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Managing Multi-jurisdictional Investigations in Latin America

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Economic globalisation has positive and negative effects for companies all over the world, especially in emerging markets. The usually quicker pace of development and economic growth in emerging markets brings not only attractive opportunities for higher investment returns to multinational companies, but often also means that companies will face challenges related to higher risks of corruption.

As of the late 1990s, a new international scenario brought forth requirements of higher standards in combating and preventing bribery, money laundering and other practices related to government corruption for countries that intend to be competitive market economies and attract foreign investors. As a result, these countries have been under pressure to adapt their legislation to the new reality and to the expectations of investors, and authorities have taken steps to oblige.

In Latin America, this new circumstance led to the recent uncovering of several high-profile corruption-related investigations. In Brazil, 'Operation Car Wash' revealed indicia of fraud, cartel and corruption involving projects by Petroleo Brasileiro SA – Petrobras. After five years since it was launched, the investigation has recently reached its 61th phase and expanded to other economic sectors, such as marketing, healthcare, banking, among others. In Argentina, in the context of the investigation named *1*, more than 20 individuals were charged after copies of notebooks were found detailing what seems to be a scheme of illicit political payments. In Ecuador, the Vice President and the former President are under investigation because of corruption allegations. These cases have brought Latin American countries into the spotlight as clear examples of investigative efforts and enforcement of anti-corruption laws involving multiple jurisdictions.

In part, this rise in investigation and enforcement can be explained by legislative and regulatory reform. The majority of Latin American countries have passed new laws and regulations focusing on the prevention and the combat of corruption, bribery, money laundering, conflicts of interest and other corruption-related matters. Reforms include new tools to investigate corruption by, for example, improving the mechanisms for cooperation with individuals (corporate executives, agents and others) and companies involved in wrongdoing, such as leniency agreements and whistleblower systems.

Latin American countries have also increased cooperation mechanisms to exchange information with law enforcement authorities in other countries. Authorities also increasingly expect that companies will have a role in conducting internal investigations and delivering information. Finally, the existing legislation is now being enforced in a more rigorous, aggressive and reliable fashion.

Considering these developments in local legislation and enforcement, and the growing multi-jurisdictional aspects of government investigations, companies must consider not only their own jurisdiction's anti-corruption regulations, but also the relevant laws established in other countries where they have business activities and relations. Understanding this scenario is key to a better assessment of an internal investigations strategy.

Overview of local legislation

As described above, many countries in Latin America have enacted new anti-corruption laws:

- Brazil has passed the Anti-Corruption Law (Law No. 12,846/2013);
- Mexico has approved several laws as part of its National Anti-Corruption System (SNA);
- Chile has passed the Corporate Criminal Liability Act (Law No. 20,393 or CCLA);
- Colombia has enacted the Transnational Corruption Act (TCA); and
- Argentina has enacted Corporate Criminal Liability Law (Law No. 27,401/2018).

It is important to highlight that the creation of new anti-corruption legislation and the enforcement of such statutes does not mean that prosecution under previously existing laws or other instances (eg, antitrust) will not be pursued. In fact, the enforcement of these recent anti-corruption statutes is expected to be an enhancement to already-existing enforcement. This reiterates the need for a greater understanding of the local legislation when assessing a plan for a cross-border investigation.

This article highlights some of the main issues that a multinational company may face with cross-border investigation involving multiple Latin American countries and their different regulations. A comparative overview of the local legislation in the most relevant Latin American jurisdictions is set out to highlight the common aspects and differences between those statutes. Note that our comments on jurisdictions other than Brazil are factual in nature and do not constitute legal advice.

Brazil

In Brazil, the Anti-Corruption Law[1] sets forth strict civil and administrative liability for legal entities that engage in conduct against the Brazilian and foreign government. Strict liability means that legal entities implicated in harmful acts under the law are liable even if they do not receive an actual benefit from the corrupt act or if the misconduct is performed by a non-authorised employee or a third party on its behalf.

The list of the conducts considered as violations under the Anti-Corruption Law is very broad and involves not only offering or giving, directly or indirectly, an undue advantage to a government official or to a related third party, it also covers financing, funding, sponsoring or in any way subsidising the practice of harmful acts pursuant to the law, and also the use of third parties to hide or disguise the real interests or the identity of the beneficiaries of the conduct.

The practice of any conduct considered harmful under the Anti-Corruption Law could lead to administrative or civil liability for the company involved. Under the administrative and judicial spheres, the company may be subject to individual or cumulative penalties, such as fines (of up to 20 per cent of the company's revenues), confiscation of assets, rights or values gained from the illegal act, partial suspension or prohibition of activities and a prohibition on receiving benefits, subsidies or credit from government entities.

