000 to BRL60 million; and
 - publication of the condemnatory decision.
- Judicial:
 - Prohibition from receiving incentives, subsidies, grants, donations or loans from public agencies or entities and from public financial institutions or institutions controlled by the government, for up to five years;
 - loss of assets, rights or valuables representing the advantage or profit, directly or indirectly, obtained from the wrongdoing;
 - partial suspension or interdiction of the legal entity's activities; and
 - compulsory dissolution of the legal entity.

Companies can also be subject to the penalties set forth in the Brazilian Administrative Improbity Act. The penalties are:

- fines that will vary according to the illicit act committed: it can be up to three times the amount of the illicit gains or up to 100 times the amount of the remuneration paid to the public official;
- debarment (prohibition to participate in bids and enter into agreements with public entities) for up to ten years;
- prohibition to receive tax or credit benefits or incentives from public entities for up to ten years.

In addition to the penalties, civil compensation for damages caused to the public treasury may be requested by the Public Prosecutor Office.

13) Are deferred prosecution agreements (DPAs) or other similar settlement mechanisms available?

Yes. There are four main settlement mechanisms available in Brazil:

- leniency programs;
- civil non-prosecution agreements (ANPC);
- collaboration agreements; and
- criminal non-prosecution agreements (ANPP).

The Brazilian Clean Company Act establishes a leniency program under which self-disclosure of corrupt practices and cooperation by corporations could result in a reduction of up to two-thirds of the fine and immunity from some, but not all, sanctions.

In order to qualify for the leniency program, the company must:

- be the first to apply for leniency;

- confess and cease its involvement in the investigated misconduct; and
- commit to full and permanent cooperation with the investigations.

Although the Law refers to leniency, it does not allow for the possibility of full exemption from sanctions. The leniency program was further regulated by Decree No. 8,420/2015, which softened the need to be the first to apply by adding the expression “when such circumstance is deemed relevant.”

In cases where Federal Prosecutors are entitled to act against both companies and individuals, the prosecutors allow individuals to adhere to the leniency agreement in exchange for immunity or softer penalties (Car Wash task force standard). This practice is not foreseen in the Brazilian Clean Company Act, but individuals may get the same benefits they could obtain in a collaboration agreement.

Collaboration agreements are mainly regulated by the Criminal Organization Act (Law No. 12,850/2013) and represent a contract entered between suspects/defendants and prosecutors, granting benefits to the one that effectively and voluntarily collaborates to clarify the facts. The procedure can result in pardon or reduction of up to two-thirds of the penalty.

In order to qualify for the benefits of the collaboration agreement, the individual must:

- voluntarily cooperate with the investigation or criminal procedure; and
- provide information that may produce one or more of the following results, among others:
 - identifying other perpetrators;
 - exposing the structure of a criminal organization;
 - preventing crimes that result from the activities of a criminal organization; and
 - recovery, in whole or in part, of the product or financial gains originated from the criminal activity.

Civil non-prosecution agreements (ANPC) were introduced in the Brazilian Administrative Improbability Act in 2019 by the Law 13,964/2019 (Anticrime Law). ANPC was further regulated by the Instruction No. 18/2021 issued by the General-Comptroller Office, which states that the agreement can be executed in or out of court when it fulfils the following condition:

- admission of guilt;
- cessation of the illicit conduct;
-
- reparation of damages caused against the public treasury;
- loss of assets or money unlawfully obtained;
- full collaboration to the investigation conducted by the Brazilian Authorities; and
- submission to at least one of the penalties indicated in the Instruction (payment of a fine, prohibition to receive tax or credit benefits or incentives from public entities and loss of the public position – if the defendant is a public official).

Criminal non-prosecution agreements (ANPP) were introduced in the Brazilian Code of Criminal Proceedings also in 2019 by the Anticrime Law, allowing prosecutors and defendants to settle cases of non-violent crimes with a minimum penalty of up to four years. The main requirements for the ANPP are:

- admission of guilt;
- damage compensation, except in the impossibility of doing so;
- waiver of assets and rights;
- rendering of community services;
- payment of a fine; and
- other conditions appointed by the prosecutor, provided it is proportional to the criminal offense.

Summary provided by Campos Mello Advogados, an independent law firm working in cooperation with DLA Piper.

[Access the full guide](#)

[Return to Overview page](#)

AUTHORS



Ricardo Caiado Lima

Partner

São Paulo | T: +55 11 3077 3500

ricardo.caiado@cmalaw.com



Ana Júlia Andrade Vaz de Lima

Associate

São Paulo | T: +55 11 3077 3500

ana.lima@cmalaw.com
