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WHITE-COLLAR CRIME IN BRAZIL: LEGISLATION, COURT DECISIONS, AND THE OPINION OF LEGAL WRITERS

Peter Walter Ashton*

One of the first Brazilian laws issued with the intent to protect the public from unscrupulous administrators of public savings (*economia popular*) was Law No. 1.521 of December 1951. This law remains in effect, and articles 2, 3, and 4 enumerate in great detail an extensive number of crimes that may be perpetrated against the public and its savings. The list of hypothetical criminal acts included in the statute is rather extensive.¹

While it would be tedious to enumerate all the cases and crimes contained in Law No. 1.521, it is interesting to note that many of the included crimes are not specifically white-collar crimes, but crimes against free enterprise and crimes employing economic power and market domination.² More modern and specific

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¹ The list of hypothetical criminal acts includes hiding merchandise or refusing to sell merchandise to a buyer who is able to pay for it. These types of acts result in the favoring of one buyer or client over another, causing financial loss to the latter. Other examples of crimes addressed by Law No. 1.521 include: (1) refusing to perform services, when working in a sales establishment of a commercial nature, that are essential to one's subsistence; (2) signing and participating in contracts that impose fixed resale prices; (3) demanding that a buyer not purchase goods from another producer; (4) obtaining or trying to obtain illegal profits by means of illegal speculation or fraudulent proceedings, causing harm to a specific group of people or to an indeterminate number of persons; (5) promoting or participating in agreements, consortiums, alliances, adjustments or mergers of capitals, with the intent to oppose or diminish free trade and bidding in the areas of production, transportation, and general trade in order to obtain an arbitrary increase in profits; (6) selling merchandise below cost to oppose free trade and other offers; (7) surreptitiously retaining or collecting raw materials, means of production, or basic products necessary to the sustenance of the people, with the intent to dominate the market anywhere in the country in order to force a price increase; (8) causing, by means of false information, fictitious operations, or any other artifices, the increase or decrease of prices of merchandise, public securities, or salaries; (9) passing false information or statements in prospectuses and announcements in order to sell, buy, or substitute negotiable instruments, securities, stock, or interest in shares of partnerships; (10) managing, directing, or exercising functions in more than one corporation or partnership of the same type of industry or trade with the intent to oppose free trade or to make free bidding more difficult; (11) administering, in a fraudulent or reckless manner, financial institutions such as banks, insurance companies, pension funds, loan companies, construction finance companies, and savings and loan associations, causing their insolvency, bankruptcy, or non-performance of contractual clauses causing loss to interested parties; and (12) defrauding shareholders and partners by illegal or fraudulent accounting procedures, and making false statements or representations. Lei No. 1.521, de 26 de dezembro de 1951, D.O. de 26.12.1951.

² *Id.*

legislation has been issued over the past fifty years to complement Law No. 1.521. For example, Law No. 8.884, of June 11, 1994, deals specifically with crimes against the economic order through market domination.³

Punishment of crimes committed under the regency of Law No. 1.521 includes fines and prison terms from two to ten years under the detention system, which is more lenient than the reclusion system (solitary confinement).⁴

For approximately fifteen years, no important legislation was issued to fight white-collar crimes and financial shenanigans. Finally, in 1964, the Revolutionary Government, headed by the military and President General Humberto Castello Branco, issued Law No. 4.595, of December 1964, through Congress.⁵ The law reorganized the banking system, created the legal concept of the National Financial System, created the Central Bank of Brazil, regulated all public federal financial institutions, recognized both public state institutions and all private financial institutions, and instituted the National Monetary Council to organize, supervise and regulate the whole system.⁶ Law No. 4.595 is of paramount importance and remains in force, though partially updated in some aspects, such as with respect to banking secrecy.⁷

Article 34 enumerates forbidden transactions and deals performed by financial institutions.⁸ These transactions and deals include making loans and pre-payments to any administrators, members of consulting or management councils, anyone on the board of supervisors or any similar board, spouses, in-laws, or next of kin up to the second grade. Additionally, loans may not be made to natural persons or legal entities that hold more than ten percent of the capital of the financial institution extending the loan, except when the Central Bank of Brazil gives specific authorization for the loan.⁹ Loans and money advancements to businesses of which the financial institution controls more than ten percent of the capital also are forbidden.¹⁰ The same rule applies to legal entities, partnerships, corporations, and associations if more than ten percent of the capital is controlled or held by any director or administrator, or their spouses or relatives, of the loan-giving institution.¹¹ The statute imposes further restrictions on the issuance by financial institutions of bonds and beneficiary shares (participation in net profits up to ten percent).¹² However, loans made by public financial institutions to legal entities,

³ Lei No. 8.884, de 11 de junho de 1994, D.O.U. de 13.6.1994.

⁴ Lei No. 1.521, de 26 de dezembro de 1951, D.O. de 26.12.1951.

⁵ Lei No. 4.595, de 31 de dezembro de 1964, D.O.U. de 31.1.1965.

⁶ *Id.*

⁷ Lei Complementar No. 105, de 10 de janeiro de 2001, D.O.U. de 11.1.2001.