Brazilian law allows legal entities to enter into a leniency agreement with government authorities. The leniency agreement is legally binding between the parties involved in the harmful conduct and the investigative authority. If the leniency agreement is executed exclusively pursuant to the Anti-Corruption Law, without the participation of federal or state prosecutors, it does not cover individuals such as the company's officers.

Under Brazilian law, not only public prosecution offices and general public attorneys but also federal, state, local and internal control agencies are entitled to investigate, impose penalties and negotiate leniency agreements. Individuals not covered by the protections under the Anti-Corruption Law can also negotiate plea bargain agreements under the provisions of the Brazilian Criminal Code (Decree-Law No. 2,848/1940), the Organised Crimes Law (Law No. 12,850/2013) and the Antitrust Law (Law No. 12,529/2011).

The Brazilian Anti-Corruption Law provides that the adoption by a company of an effective compliance programme with internal mechanisms and procedures able to assure integrity, audits, incentives for the disclosure of irregularities and internal policies (code of ethics and code of conduct) may lead to penalty reductions and may influence government authorities to apply more lenient sanctions.

Finally, although implementation of the legislation described above represents a great advance in the fight against corruption, the recent history of enforcement in Brazil has unveiled new challenges to the combat of corruption and organised crime. In this regard, the new federal administration, which has been in power since the beginning of 2019, has presented Congress a set of legislative proposals aimed at addressing such challenges. These proposals are part of the project called the 'anti-crime plan', which includes:

- making illegal campaign donations a criminal offence;
- enhancing the legal framework that protects whistleblowers from retaliation; and
- increasing prison sentences for corruption-related crimes, among others.

Chile

The CCLA provides for criminal liability of legal entities for conducts related to money laundering, terrorist financing and bribery of public officials. The CCLA was enacted to meet the requirements of the Organisation for Economic Co-operation and Development Anti-Bribery Convention, and underwent several amendments over the past years, including the Anti-Crime Agenda (Law No. 20,931/2016), an initiative to strengthen the prosecution of robbery, burglary, theft and wilfully or negligently receiving or possessing stolen goods.

Sanctions for CCLA violations include fines, temporary or perpetual prohibition from entering into contracts with governmental entities, partial suspension or full temporary prohibition from being eligible for governmental benefits and even dissolution, if a company is convicted of the same crime within a five-year time period. The CCLA also provides that the adoption of an effective compliance programme may lead to penalty reductions and may influence the government authorities to apply more lenient sanctions.

Regarding other government authorities in Chile, although the CCLA does not provide for a self-reporting mechanism for corruption practices, the country has an established leniency programme for antitrust violations, which may identify corruption-related practices and give rise to a CCLA investigation.

Mexico

In Mexico, the SNA was enacted with the publication of three main statutes:

- the General Law for the National Anti-Corruption System;
- the General Law of Administrative Liability; and
- the Organisational Law of the Federal Administrative Court.

It also amended several existing laws, including the Federal Criminal Code, the Tax Coordination Law, the General Government Accounting Law, the Organic Law of the Federal Public Administration and the Organic Law of the Attorney-General's Office.

Several improper conducts such as bribery, influence peddling (it also prohibits a new form of peddling related to public bids) and unlawful participation in administrative procedures while disqualified or banned are now under the scope of application of the SNA's provisions. The penalties include fines, compensatory and punitive damages, disqualification from participation in public procurements, imprisonment of individuals involved, among others. The SNA also provides that a company can be sanctioned for conducts carried out by third parties acting on its behalf or for its benefit.

The new Mexican anti-corruption laws created a specialised Federal Administrative Court and a special prosecutor's office with enhanced powers to prosecute corruption cases and granted new powers to public authorities such as the Federal Comptrollership Unit and the Ministry of Public Administration. Further, in April 2018, as part of the improvement of SNA, the Mexican Congress has approved a constitutional amendment to strip politicians of immunity.[2] At the same time, the Congress has blocked the arbitrary removal of the special anti-corruption prosecutor.

The SNA also grants benefits to companies that have internal integrity systems (once they are compatible with the parameters provided by the law), reporting and whistleblower protection procedures. Those who cooperate with investigations may also be granted leniency. Self-reporting and cooperation are also encouraged by the SNA and by the Mexican antitrust regulations, which may influence a company's decision on the strategy adopted in a cross-border investigation.[3]

Colombia

In Colombia, since the Colombian Criminal Code and the Colombian Anti-corruption Statute, the country has made efforts to improve its combating of corporate transnational and national corruption, which resulted in the enactment of Law No. 1778/2016.[4] (the Anti-bribery Law). According to the Anti-bribery Law, not only legal entities registered in Colombia, but also foreign affiliates and Colombian subsidiaries of transnational companies are subject to sanctions and penalties before the Colombian Superintendency of Companies.

