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FIGHTING CORRUPTION AND PROMOTING COMPETITION

Contribution from Brazil

-- Session I --

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FIGHTING CORRUPTION AND PROMOTING COMPETITION

-- Brazil --

Introduction

1. On the 1st of August 2013 was adopted the new Brazilian Anti-corruption law¹ in line with the State's policies to combat this scourge by harnessing the private and public sector under strict scrutiny. The law innovates by sanctioning private companies for corruption practices against the public administration and civil servants². Any advantage, sponsor, financial or material benefits granted by a private entity to a public agent is explicitly condemned by the new law³; under the previous regime, only the public agents were administratively penalized in such cases⁴. There now exists an administrative legal framework capable of sanctioning both public and private actors for acts of corruption.

2. The Anti-corruption law contains a special provision on the fraudulent practices which could hinder the competitive nature of public bidding procedures⁵. Such procedures often act as the fermenting area of corruption outbreaks, the result being an inefficient allocation and use of national resources⁶, and at the same time, a vicious circle further inciting private and public agents to give way to fraudulent practices – the latter becoming with time a customary practice and to a certain extent, an obligatory process to participate in bidding procedures. The new Statute was purposefully framed to regulate private companies' behaviour⁷: under the empire of the previous law, they were often immunised in corruption cases where they had played an active role to derive benefits by bribing the public administration; in this process of “*patrimonial*” management of public resources characterised by the blurred limits between the private and the public sphere⁸, many potential private competitors were left on the bench. Such acts of corruption

¹ Law no. 12.846/13 on the administrative and civil responsibility of legal entities for the commission of acts against national or foreign public administration.

² Law no. 12.846/13 on the administrative and civil responsibility of legal entities for the commission of acts against national or foreign public administration, articles 2 and 3.

³ Law no. 12.846/13 on the administrative and civil responsibility of legal entities for the commission of acts against national or foreign public administration, article 5.

⁴ FRANCO, Isabel, “Lei Anticorrupção e acordos de leniência”, *O Estado de São Paulo* (25/11/2013).

⁵ Law no. 12.846/13 on the administrative and civil responsibility of legal entities for the commission of acts against national or foreign public administration, article 5 (IV) (a).

⁶ DE CASTRO, Luciano, “Combate à corrupção em licitações públicas, Working Paper – University Carlos III of Madrid, Economic Series, April 2007, p.2.

⁷ It can be read simultaneously with Law no.12.813 of the 16th of May 2013 on the Conflict of Interests in the exercise of the Federal Executive Power.

⁸ See for example: BUARQUE DE HOLANDA, Sérgio, *Raízes do Brasil*, São Paulo, Companhia das Letras, 1995, PP.145-146; FILGUEIRAS, Fernando, “A tolerância à corrupção no Brasil: uma antinomia entre normas morais e prática social”, *Opinião Pública*, vol.15, no.2, November 2009, PP.389-390.

obviously infringed the competitive environment; accordingly, the new anti-corruption law aims not only at promoting but also at protecting competition. It completes the Brazilian competition legal framework and will work hand-in-hand with the latter, for instance, in cartel cases. For a continent-size State like Brazil, a legal and institutional pluralism is sometimes *sine qua non* for the promotion of voted policies and for the protection of common values. In the fight against corruption, competition law and policy have been used; in the promotion and protection of competition, anti-corruption measures have been adopted. A reciprocal fertilisation exists between these two fields but their effective dialogue for efficient and practical results depends on the techniques used to build a common language. In line with the anti-corruption context in Brazil (1), the latter has opted for institutional co-operations between the Brazilian Competition Authority and other public bodies in charge of corruption conundrums (2).

1. The Anti-Corruption Context in Brazil

3. Corruption is fought by the close institutional and legal interaction and dialogue. Brazil relies on a consolidated anti-corruption legal framework which, in a dialogical spirit, sometimes borrows legal techniques from competition law (1.1) and it also has specialised institutions for such purposes (1.2).