⁸ Lei No. 4.595, art. 34, de 31 de dezembro de 1964, D.O.U. de 31.1.1965.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

the capital of which the loan giving institution controls, are exempted.¹³ Punishment is specified in paragraph 1 of article 34: All such deals and operations are crimes punishable by one to four years of prison in solitary confinement (*reclusão*).¹⁴

According to Law No. 4.595, another type of white-collar crime is the breaking of secrecy (*sigilo*), even in situations where the financial information was given to the agents or officers of the Internal Revenue Service, Central Bank, National Monetary Council, or other governmental agencies. Failure to observe the secrecy code is punishable with a prison term from one to four years under the reclusion system (solitary confinement).¹⁵ Besides imposing terms of imprisonment, punishment under Law No. 4.595 may include: advertence, a variable monetary fine, suspension of the right to exercise financial functions, temporary or permanent disqualification to manage financial institutions, or cancellation of authorization to operate public financial institutions.¹⁶

Half a year after the appearance of Law No. 4.595 — a seminal piece of legislation for the Brazilian banking system affecting a broad range of financial institutions — Congress issued Law No. 4.728, which provided detailed regulation of access and distribution of securities in the capital market.¹⁷ Because the Brazilian Securities and Exchange Commission¹⁸ was not created until 1976, the Brazilian Central Bank (*Banco Central do Brasil*) had the authority to regulate and supervise all Brazilian financial institutions, including all exchanges of the securities market. Law No. 4.728 was a very important law for the Brazilian capital and financial markets and its national financial system. Article 4, section 2, of this Law mandates that if the Central Bank verifies or is notified of any crime committed by anyone within the national financial system, defined by law as being the object of a Public Action Crime (*crime de ação pública*) it must immediately notify the State Attorney or Public Prosecution Office.¹⁹

Law No. 4.728 was mainly superseded by Law No. 6.385, which created the *Comissão de Valores Mobiliários (CVM)* — the Brazilian Securities and Exchange Commission — and established new regulations for most aspects of the distribution system of securities initially instituted by Law No. 4.728.²⁰

In 1974, Congress decreed Law No. 6.024, which consolidated all prior legislation concerning the bankruptcy of financial institutions.²¹ This law regulated

¹³ *Id.*

¹⁴ *Id.*

¹⁵ Lei Complementar No. 105, art. 10, de 10 de janeiro de 2001, D.G.U. de 11.1.2001.

¹⁶ Lei No. 4.595, art. 44, de 31 de dezembro de 1964, D.O.U. de 31.1.1965.

¹⁷ Lei No. 4.728, de 14 de junho de 1965, D.O.U. de 16.7.1965.

¹⁸ Comissão de Valores Mobiliários (CVM).

¹⁹ Lei No. 4.728, art. 4, § 2, de 14 de junho de 1965, D.O.U. de 16.7.1965.

²⁰ Lei No. 6.385, de 7 de dezembro de 1976.

²¹ Lei No. 6.024, de 13 de março de 1974.

the out-of-court liquidation and all aspects of forcible intervention in and out of financial institutions, public and private, with only an exception for federal public financial institutions.²² Bankruptcy proceedings took a backseat and were considered a solution of very last resort.

Although Law No. 6.024 does not specifically deal with white-collar crimes — at least not directly — it is important for the analysis of the subject matter because both proceedings are regulated in detail by the law — *i.e.*, the proceeding of administration of the financial institution through a nominated interventionist and the proceeding of forced, out-of-court liquidation take into account the possibility that white-collar crimes have been committed.²³ According to the law, the interventionist must indicate, with convincing evidence as support, harmful acts and omissions committed by the administrators of the financial institution.²⁴ Convincing evidence also is required for the proceedings of out-of-court liquidation of the company.²⁵ According to article 20, the report has to be made by the liquidator of the company.²⁶

An extremely important effect of both proceedings, specified in article 36, is the total blocking — or freezing — of all property (chattels, securities, real estate, etc.) belonging to the administrators or managers of the financial institution under intervention or administrative liquidation.²⁷ The property of managers is blocked if they worked for the institution in the twelve months preceding the official act of intervention or liquidation.²⁸ The Central Bank or the CVM may extend these precautionary measures beyond the managers to all members of the supervisory council of the company, the lower echelon managers, and to any person who in the twelve months prior to intervention or liquidation had bought, or otherwise acquired, property from the aforementioned persons.²⁹ Another important effect of the official proceedings under scrutiny is the prohibition of persons affected by the proceedings as managers, or otherwise, to leave the city or county where the proceedings take place.³⁰ These persons may only travel with the express authorization given by the Central Bank or by the CVM.³¹ All public registration offices for real estate transactions, airplanes, ships, automobiles, and so forth are notified by the authorities not to register any sales transaction or donation while the

²² *Id.*

²³ *Id.*

²⁴ *Id.* art. 11(b).

²⁵ Lei No. 6.024, de 13 de março de 1974.

²⁶ *Id.* art. 20.

²⁷ *Id.* art. 3(c).

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ Lei No. 6.024, de 13 de março de 1974.

proceedings occur.³²

Articles 39 and 40 expressly consider and take into account the civil responsibility of all persons involved in the proceedings, mainly managers and other persons suspected of committing unlawful acts or omissions.³³ These individuals are jointly and severally responsible for such acts.

Article 41 regulates the official legal inquest proceedings which have to be undertaken to specify and detect the reasons that caused the intervention or liquidation, as well as the respective individual or collective responsibilities of all persons involved.³⁴ This inquest must be held by the Brazilian Central Bank.³⁵ If the result of the inquest points to criminal behavior (e.g., commission of white-collar crime), the entire process and documentation must be delivered to the judge who would be competent, or who would have jurisdiction, to open bankruptcy proceedings, with immediate notification of the District Attorney or Public Prosecutor.³⁶ Any property of the indicted individual not yet blocked must be sequestered at the request of the public prosecutor to the presiding judge.³⁷

Law No. 6.024 is undoubtedly a milestone in respect to the treatment that the Brazilian Federal Government dispenses to private and public non-federal financial institutions that are in financial or administrative difficulties due to incompetent or fraudulent administrative actions. While the law obviously punishes such behavior, it is also quite clear that, in the interest of the whole financial system and the market in general, the law vehemently attempts to avoid bankruptcy proceedings. The Brazilian Central Bank and the CVM punish white-collar crimes but try to save financial institutions from bankruptcy by first using the tool of the *intervention*, and if this proceeding is not sufficient, they employ the second proceeding, called *out-of-court administrative liquidation*.³⁸ Bankruptcy is always possible, but it is considered a proceeding of last resort.