The Anti-bribery Law only foresees the administrative liability of companies and relevant administrative proceedings related to corruption acts – the criminal liability of individuals involved in the misconduct is independent from the conviction (or not) of their respective companies under the Anti-bribery Law provisions and must be judged under the provisions of the Colombian Criminal Code (similarly to Brazil).

The Anti-bribery Law also credits the self-disclosure of the illegal acts by companies, if made before the Superintendency starts investigations about the relevant misconduct and before the relevant administrative proceeding. At the same time, it provides circumstances that may mitigate the sanctions imposed on the companies, including the existence of an effective compliance programme. The Colombian antitrust regime also provides for similar conditions in the negotiation of leniency agreements with companies or individuals.[5]

Argentina

In Argentina, the initiative to combat corruption is led by the Anti-Corruption Office, an independent body under the Ministry of Justice, Security and Human Rights, to investigate corruption cases in public government. It focuses on the application of the Argentinian Criminal Code articles 256 and 258 – the main legal provisions prohibiting the bribery of public officials in Argentina.

In December 2017, Argentina enacted Corporate Criminal Liability Law (Law No. 27,401), imposing criminal liability to companies for corruption-related violations. The law entered into force in March 2018, has extraterritorial reach, and punishes the offences practised against the Argentine and foreign governments, such as:

- domestic bribery;

- transnational bribery;
- trading in influence;
- participating in the offence of extortion;
- participating in the offense of illicit enrichment of publish officials; and
- an aggravated form of misrepresentation in books and records.

Moreover, according to the Law No. 27,401, companies with intention to contract with government must have an adequate integrity programme, a Code of Ethics, internal policies and periodic trainings to prevent crimes in any interaction with the government.

Main concerns while managing multi-jurisdictional investigations in Latin America

In addition to changes to local legislation, authorities in Latin American countries have also recently embarked on new cross-border cooperation initiatives. In February 2017, public prosecutors from Argentina, Brazil, Chile, Colombia, the Dominican Republic, Ecuador, Mexico, Panama, Peru, Venezuela and Portugal – adding a European element to the effort – signed the Brasilia Declaration.

The Brasilia Declaration established the creation of joint teams for bilateral or multilateral investigations, with the aim of allowing authorities to cooperate in the coordination of ongoing investigations related to recent cases involving acts of bribery, corruption and money laundering related to government officials of several countries.

The declaration was based on article 49 of the Merida Convention, which provides for full technical autonomy and functional independence of the joint teams of an investigation and cooperation within law enforcement authorities. The main objective is to permit the execution and the request of international cooperation and the recovery of assets for the full compensation of the damages caused by the parties under investigation, including payment of fines, all in accordance with local legislation.

Also, Latin American countries have been entering into bilateral cooperation agreements.For instance, on 26 March 2019, Brazil and Chile signed an Interinstitutional Cooperation Agreement to Fight Corruption, which sets forth mechanisms for mutual assistance for the implementation of measures to prevent, detect and punish offences practised against the public administration; as well as to develop strategies for promoting an integrity culture. Furthermore, Brazil also signed a cooperation agreement with Colombia, on 13 February 2018, to improve investigations, exchange information and impose administrative penalties to private companies involved in corruption and transnational bribery.

According to media reports disclosed in July 2018, Brazil is also negotiating to enter into a judicial cooperation agreement with Argentina, in order to enable Argentine courts to receive information and evidences obtained through plea bargain and leniency agreements settled in Brazil, in the context of the Car Wash probe.

In light of the above, companies considering an internal investigation in the face of a multi-jurisdictional government investigation in Latin America should bear in mind the importance of the assistance provided by experienced legal advisers and by legal partners in the jurisdictions impacted by the facts supposedly committed, in order to handle the specific requirements of local legislation with respect to key issues such as data preservation and collection, employee interviews, attorney–client privilege applicability, fact analysis and reporting, disclosure and settlements.