1.1 The Legal Context: how competition law techniques inspire anti-corruption law

4. The Brazilian Constitution of 1988 states that the public administration has an obligation to act under legality with impersonality, morality, transparency and efficiency⁹. It also provides that public construction projects, services, public acquisitions and disposals must be done following a public bidding procedure which guarantees the equal treatment of all participants¹⁰. An important statute – Law no. 8.666/1993 – was adopted in 1993 in order to apply the constitutional provision. The statute regulates bidding procedures through fundamental principles like free competition, publicity, strict observance of the terms of the tender notification, objective judgement and compulsory awarding¹¹. Public-private contracts and partnerships are put under close scrutiny under this law. This is in line with Brazil's efforts and will to foment a new contractual culture which rests on a competitive spirit and transparency: all public tenders must obey to such principles to be legally valid – and to serve the public interest. Such efforts are further corroborated by the statute voted – Law no. 12.462/2011 – on the 4th of August 2011 on differentiated contractual regimes in the context of the World Cup 2014 and of the Olympic Games 2016¹². These principles are also enshrined in international conventions signed and ratified by the Brazilian State, for instance, the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions of the 21st November 1997, the Inter-American Convention against Corruption of the 29th March 1996 and the United Nations Convention against Corruption of the 31 October 2003.

5. More recently and as aforesaid in the introductory part, a brand new anti-corruption law was adopted in Brazil in August 2013¹³. The new statute provides for the administrative and civil responsibility of private entities for anti-competitive acts of bribery during public bidding procedures. Competence is here namely granted to The Brazilian Comptroller General (*Controladoria Geral da União – CGU*¹⁴) to instigate administrative proceedings against private entities in cases where their responsibility is presumed.

⁹ Article 37 of the Brazilian Constitution.

¹⁰ Article 37, paragraph XXI.

¹¹ Law no. 8.666/1993 (21/06/1993), article 22.

¹² Law no. 12.462/2011 (04/08/2011), article 1 (I), paragraph 1.

¹³ Law no. 12.846/13 on the administrative and civil responsibility of legal entities for the commission of acts against national or foreign public administration.

¹⁴ See *infra*.

The influence of competition law in the drafting of the anti-corruption law is worthy and interesting in that it confirms the dialogue between the two fields. Indeed, the 2013 anti-corruption law enables public bodies to enter into leniency agreements with private entities responsible for anti-corruption acts provided for in the said statute¹⁵. Like in competition law proceedings, the anti-corruption legal regime enables private companies to collaborate with the public administration to help identify other companies involved in a given corruption case and to readily obtain information and documents proving the illicit act¹⁶. The leniency agreement has to fulfil some conditions to be effective: the private entity must take the initiative of the collaboration and express an initial interest for such a procedure; the private entity must stop any involvement in the illicit act as soon as a leniency agreement is proposed; it must admit its participation in the illicit enterprise and accept a complete and permanent collaboration with the investigators, ready to participate in all proceedings at its own expenses as long as they last¹⁷. Abiding to the leniency agreement can reduce the fine due to be paid by the participant¹⁸ and enable him to continue benefitting from public subsidies¹⁹. A legal tool – the leniency program –, originally pertaining to the competition law sphere, has thus been used as a model and its logic and spirit have been efficiently transposed to the anti-corruption field where they are expected to be enforced for a double positive effect: combating corruption and protecting competition. It appears as an extension of competition law in another related law field and the logic here is a complementary and not a conflicting one.

6. This dialogue also brightly exists in the Brazilian institutional anti-corruption context.

1.2 *The Institutional Context*

7. The Brazilian Competition Authority does not, in itself, have jurisdiction for corruption matters. This is institutionally normal: a competition authority is specialised in competition questions and is expected to deliver learned opinions within this ambit.

8. Corruption and anti-corruption issues fall under the competence of other public bodies, the main ones being the Comptroller General (*Controladoria Geral da União – CGU*), the Federal Court of Auditors (*Tribunal de Contas da União – TCU*) and the national and federal Public Prosecutors; the Ministry of Planning is also engaged in combating corruption.