In 1987, Decree-Law No. 2.321 was enacted to complement Law No. 6.024 and created an entirely new proceeding to defend public finances.³⁹ This new proceeding received the official title: Regime of Special Temporary Administration of Public Non-Federal and Private Financial Institutions.

The proceeding is applicable when the following facts or situations occur:

(a) repeated practice of transactions which are contrary to the general guidelines of economic policy or financial policies of the federal

³² *Id.* art. 38.

³³ *Id.* art. 39–40.

³⁴ *Id.* art. 41.

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ Out-of-court administrative liquidations attempt to avoid the protracted and complicated bankruptcy proceedings that typically occur in judicial liquidations.

³⁹ Decreto Lei No. 2.321, de 25 de fevereiro de 1987, D.O.U. de 26.2.1987.

government as contained in federal law;

(b) the existence of non guaranteed debts;

(c) non-compliance with federal normative instructions in regard to *bank reserves* to be maintained with the Brazilian Central Bank;

(d) *fraudulent or reckless operations or transactions undertaken by managers*;

(e) losses caused by incompetent management, which put to risk the credit of creditors; repeated non-observance or disobedience with respect to federal bank legislation, which is not corrected after orders given by the Central Bank, in accordance to its legal supervisory powers.

All cases or occurrences of fraud or unjustified non payment of debts enumerated in articles 1 and 2 of the Bankruptcy Law, Decree-Law No. 7.661 of June 21, 1945.⁴⁰

The proceeding does not interrupt the regular business routine of the affected company or it's normal functioning. However, all managers and members of the supervisory council immediately lose their powers of administration and supervision of the financial institution affected by the proceedings.⁴¹ The new management and supervision of the company will be exercised by specialists nominated by the Central Bank and granted the full powers of management.

One of the important aspects of this powerful legal tool given to the Central Bank is the introduction of the concept of *strict liability* to all former managers and supervisors of the affected financial institution, independent of evidence of guilt, blame, or criminal intentions (DOLUS).⁴² This radical innovation is contained in article 15. The determining factor to impose this responsibility is the existence or proof of control or connection of control (*vinculo de controle*).⁴³

Law No. 9.447 details the joint and several responsibility of all managers and supervisors of all financial institutions subject to Law No. 6.024 and Decree-Law No. 2.321.⁴⁴ All irregular acts, whether crimes or not, committed by natural persons or moral entities that are independent auditors, must also be submitted to the inquest proceedings regulated by article 41 of Law No. 6.024.⁴⁵ It can be said therefore that Law No. 9.447 expands the reach of Law No. 6.024.

Article 7 guarantees the continuance of all civil and criminal actions against indicted persons, even if the proceedings of intervention, out-of-court liquidation,

⁴⁰ *Id.* art. 1 (translated by the author) (emphasis added).

⁴¹ *Id.*

⁴² *Id.* art. 15.

⁴³ *Id.* art. 15, § 1.

⁴⁴ Lei No. 9.447, de 14 de março de 1997.

⁴⁵ Lei No. 6.024, art. 41, de 13 de março de 1974.

or special temporary administration are interrupted or closed.⁴⁶

Law No. 7.492 brought to the legal scene a new and fresh start to combat white-collar crime.⁴⁷ Law No. 7.492 defines the meaning of financial institution. A financial institution, or its equivalent, is defined as any moral entity, or even natural person, of public or private law, which, as its or his main or even only secondary activity, cumulatively or not, solicits, intermediates, or employs, applies and invests financial resources which belong to third parties, operates with national or foreign currency, issues, distributes, negotiates, administers or holds in custody any kind of security or negotiable instrument.⁴⁸ Additionally, the statute deals with insurance, exchange, capitalization of moneys or resources, and any kind of savings or third-party moneys.⁴⁹

Crimes against the national financial system are contained in articles 2 through 23 of Law No. 7.492. All are crimes of a white-collar nature. This is the list of crimes and respective punishment:

(1) to print, duplicate, or fabricate in any way or to cause circulation without written authorization of the issuing company, any certificate, or provisional certificate or negotiable instrument, punishable by reclusion of two to eight years, plus a fine;⁵⁰

(2) to print, produce, divulge, distribute, or order, to distribute, prospects or any kind of publicity of unauthorized securities or negotiable instruments, punishable by reclusion of two to eight years, plus a fine;⁵¹

(3) to divulge false information or intentionally incomplete information in order to cause a loss in respect to any financial information, punishable by reclusion of two to six years, plus a fine;⁵²

(4) to manage any financial institution fraudulently, punishable by reclusion of three to twelve years, plus a fine;⁵³

(5) to manage recklessly, punishable by reclusion of two to eight years, plus a fine;⁵⁴

(6) to abscond or to take for one's self money, securities, real estate, or any other chattel of which the person has possession, without due authorization of the owner, punishable by reclusion of two to six years, plus a fine;⁵⁵

⁴⁶ *Id.* art. 7.

⁴⁷ Lei No. 7.492, de 16 de junho de 1986.

