

## [#27: AIJA seminar on anti-corruption in Brazil](#)

On 23 and 24 March we attended the [AIJA](#) seminar on the challenges of Anti-Corruption in Brazil. The seminar presented a general overview and discussions on current topics of the anti-corruption legislation and compliance programs in different jurisdictions all over the world. Brazil was the perfect place to host this seminar, as Brazil has one of the largest ongoing anti-corruption investigations, also known as Operation Carwash as explained in [Lawlunch #26](#). The ongoing criminal investigation is of such a scope that it is even 'rewarded' with a Netflix series called 'The Mechanism'.

Operation Car Wash or in Portuguese Operação Lava Jato, is an ongoing criminal investigation being carried out by the Federal Police of Brazil and judicially commanded by Judge Sérgio Moro since 17 March 2014. It is a cross border investigation with more than one thousand warrants for search and seizure, temporary and preventive detention and coercive measures. In 2016 a breakthrough went down in the case since Odebrecht and Braskem two Brazil based companies pleaded guilty in U.S. federal court in Brooklyn to violate a U.S. foreign bribery law after an investigation involving political kickbacks at Brazil's Petrobras bribery scheme.

Odebrecht SA and affiliated petrochemical company Braskem SA agreed on a penalty of \$3.5 billion, the largest penalty ever in a foreign bribery case. This penalty resolved international charges involving payoffs to Brazil's state oil company and others. The huge penalty was negotiated as part of a broad settlement with U.S., Brazilian and Swiss authorities. We even learned that the Brazilian, Swiss and US public prosecutors have an Whatsapp group to keep in close contact to exchange information. As you can imagine this raised questions about international judicial assistance and whether the legal

requirements are met.

The Carwash investigation thus formed an important bases to discuss several topics during the AIJA seminar. We came across interesting differences between jurisdictions and problems. For instance how is the principle of ne bis in idem safeguarded in such cross border investigations and how can two Brazilian companies plead guilty in a US Court while a company in Brazil cannot be held criminally liable? These questions show that close contact between lawyers in such cross border investigations is of vital importance.

One of the interesting differences we discussed extensively is the role of legal entities in different jurisdictions. In the Netherlands, it has been possible for a legal entity to be prosecuted since 1951 for specified economic crimes. And since 1976 it has been possible to prosecute legal entities for any crime according to article 51 of the Dutch Procedural code.

The question is how can a legal entity be held criminal liable? A legal entity does not have any hands or feet nor can it act by itself. It always has to be represented by a natural person. But how can acts (or omissions) of individuals (directors, managers, employees) be allocated to a company? Whether the criminal actions of a natural person can be attributed to a legal person depends on whether the company had control over the criminal activity and accepted it.

This means that if the criminal activity of a natural person is part of the normal business of the company, or is part of the company's official or unofficial policy, or is more or less accepted by the company, the criminal offence can be attributed to the company. The Dutch Supreme Court summed up four situations in which conduct, in principle, may be said to be carried out 'within the scope of a corporation':

- the act or omission has been carries out by someone who works for the company;

- the conduct fits the everyday 'normal business' of the corporation;
- the corporation gained profit from the conduct concerned;
- the course of action was at the 'disposal' of the corporation, and the corporation has 'accepted' the conduct – acceptance including the failure to take reasonable care to prevent the conduct from being performed.

In our daily practice we see that the public prosecution office tends to hold legal entities responsible for actions of an employee without assessing whether the acts of the employee can be attributed to the company. Moreover, considering the jurisprudence of the Dutch Supreme Court the legal entity has to act intentionally to commit a crime. All the relevant circumstances have to be taken into account for this. For instance, if an employee committed wrongful acts it has to be taken into account whether the company has given clear instructions to the employee to do its work right. Furthermore there should be a reason for the legal entity to doubt the satisfactory services of the employee. If not a crime of an employee cannot merely be attributed to the legal entity.

This jurisprudence thus shows that internal regulations and compliance procedures are of vital importance to discuss issues about (criminal) liability.

This AIJA seminar shows that cross border investigations are growing and lawyers have to take into account all the differences between jurisdictions and work closely together to prevent that our clients will receive a tailor made solution for every jurisdiction.

Do you have any questions about this subject or are you confronted with a related issue and would you like to discuss this with us? Please feel free to contact us via [boezelman@hertoghsadvocaten.nl](mailto:boezelman@hertoghsadvocaten.nl) and [boer@hertoghsadvocaten.nl](mailto:boer@hertoghsadvocaten.nl).