9. The Comptroller General controls and audits the expenses of the Federal Executive; it acts as the Brazilian anti-corruption agency. The Federal Court of Auditors is responsible for the auditing of the public administration's accounts; it supervises the public treasury. The Ministry of Planning organises the information technology system for public procurement and have, accordingly, developed software tools to better detect potential shades of corruption acts during public bidding processes.

10. The Brazilian Competition Authority has established close working links with each of these bodies²⁰. It has been working hand-in-hand with the Ministry of Planning in order to have access to data on

¹⁵ Law no. 12.846/13 on the administrative and civil responsibility of legal entities for the commission of acts against national or foreign public administration, article 16.

¹⁶ Law no. 12.846/13 on the administrative and civil responsibility of legal entities for the commission of acts against national or foreign public administration, article 16 (I), (II).

¹⁷ Law no. 12.846/13 on the administrative and civil responsibility of legal entities for the commission of acts against national or foreign public administration, article 16, paragraph 1 (I), (II), (III).

¹⁸ Law no. 12.846/13, article 16, paragraph 2.

¹⁹ Law no. 12.846/13, article 19 (IV).

²⁰ OECD, *Collusion and Corruption in Public Procurement*, Policy Round Tables, 2010, pp.72-74.

public tenders and procurement following its objective of identifying and scrutinising bid riggings. Accordingly, the Brazilian Competition Authority has been granted access to the Ministry's database of public acquisitions: the Authority can thus follow the implementation of suspicious bidding procedures and have direct access to any data relevant for its inquiries.

11. As far as cartels are concerned, the Brazilian Competition Authority also cooperates with the Public Prosecutors and with the Federal Police; cartel constitution is a crime under Brazilian law. In such mutual exchanges, the Authority informs its partners on the competition law approach to tackle cartels and bid rigging procedures. The aim is to provide a complete picture of the procedural and substantial legal questions that characterise these offences through competition law and criminal law expertise. The Competition Authority has similarly established working links with the Federal Police, especially in investigating bid riggings. They collaborated, for instance, in a dawn raid in 2009 in an information technology services case.

12. On the basis of the close ties between competition and corruption, the Competition Authority has been called to participate in inter-ministerial working groups, the aim being to enlighten the Government and its anti-corruption fighting policies with its technical competences. It has, for example been invited to integrate the National Strategy to Fight Corruption and Money Laundering in which collaborate 70 executive, legislative and judicial bodies with the assistance of the Federal Prosecutor, the Comptroller General and the Audit Court. The Group focuses on issues like money laundering, corruption, bribery and collusion in public procurement. It has recently been working on bidding procedure conundrums and outsourcing contracts related to the forthcoming World Cup and Olympic Games.

13. In the same vein, the Brazilian Competition Authority has signed a cooperation agreement with the Federal Court of Auditors in 2008²¹: the cooperation is a useful one to detect and investigate collusive practices in the particular field of outsourcing contracts which are sometimes corrupted. The Authority has – alongside – signed a cooperation agreement with the Comptroller General in 2009²². The latter being the main anti-corruption body in Brazil, this agreement shall be used as a means to illustrate how the Competition Authority conducts an institutional cooperation with this organ.

2. Institutional Cooperation between CADE and the Office of the Comptroller General

14. The cooperation's framework must priorly be presented (2.1) in order to explain its implementation (2.2).

2.1 The Cooperation's framework

15. The cooperation between the Brazilian Competition Authority and the Comptroller General's office rests on a series of principles anchored in the cooperation agreement's preambulatory part. The cooperation indeed aims at fighting any form of active or passive corruption in public procurement in order to allocate the State's scarce resources towards productive ends. This, the agreement claims, can be done by combating illegal transfers of public funds to private persons or entities. Such acts of corruption whereby one private entity obtains illegal advantages or privileges in exchange of money transferred or payments of any other nature made to the public administration are not isolated ones and require a tentacular institutional intervention. The scourge is a national one and does not only pertain to the *micro* level; for this reason, the question is of a Federal nature and importance -, and depends on the active participation of Federal organs.

²¹ Cooperation Agreement between the Brazilian Competition Authority and the Federal Court of Auditors (12/03/2009).