⁴⁸ *Id.* art. 1.

⁴⁹ *Id.*

⁵⁰ *Id.* art. 2.

⁵¹ *Id.*

⁵² *Id.* art. 3.

⁵³ *Id.* art. 4.

⁵⁴ *Id.*

⁵⁵ *Id.* art. 5. Article 25 mentions those persons who exercise control of the company — managers of financial institutions, directors, lower echelon managers — as well as any kind

(7) to deal or negotiate with rights, securities, or any chattel or real estate without authorization of the person who is entitled to give it, punishable by reclusion of two to six years, plus a fine;⁵⁶

(8) to induce or to maintain in error by withholding or giving false information to a partner, investor, or competent public authority in connection with any financial deal or situation, punishable by reclusion of two to six years, plus a fine;⁵⁷

(9) to issue, offer, or negotiate in any securities which are:

I- false or falsified;

II - have been issued without previous registration with the competent authority, or in divergent conditions of previous registration, or based on an irregular registration;

III - issued without coverage or sufficient guaranties according to the law;

IV - issued without previous authorization of the competent authority, whenever this is required by law.

Punishable by reclusion of two to eight years, plus a fine;⁵⁸

(10) to demand payment, without legal support, for interest, commission, or any other type of compensation in connection with transactions which involve insurance, credit, administration of mutual funds, or associations of mutually helping investors, in order to acquire goods and valuables, dealing with securities and stocks, punishable by reclusion of one to four years, plus a fine;⁵⁹

(11) to defraud a supervisor or any investor by inserting or making somebody insert, into a certificate of investment, security, stock, bond, etc., a false statement or a statement which is different from the one that should be inserted, punishable by reclusion of one to five years, plus a fine;⁶⁰

(12) to insert/include or to omit information required by law to be shown in accounting documents of financial institutions, insurance companies, or any company of the distribution system of negotiable instruments and securities;⁶¹

(13) to keep or circulate credits or values in an accounting system parallel to the official one required by law, punishable by reclusion of one to five years, plus a fine;⁶²

(14) failure of the ex-manager of the financial institution to exhibit within the time limits and conditions established by law, to the interventionist, liquidator, or manager of the bankrupt estate, all information, statements, and affidavits or

of administrator, such as interventionists, administrators of bankrupt companies, and liquidators. *Id.* art. 25.

⁵⁶ *Id.* art. 5.

⁵⁷ *Id.* art. 6.

⁵⁸ *Id.* art. 7.

⁵⁹ *Id.* art. 8.

⁶⁰ *Id.* art. 9.

⁶¹ *Id.* art. 10.

⁶² *Id.* art. 11.

documents which must be presented, punishable by reclusion of one to four years, plus a fine;⁶³

(15) to cause the disappearance of any chattels, real estate, or valuables, which are banned from legal sale, donation, or any other means of transaction ban issued as an order in a proceeding of intervention, out-of-court liquidation, or bankruptcy of a financial institution, punishable by reclusion of two to six years, plus a fine;⁶⁴

(16) the taking by an interventionist, liquidator, or administrator of bankrupt estate such chattels, real estate or valuables, or cause them to be transferred to themselves or third parties, punishable by reclusion of two to six years, plus a fine;⁶⁵

(17) to present in- and out-of-court, liquidation proceeding, or bankruptcy process a statement of credit pending, or a false claim, or to present false or simulated papers or documents, punishable by reclusion of two to eight years, plus a fine;⁶⁶

(18) to knowingly and falsely recognize a credit as legitimate by an ex-manager or administrator of a bankrupt estate or person, punishable by reclusion of two to six years, plus a fine;⁶⁷

(19) to operate without due authorization, or with fraudulently obtained authorization, a financial institution, and to circulate and distribute securities and other valuables, or to operate a money exchange, punishable by reclusion of one to four years, plus a fine;⁶⁸

(20) to receive or give financing to any of the persons mentioned in article 25 of this law (controller, administrator, manager, sub-manager of a financial institution) directly or indirectly, or to finance, give money as advancement to a controller, administrator, any member of a council mentioned in the articles of incorporation, to spouses, parents or grandparents, sons and daughters or grandchildren, or any inlaws of same blood or only related by law up to the second grade, or to a partnership or corporation controlled by the financial institution, directly or indirectly, or by any of the named persons, punishable by reclusion of two to six years, plus a fine;⁶⁹

(21) to give or receive — in one's own name, as controller, or as administrator of the partnership or corporation — financing, credit, money payment, salaries, "pro labore," or any kind of payment to persons under the conditions of this article; the same applies if the transaction is done secretly or if the payment of profits, their receipt, or their promotion are undertaken by the financial institution secretly,

⁶³ *Id.* art. 12.

⁶⁴ *Id.* art. 13.

⁶⁵ *Id.*

⁶⁶ *Id.* art. 14.

⁶⁷ *Id.* art. 15.

⁶⁸ *Id.* art. 16.