The first step must be the assessment of the risks involved in the alleged violation, the credibility and the urgency of the allegations. This must be followed by a strict definition of the scope of the investigation, to understand the scope and potential roadblocks for collecting, reviewing and providing relevant documents to the regulators. When the investigation involves different jurisdictions, the document review process must consider that the authorities, as well as the parties involved, may face laws prohibiting the export of information, state secrets, trade secrets and personal information without proper authorisation or consent. It is worth noting that some countries have already begun to enact regulations that discipline investigations made by lawyers. Brazil, for example, published on 11 December 2018 a provision elaborated by the Federal Board of the Brazilian Bar Association, which sets forth provisions on the ‘defensive investigation’ – activities of investigative nature developed by lawyers.

Data privacy concern is directly connected with the analysis of the employees’ data on electronic devices, such as corporate emails, smartphones, laptops, tablets and other devices, which should consider the particularities that may reflect local aspects in each of the countries involved. The possible interests of each countries’ authorities should be taken into consideration at the document review phase and the drafting of interview outlines, given that further negotiations may require specific evidence related to local matters. In this regard, the company, as well as the authorities involved, should balance the right to access the employee’s information against their right to privacy. Employee’s privacy is a major concern when conducting an investigation in Argentina, Uruguay and Colombia because of their specific legislation that establishes personal data protection. In Brazil, in August 2018, the Brazilian Data Protection Law (LGPD) has passed and is intended to radically change the data protection

system of the country. LGPD expressly determines the international transfer of data when it is necessary for international legal cooperation between government intelligence, investigations and prosecution authorities, according to instruments of international law, or when it is the result of a commitment established in an international cooperation agreement.

To conduct interviews with relevant witnesses, it is important to have a lawyer leading or co-leading the interview in order for attorney–client privilege to apply to work product, records and data. Most countries in Latin America recognise a lawyer's communications and office as protected from disclosure and seizure. However, attorney–client privilege rules are generally less comprehensive than in the United States and that needs to be taken into account when choosing the appropriate jurisdiction for the interview process.

The disclosure of information to a regulator when facing a multi-jurisdictional investigation may represent a risk before other regulators, which may trigger the imposition of unexpected fines. The development of a strategy to disclose information is key to prevent additional risks to the company. Some jurisdictions have positive disclosure requirements but most do not. When facing a jurisdiction where there is no legally required disclosure obligation, the company involved must evaluate the potential impact of such disclosure in other jurisdictions.

Moreover, before disclosing any information, it is important to determine whether local legislation allows the company and individuals to enter into settlements with the authorities in exchange of benefits, such as reduction of fines (eg, plea bargain and leniency agreements). On the other hand, if the company decides to disclose in one relevant jurisdiction, but not in others, it must evaluate the risks related to such strategy. Single-jurisdiction disclosures might affect investigations in other jurisdictions, especially considering the new scenario of international cooperation in Latin America. A proper multi-jurisdictional strategy for disclosure of information would balance the benefits and risks related to multiple and single disclosure, according to the legal statutes of the countries that may investigate the conduct at hand.

Finally, the coordination of settlements with the various authorities in different jurisdictions (and, in certain cases, more than one authority in the same jurisdiction) may mitigate the risk of multiple fines, disgorgement and other sanctions for the same conduct. However, such coordination is very challenging and time-consuming considering that regulators may have different enforcement policies or expectations. All of this may bring additional challenges to the process of negotiation, and reinforce the necessity of a having a well-planned multi-jurisdiction negotiation strategy in place.

Conclusion

The wish to enter the globalised economic market alongside the most recent uncovered scandals has triggered the adoption of stricter rules on anti-corruption matters by Latin American countries. Despite of this ongoing trend, however, there are many differences between the applicable legislation in each country and how different authorities might interact in the event of a cross-border investigation.

The current framework of anti-corruption regulations and increased cross-border cooperation in Latin America highlights the importance of a well-thought-out and custom-made investigation plan. To be effective, such a plan must balance the risks related to each relevant jurisdiction, attempt to mitigate the company's level of exposure to penalties and fines, and develop a comprehensive view of the benefits of pursuing a leniency application or defence strategy.

Notes

[1] www.planalto.gov.br/ccivil_03/_ato2011-2014/2013/lei/l12846.htm.

[2] https://www.reuters.com/article/us-mexico-corruptionlawmaking/mexicos-lower-house-of-congress-votes-tostrip-politicians-of-immunity-idUSKBN1HQ38U.

[3] www.diputados.gob.mx/LeyesBiblio/pdf/LGSNA.pdf.

[4] http://es.presidencia.gov.co/normativa/normativa/LEY%201778%20DEL%2002%20DE%20FEBRERO%20DE%202016.pdf.

[5] http://latinlawyer.com/jurisdiction/1003076/colombia.

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