²² Cooperation Agreement between the Brazilian Competition Authority and the Comptroller General's Office (28/07/2009).

16. The cooperation agreement therefore provides for the creation and adoption of specific and tailored mechanisms and techniques to strengthen the dialogue between the anti-corruption authority (The Comptroller General²³) and the Competition Authority which are expected to act preventively and repressively. Their close collaboration is the main tool for the agreement to be implemented efficiently, with expected short run and long run effects and results.

2.2 *The Cooperation's Implementation*

17. Mutual education is what is expected from the concerned authorities in their anti-corruption and competition promotion task. Cooperation through mutual education obviously enters into the Brazilian Competition Authority's advocacy policies: combating corruption to safeguard the economy's competitive health.

18. Consequently, the Competition Authority is expected to transfer any relevant information on potential fraudulent activities obtained during its administrative procedures to the Secretary for the Prevention of Corruption and for Strategic Information of the Comptroller General's office; the Secretary must accordingly reciprocate when it is made aware of useful data on competition and corruption²⁴. In a similar logic, both authorities have accepted to offer technical assistance to each other and to provide technical advice in given cases which are of their potential mutual interest²⁵. They can, for such purposes, require that an expert from the other authority be present during specific audiences²⁶. Both authorities can also decide to set up joint working groups – eventually with other public bodies – in order to investigate violations of the Brazilian economic order²⁷.

19. One important aspect of this institutional collaboration is the expected mutual and permanent education. The agreement states it clearly: an educational cooperation is a tool to prevent and fight against economic unhealthy practices. The Competition Authority hence agreed to continually share and discuss their best practices, technical and operational know-how in the field of competition law and tender drafting procedures in order to improve and sharpen their tools in combating cartels and corruption²⁸. For so doing, they have planned to organise mixed and joint seminars, courses and exchange programs on technical aspects of conducting legal dawn raids²⁹.

20. The Brazilian Competition Authority has, consequently, also been granted access to the Comptroller General's Public Expenditure Observatory³⁰ (called the *Observatório da despesa Pública* – ODP). The data therein available can be used, through a tracking system, to identify fraudulent acts in bidding procedures. By relying on this electronic device and its sophisticated resources, the Competition Authority can thus conduct advanced investigations in the field of public procurement. We hereinafter enclose an annex explaining how and why the Public Expenditure Observatory is an efficient tool against bid rigging.

²³ The latter has a special internal body called the Secretary for the Prevention of Corruption and for Strategic Information.

²⁴ See article 2 of the Cooperation Agreement between the Competition Authority and the Comptroller General.

²⁵ See article 4 of the Cooperation Agreement between the Competition Authority and the Comptroller General.

²⁶ *Ibid.*, article 4.1

²⁷ *Ibid.*, article 4.2, 4.3.

²⁸ *Ibid.*, article 4.4.

²⁹ *Ibid.*, article 4.5.

³⁰ OECD, *Collusion and Corruption in Public Procurement*, Policy Round Tables, 2010, p.73