⁶⁹ *Id.* art. 17.

punishable by reclusion of two to six years, plus a fine;⁷⁰

(22) to violate the secrecy of knowledge acquired on account of the administrative functions exercised through an operation or service provided by a financial institution, or any operative which integrates the national system of distribution of securities, punishable by reclusion of one to four years, plus a fine;⁷¹

(23) to obtain, by fraudulent means, a financial contract or money payment from a financial institution, punishable by reclusion of two to six years, plus a fine. The penalty is augmented by one-third if the crime is committed to the detriment of a public financial institution, or by a private institution which receives credentials from a public financial institution to give credit and financial help;⁷²

(24) to employ money and resources/credits, received from a public official of a financial institution, in deals and transactions not foreseen or authorized by law or contract, or received from a private institution authorized by a public financial institution to open and give lines of credit, punishable by reclusion of two to six years, plus a fine;⁷³

(25) to use a false identity or to give to another person a false identity to transact a foreign exchange, punishable by detention of one to four years, plus a fine;⁷⁴

(26) anyone who, under these circumstances, withholds information that he should give, or makes false statements, punishable by detention of one to four years, plus a fine;⁷⁵

(27) to perform an unauthorized foreign exchange in order to promote the export of hard currency, punishable by reclusion of two to six years, plus a fine;⁷⁶

(28) to anyone whom in any way promotes, without legal authorization, the export of foreign moneys, or maintains foreign bank deposits that have not been declared to the appropriate federal authorities, punishable by reclusion of two to six years, plus a fine;⁷⁷

(29) any action of a public official that delays, omits, or acts against an express disposition of the law that is necessary for the regular functioning of the financial system, as well as for the maintenance and preservation of the interests and values of the national economic and financial order, punishable by reclusion of one to four years, plus a fine.

Article 26 provides that any criminal action to punish all crimes enumerated in Law No. 7.492 shall be undertaken by the federal public attorneys, in a federal

⁷⁰ *Id.*

⁷¹ *Id.* art. 18.

⁷² *Id.* art. 19.

⁷³ *Id.* art. 20.

⁷⁴ *Id.* art. 21.

⁷⁵ *Id.*

⁷⁶ *Id.* art. 22.

⁷⁷ *Id.* art. 22.

court.⁷⁸ Both the Brazilian Central Bank and the CVM may take part, as assistants, in the judicial proceedings. The principle of secrecy of financial transactions and bank operations may not be invoked to stymie criminal proceedings.⁷⁹ Preventive prison may be considered and decreed if the magnitude of the losses of a financial nature justify the measure.

In 1998, Law No. 9.613 was issued to control money laundering operations and the hiding of financial resources obtained in illegal transactions.⁸⁰ The law created a system to control financial operations, and to supervise, control, and inspect the moving of goods and capital.⁸¹ The purpose of this law is to combat: (1) organized crime syndicates; (2) incriminating behaviors which have the purpose to obtain illicit gains from illicit economic or financial operations; (3) the narcotics and related drugs trade; (4) terrorism; and (5) contraband and the illegal trafficking of arms, munitions or any material necessary for their production.⁸² The law also takes into account and punishes: (1) hijacking and extortion; (2) crimes against the public administration; and (3) the request and demand, for one's self or for third parties, directly or indirectly, of any favor or benefit as condition or price to undertake or not to undertake any administrative action.⁸³ The law also considers any crime perpetrated by criminal organizations as a crime against the national financial system.⁸⁴

Article 1 of the law proceeds to typify as crimes the following procedures: to hide or to dissimulate the nature, origin, whereabouts, disposition, and movement of property or goods, values, and rights, which are obtained directly or indirectly through operations and transactions which derive and are connected to crimes mentioned above.⁸⁵ The law defines in detail each concept listed in article 1o, such as to hide, to dissimulate, nature, and origin.⁸⁶ The stipulated penalty for these crimes varies from three to ten years of reclusion plus a fine.⁸⁷

Paragraph 1 of article 1 of the Law specifies under three headings the conversion of illicit gains obtained through criminal conduct into licit investments.⁸⁸ The law goes to great lengths to define, conceptually, the whole operation. It analyzes terms such as: to acquire, to receive, to exchange, to give or to receive guarantees, to negotiate, to hold or to safeguard, to move, to transfer, to receive as

⁷⁸ *Id.* art. 23.

⁷⁹ *Id.* art. 29.

⁸⁰ Lei No. 9.613, de 3 de março de 1998, D.O.U. de 4.3.1998.

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.* art. 1.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

a deposit, to import, to export, goods and valuables stating values which do not correlate with the real value of the operation.⁸⁹ The penalty is three to ten years of reclusion, plus a monetary fine.⁹⁰

Paragraph 2 of article 1 punishes with the same penalty those persons who handle and invest, in any economic or financial transaction, moneys and valuables which are known to them as the product of illicit operations and crimes.⁹¹ For the purpose of the law, it is considered the same as receiving, hiding, and selling stolen goods (*receptação* — fencing).⁹²

Law No. 9.613 also takes into account, for the purpose of sentencing, the participation in organized crime and criminal groups, associations, or offices.⁹³ Obviously the person must be clearly aware of the criminal behavior of his companions or associates.

Paragraph 5 of article 1 regulates cooperative conduct of someone who is a member of a criminal organization.⁹⁴ Denunciation (*delação*) and information about other criminal associates to the investigative authorities has a potential bonus. One-third to two-thirds of the penalty may be reduced and the person cooperating may only face a sentence of controlled liberty rather than confinement in prison.⁹⁵ Any information (denunciation) must be given spontaneously and the information must be useful and helpful, facilitating the elucidation of crimes and detection and detention of criminal associates or collaborators.⁹⁶

A recent law, which resembles American legislation that probably inspired the Brazilian legislature, institutes and regulates a witness protection program.⁹⁷

The Brazilian anti-trust legislation has been updated by Law No. 8.884.⁹⁸ In Brazil, all crimes committed in this area are called "Crimes Against the Economic Order." Law No. 8.884 is a revised version of, and complement to, Law No. 1.521, as mentioned at the beginning of this Article.

Article 20 provides a resumé of the infractions, breaches, infringements and law-breaking behaviors that are most commonly perpetrated in this economic area.⁹⁹ These truly deviant behaviors have more of an economic nature than other white-collar crimes. These acts usually are committed by high echelon executives of large corporations that try to control all or a segment of the market. In the opinion of the

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ Lei No. 9.807, art. 12, de 13 de junho de 1999, D.O.U. de 14.7.1999.

⁹⁸ Lei No. 8.884, de 11 de junho de 1994, D.O.U. de 13.6.1994.

⁹⁹ *Id.* art. 20.

Brazilian legislators, the efforts and shenanigans employed to achieve market domination may also be considered a special type of white-collar crime.

Law No. 8.884 tries to protect free enterprise by prohibiting any conduct or proceeding that limits, infringes upon, falsifies or does harm to free enterprise and free initiative. The law's purpose is to combat market domination of goods and services. Furthermore, it establishes as its goal to fight the arbitrary increase of profits, as well as the posture and abusive exercise of market-dominating behavior. The law presumes that a market dominating situation exists whenever a corporation or an association of corporations dominates twenty percent of the market of any goods or services.¹⁰⁰

The law tries to be quite specific in characterizing all types of deals and operations. The law defines infractions of the economic order as the ultimate purpose to curtail free enterprise, free initiative, and the workings of the free market and trade competition.

The following facts, deals, and transactions are considered infractions:

(1) to establish or practice, in agreement with a competitor, under any form, prices and conditions of sale of merchandises or services;

(2) to obtain or influence the adoption of a uniform commercial conduct or to make such an agreement with the competition;

(3) to deny the market of the services of finished or unfinished goods or to deny, with other producers, the sources of raw materials or intermediary products;

(4) to limit or obstruct the access of new companies to the market;

(5) to create difficulties in regard to the functioning and/or development of a competing company, supplier, buyer, or finance company of goods and services;

(6) to obstruct a competitor's access to sources of raw materials, important goods, equipment or technologies, or to deny access to channels of distribution;

(7) to demand or to concede exclusivity and to divulge publicity in regard to the mass media;

(8) to agree upon prices in anticipation of a public bidding;

(9) to use methods of a false nature to provoke price oscillation of goods pertaining to a third party;

(10) to regulate the market for goods and services, establishing agreements to limit or control research and development of a technological nature, regulating the production of goods and services, to block or make it difficult to obtain or distribute investments destined to produce goods or services;

(11) to impose on distributors, retailers, dealers, or representatives of goods and services any selling prices, discounts, conditions of payment, minimum or maximum quantities, profit margins, or any other condition of sale, with respect to their dealings with their third-party clients;

(12) to discriminate against buyers or providers of goods or services, employing

¹⁰⁰ *Id.*

price differentials or operational sale or service conditions;

(13) to refuse to sell goods or to provide service based on normal payment conditions or according to commercial custom and practice;

(14) to make difficult or break the continuity or development of commercial (trade) relations of an indeterminate nature on account of the refusal of the other party to submit to unjustified clauses of a commercial nature or conditions which violate free competition;

(15) to destroy, waste, or hoard basic materials, intermediate products, finished products, as well to destroy, waste, or block the functioning of equipment employed to produce or transport such materials or merchandise;

(16) to monopolize or impede the utilization of industrial or intellectual property rights, or rights to explore technologies;

(17) to abandon or to force the non-cultivation of plantations, without just cause;

(18) to sell merchandise below production costs without justification;

(19) to import merchandise below production costs in the country of origin, which is not a member of GATT, or a signatory to the anti-dumping and subsidies code;

(20) to interrupt or reduce in large scale production without just cause;

(21) to totally or partially cease factory operations, without just cause;

(22) to withhold or prevent production of consumable goods, with the exception of those goods with a value that guarantees the cost of production;

(23) to condition the sale of one product on the acquisition of another, or to condition the delivery of services on the delivery of another service or on the acquisition of goods;

(24) to impose excessive prices, or to increase unjustifiably the price of goods and services.¹⁰¹

Law No. 10.303 regulates crimes against the capital (stock) market, especially manipulation of information and the unauthorized use of privileged information by insiders.¹⁰²

Articles 27-C, 27-D, 27-E, and 27-F of Law No. 6.385 became the basis to fight the misuse of insider information.¹⁰³ A penalty of one to eight years of reclusion in prison and a fine of up to three times the value of the illicit gain obtained, is reserved for those convicted.¹⁰⁴ The misuse of insider information includes those people who have negotiated simulated operations or executed any other kind of fraudulent maneuver, with the intent to artificially alter the normal functioning of the securities markets, trading in exchanges, over the counter markets, commodities

¹⁰¹ *Id.* art. 21.

¹⁰² Lei No. 10.303, de 31 de outubro de 2001, D.O.U. de 1.11.2001.

¹⁰³ Lei No. 6.385, de 7 de dezembro de 1976.

¹⁰⁴ *Id.*

markets, and futures markets. Furthermore, such individuals must have acted with the intent to obtain unjustified profit or advantage, either for oneself (personally) or for another party, causing loss to third parties.

Article 27-D addresses specifically crimes committed by insiders.¹⁰⁵ Reclusion of one to five years and a fine of three times the value of the illicit gain obtained is mandated for those who use relevant insider information. This includes information not yet divulged to the market which should be confidential and is capable to propitiate for the insider or for a third-party unjustified advantage, and information used in any negotiation in one's own name or in the name of a third party, to buy or sell any kind of security, bond, share, stock or similar valuable.