ANNEX 1: PUBLIC SPENDING OBSERVATORY - ODP (*OBSERVATÓRIO DA DESPESA PÚBLICA*): A TOOL AGAINST BID RIGGING³¹

1. In the last years, the Brazilian Federal Government has invested in new technologies to identify suspicious patterns of illegal behavior in the context of public expenditure which were, at first glance, not perceived and, therefore, hidden. These tools have been developed and used to reveal cases of corruption, fraud and collusion in public procurement. The major focus of this initiative is on the Public Spending Observatory – ODP (acronym from the Portuguese *Observatório da Despesa Pública*), a newly created unit within the Office of the Comptroller-General - CGU (Controladoria-Geral da União).
2. The Office of the Comptroller-General (CGU) is a federal agency responsible for assisting directly and immediately the President of the Republic regarding matters related to the defense of public assets as well as increasing the transparency of administration. CGU's main focus is internal control through auditing and disciplinary actions against civil servants. In addition, CGU also devotes efforts to research and develop new techniques to prevent and fight corruption in Brazil.
3. This challenge requires CGU to monitor and detect potential frauds in relation to the use of federal public resources by devising solutions in order not only to expose current corruption cases, but also to prevent future events.
4. In 2008, CGU established the Public Spending Observatory - ODP, a permanent unit of intelligence, based on a modern and innovative concept: combine the practical knowledge and experiences of auditors with the use of advanced tools of information technology to speedily process an enormous volume of data.
5. The main goal of the ODP is to foresee fraud-risk situations. This knowledge-building exercise is quite useful in designing public policies aimed at preventing and combating corruption. Based on systematic information and periodic updates, the ODP provides CGU and some other government agencies with elaborated knowledge, analytical statements about the quantity and quality of public spending as well as with indications of sensitive areas of public spending, in terms of corruption risk.
6. The novelty of the ODP derives from the fact that it consolidates all the available public expenditure information - fragmented in several computerized systems from different bodies and constructed in a variety of technology platforms, from the oldest to the latest - in only one database. As a consequence, ODP transforms these disaggregated data into knowledge of high added value, contributing to the efficient management of public resources as it may help the authorities to identify, prosecute and prevent cases of misappropriation and other frauds.
7. ODP is built around a multi-disciplinary environment composed by auditors and IT staff. In addition, specific task forces are formed depending on the matter to be investigated, which might include other authorities other than CGU officials.

³¹

Annex I was prepared by the Office of the Comptroller-General.

8. As an important example of the capabilities of the Observatory, it is noteworthy the use of its analysis tools to fight cartels and collusion schemes in public procurements.

9. Originally, the basic elements of a bidding process and its bidders were already available in a federal database. ODP processes and compares this information with other comprehensive databases maintained by other agencies, such as: tax administration system provides information about the corporate structure of bidder companies and its partners; family relationships and jobs are known by the social security service, and multiple databases register addresses.

10. Crossing these data, the ODP identifies “trails” indicating atypical situations, which do not a priori constitute evidence of misappropriation or irregularities, but do require further attention, such as: the participation of companies with common shareholders in the same procurement procedures, different bidders with the same address, family bonds and past and present employer-employee relationship between partners and directors of the bidder companies. Internal analysis of the procurement databases may also indicate suspicious patterns of bid-rotation and market division among competitors by sector, geographic area or time, which might indicate that bidders are acting in a collusive scheme.

11. Those “trails” are automatically followed in a daily basis, resulting in “red” or “orange” warnings to the administrative or criminal authorities or even to the federal agency responsible for the problematic procurement process. Once detected a suspicious pattern, it is loaded in an OLAP (Online Analytical Processing) tool which results in reports and management review panels. The main objective is to analyze the distribution of bidding processes of a product or service by geographic area, government agency, amount of resources involved, per year during a certain period of time.

12. It is noteworthy that the work of the ODP has already been used in cooperation with the Secretariat of Economic Law (SDE) of the Ministry of Justice in some concrete cases still under investigation regarding alleged cartels in public procurement.

13. The joint work between CGU and SDE is presenting some quite positive results, especially concerning the exchange of valuable information and expertise in public procurement. Corruption prevention and fighting cartels are too complex and too broad to be dealt in a single front. The protection of public treasury cannot be separated of the discussion of efficiency and efficient purchases in public procurements. Bid rigging schemes make government spends more money than it should be necessary if the competition in public procurement was effective. Additionally, in some cases, the cartel may sponsor the corruption scheme. Consequently, if the authorities tackle the corruption, but not the cartel, the next procurement official or agency, for example, may be negatively influenced by the cartel.

14. Criminal punishment of corruption cases is quite important, but it is not enough. To deal with corruption in a modern way, comprehensive techniques are required, as long as a broad comprehension of this phenomenon. To this extent, the activities performed by state control agencies, like CGU, and competition authorities, like SDE, are essential to fighting cartels and corruption efficiently. Due to the impossibility of continuous human presence and overseeing on all fronts, modern technologies and initiatives to maximize the capabilities of these bodies, as the ODP, shall also be of paramount importance in this way.