Article 27-E punishes the unauthorized exercise of any function, activity, job, profession or position, dealing with securities in the capital markets.¹⁰⁶ Such punishment is warranted even without any gratuitous gain on a personal basis or as an institution that is a part of the distribution system, as an administrator of a collective portfolio of securities or individual portfolio, as an independent investment agent, as an independent auditor or analyst of securities, or as a fiduciary agent. Reclusion varies from six months to two years, in addition to a fine.

Article 27-F specifies that all fines imposed for crimes committed under articles 27-C and 27-D must be imposed in connection with the damage caused or the illicit gain obtained.¹⁰⁷

Article 30 of Law No. 6.385 specifies that any court procedure or litigation that deals with the subject matter of the competence of the Brazilian CVM, the agency must always be notified to intervene, within fifteen days of notification, if CVM determines that this is necessary or opportune.¹⁰⁸

¹⁰⁵ *Id.* art. 27-D.

¹⁰⁶ *Id.* art. 27-E.

¹⁰⁷ *Id.* art. 27-F.

¹⁰⁸ *Id.* art. 30.

APPENDIX A

A STUDY OF WHITE-COLLAR CRIMES COMMITTED AGAINST THE BRAZILIAN FINANCIAL SYSTEM

This Appendix contains a summary of the book, *Penal Control of Crimes Against the National Financial System*,¹⁰⁹ by Under Federal State Attorney Ela Wiecko V. De Castilho. The 352-page book was published in 1998 by Belo Horizonte: Del Rey.

The research contained in the book was sponsored by the Brazilian Association of Judges. A questionnaire was sent to 13,100 judges. 3,927 judges answered (approximately thirty percent). The profile of the answering judges was as follows:

- Fifty-two percent of respondents were less than forty years of age.
- Eighty-three percent of respondents answered that they take into account, when sentencing, social aspects of the case.
- Seventeen percent of respondents are conservatives, or legalistic or traditionalists
- Twenty-one percent of the responding judges are female.
- Seventy percent of respondents are Catholics and married.
- Fifty-five percent of respondents stated that their parents only had primary schooling.

The study analyzed a nine-year period from 1986 to 1995, which included 606 official communications of suspected fraudulent transactions made by the Brazilian Central Bank to the offices of the Federal Public Attorneys. In each case, the facts submitted indicate that the suspected fraudulent transactions could be prosecuted, since they had been typified in the course of an administrative proceeding as white-collar crimes under Law No. 7.492.

From the beginning of the study, the author/researcher stated that the performance of the Brazilian Central Bank must be considered as very weak.

Based on the above statistic (606 communications of possible fraud in nine years) the President of the Brazilian Central Bank (BACEN) stated in 1996 to a special commission of the Brazilian Senate that the BACEN never says that a crime has been committed. It is not the function of BACEN to affirm officially whether a crime has been committed. The Central Bank does not decide on the culpability of bankers, nor does it place them in handcuffs. The Brazilian Central Bank has other functions.

This speech revealed the BACEN's absence of control, lack of interest in the matter, a substantial lack of administrative proceedings against suspected

¹⁰⁹ ELA WIECKO V. DE CASTILHO, O CONTROLE PENAL NOS CRIMES CONTRA O SISTEMA FINANCEIRO NACIONAL [PENAL CONTROL OF CRIMES AGAINST THE NATIONAL FINANCIAL SYSTEM] (1988); see also Lei No. 7.492, de 16 junho 1986.

defrauders, and furthermore a pronounced lack of interest in the criminal prosecution of financial wrongdoers.¹¹⁰ After much criticism and accusations of omission directed against BACEN, Minister of Finance Dr. Pedro Malan ordered Mr. Gustavo Loyola, then-President of BACEN, to issue new and complete information and statistics about the fraudulent transactions.

BACEN compiled new information covering a five-year period from 1991 to 1995. In March 1996, BACEN informed the Senate Commission that a total of 1,226 official communications resulting in suspicions of fraudulent behavior had been compiled and partially prepared for delivery to the Federal State Attorneys. However, only 606 communications had been analyzed and readied for official delivery. Of those cases, 215 emanated from the State of São Paulo, sixty-seven cases from the State of Rio Grande do Sul, and eighty-eight from the State of Mato Grosso do Sul, with the remaining communications originating from all over Brazil.

It is clear that BACEN started to act only after the manifestation of much criticism to prevent the fraudulent transactions from the year 1991 onwards.

Another interesting aspect that the study revealed was the number of years it took the Central Bank to communicate possible criminal facts to federal criminal prosecuting authorities. On the average, more than two years (twenty-six months) elapsed prior to revealing the suspicious actions. In almost ten percent of the cases, it took more than four years, and in only seventeen percent of the cases did it take less than one year for the BACEN to act.

The average time it took the BACEN to implement an administrative inquiry varied between two and three months, and the average time it took to conclude those inquiries was approximately two years. The average time between indictment and sentencing also totaled approximately two years.

Eighty percent of the sentences applied the statute of limitations. Of the remaining twenty percent of sentences, thirteen percent were absolved and only four percent of the cases were condemned. Three percent were mixed sentences.

The conclusion one has to reach, upon seeing those statistics, is one of almost total impunity. For example, the 1994 Brazilian prison census did not register a single inmate condemned for crimes against the financial system.¹¹¹

This allows the following conclusion:

The Central Bank controls the mechanism of selection and determination of most of the cases that should be considered crimes against the economic order. There is no doubt that the Central Bank lacks inspection and control, and has a laxity of active supervision. This is the main reason why so few cases of fraudulent transactions are communicated to the federal prosecuting agency.¹¹² A second reason is the manifest lack of interest of BACEN to communicate suspicious facts

¹¹⁰ DE CASTILHO, *supra* note 109, at 157.

¹¹¹ *Id.* at 228.

¹¹² *Id.* at 230–31.

of fraudulent activity. A third reason, possibly, is the connection that exists between the top administration officers of BACEN and the top management officers of the financial community. Many times, a top director of BACEN leaves a government post and shortly thereafter becomes a director, CEO, or another type of administrative officer of a private bank or financial institution. The reverse transition from financial institution to governmental post has happened many times as well.

Over the second semester of 1986 and all of 1987, not a single communication of possible fraudulent behaviour was issued by the BACEN. Between the years 1988 to 1990, the number of communications made by BACEN is negligible. Only in 1991 and primarily in 1992 did BACEN start to report possible criminal facts. There is no doubt that BACEN is slow to act, and when it does act, it does not regularly furnish important data and information.¹¹³

One more factor must be taken into account — the “negotiating factor”. Many times, BACEN negotiates with the party(ies) possibly involved in economic or financial crimes. These negotiations legitimately try to settle or resolve debts incurred by the financial institution where illicit acts have been verified, thereby making it usually impossible — or at least difficult — to portray the guilty party(ies) as criminals once some kind of settlement has been reached.¹¹⁴

On the other hand, it must be pointed out that the Federal Police usually does not act on its own accord with respect to financial crimes. When initiated, however, it takes the Federal Police approximately two months to conclude a preliminary inquiry, which may serve as a basis for action for the Federal State Attorneyship.

Although the Brazilian Central Bank uses a preventive method of inspection of all financial institutions under its jurisdiction, this method has been revealed to be quite deficient. Most BACEN inspectors merely “go by the book” when verifying whether instructions and standards issued by BACEN have been observed by the management of these financial institutions. Instead, the investigators should verify value and substantiveness of assets as well as liquidity. This pronounced lack of practical procedure has been the hallmark of two important bank failures in recent times: the sinking of the Banco Econômico of the State of Bahia, later bought by the Spanish bank Banco Bilbao Viscaya, and the near-bankruptcy of the Banco Nacional. Another famous case of mismanagement is the Banco Bamerindus of the State of Paraná, which was negotiated with HSBC Hong Kong Shanghai Bank Corporation.

Thus, it can be stated as a fact that — in general — the preventative inspection of financial institutions and transactions by BACEN is not efficient.

For the years 1991 and 1992, statistics show that out of a total of 53,372 financial operations or deals, only 7,056 were inspected, within the framework of

¹¹³ *Id.* at 238–40.

¹¹⁴ *Id.* at 245.

375 inspection processes. This means that only about thirteen percent of the total number of transactions were somehow inspected. Of these 7,056 inspected transactions, 2,268 — approximately one-third (thirty-two percent) — showed some type of irregularity. If one applies this percentage on the total number of transactions during those two years, it is permissible to conclude that possibly more than seventeen thousand financial transactions showed some type of irregularity. Quite impressive and worrisome.¹¹⁵

Another serious and worrisome aspect is the lack of knowledge and preparedness of the federal sheriffs and inspectors. They usually do not understand what has been perpetrated. An example of that lack of competence is the federal police inquiry installed to detect fraudulent accounting practices in the case of the Banco Nacional.¹¹⁶ The facts that were to be inspected occurred in 1988. Six years later, in 1994 the Central Bank issued a communication about the facts. After an additional two years of federal police detective work, nothing irregular was discovered or detected. Another financial scandal, however, which already had been under scrutiny for ten years, revealed facts and evidence that could have been sufficient to indict and condemn the perpetrators of the Banco Nacional accounting scam ten years earlier. The overall conclusion that one draws from this situation is the fact that, for financial white-collar crimes, there is very little punishment in Brazil. One may even speak of impunity.

Out of an estimated total of one million crimes committed per year in Brazil, the small percentage that deals with white-collar crimes (i.e., acts and behaviors that could be prosecuted under and according to Law No. 7.492) are simply ignored.¹¹⁷ The reason for such a state of affairs, as shown, are manifold, but mainly are derived from a lack of will to indict and prosecute. There also exists a lack of will to gather facts on all levels from public authorities and likewise an almost total lack of statistics and formal registration of criminal conduct.

In general, little importance is attributed to combat white-collar crime in Brazil. The practical immunity of prosecution of perpetrators of white-collar crimes in Brazil is a real fact.¹¹⁸ Not only does the federal executive, through its agencies, show a lack of interest to prosecute such criminal behaviors, but also the legislative branch has shown a noted resistance to further criminalize, on a primary base, all types of white-collar criminal, fraudulent behaviors.

Another reason that must be pointed out is the relationship, many times quite close, between the holders of economic power — wheelers and dealers — and those who exercise executive or legislative power. In fact, sometimes those individuals in the first category sustain those of the second category in executive or legislative

¹¹⁵ *Id.* at 236.

¹¹⁶ *Id.* at 259.

¹¹⁷ *Id.* at 285.

¹¹⁸ *Id.* at 286.

power.

In conclusion, I would like to point out that the research conducted by Dr. Ela Wiecko V. De Castilho, Under Federal State Attorney, in this area of financial white-collar crime has been absolutely crucial and has been published in a research book, which I accessed, entitled *O Controle Penal nos Crimes contra o Sistema Financeiro Nacional [Penal Control of Crimes Against the National Financial System]*.¹¹⁹ Most of the statistics and general conclusions of this paper have been extracted from her seminal research, published in 1997.

¹¹⁹ *Id.*

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