

Social damage and compensation funds – designing standards for management and disposition of returned assets¹

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Corruption scandals have had deep impact in Brazil's society, economy and politics in recent years. Car Wash and other anticorruption operations have revealed that a large number of public contracts has been awarded after bribe payments; political parties and electoral campaigns have received non-registered funds, to say the very least; companies have admitted illegal funding of thousands of political candidates; influential politicians and high-level civil servant have been granted large sums of bribes. All that have undermined confidence in Democracy, that reached the lowest levels in history, creating room for populism and extremism.

After reading the above, one will easily reach the conclusion that corruption practices have resulted in huge social damage in Brazil. Also, it is not difficult to understand that those crimes were committed by powerful groups – and such powerful groups could still be in power, economically and/or politically, at some extent.

Due to recent institutional developments, Brazil has fortunately been able to prosecute and sanction some of those corruption cases, bringing back large sums of money, be it assets confiscated, or fines paid. In the light of such developments and the availability of resources as a result of anticorruption efforts, it is advisable to reflect on the adequate management and fair disposition of such funds.

In that sense, both aspects – social damage and the participation of high-level actors in perpetrating corruption – should be considered when it comes to designing principles and standards for the management and the disposition of the returned assets and funds.

Transparency International (TI) Brazil has been advocating for the social destination of parts of funds and assets recovered in corruption cases. The rationale here is that, even though the largest portions of returned funds should indeed return to affected government agencies – provided they can demonstrate that oversight and control have improved and that persons involved in corruption cases are no longer in power – , a portion (for example, 20%) should be used towards two goals: to prevent corruption, via strengthening of social accountability, and to provide access to basic rights, that have been made more difficult due to state and policy capture.

Social damage and compensation fund – a concrete case

In June 2017, a large Brazilian meatpacker, JBS, and federal prosecutors of the Greenfield Task Force reached a leniency agreement in which the company admitted crimes involving federal funds. As a result, JBS must pay 10.3 billion Brazilian Reais (BRL), which converts to approximately 2.7 billion USD, within 25 years, via annual disbursements. Out of this total, 8.3 billion BRL (2.1 billion USD) will return to government agencies affected, such as state-owned banks, whereas the remaining 2 billion BRL

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(approximately 600 million USD) should be used for the planning and execution of social projects aimed at compensating for the social damage that corruption practices have caused.

In December 2017, JBS, the Greenfield Task Force and Transparency International - Brazil signed a MoU (Memorandum of Understanding) in which all parts announced that TI would offer recommendations on the management and disposition of the compensation funds – the 600-million-dollar fund.

After a series of meetings, interviews and research, TI Brazil handed over to the Greenfield Task Force, in May 2019, the report “Governance of Compensation Funds in Corruptions Cases – A Guide of Good Practices to promote the compensation of social damages”. Overall, the 120-page report recommended that the management of the JBS fund should follow three principles: co-management; sustainability/perennially; and good governance.

- **Co-management:** the company should agree in sharing with civil society representatives the management of the fund as well as the most strategic decisions on the disposition of the resource. Such representatives should be allowed as part of the board following prior approval from both the company and the federal prosecutors. In a first phase, both parts – civil society representatives and JBS representatives – should have equal power, reflected in the equal number of seats and voting powers. After a few years, as the flow of the funds would rise (a reminder: the 600-million-dollar fund is to be formed after 25 years, with annual disbursements), civil society representatives will have the majority of the seats at the board. The third and last phase of the process: the company will withdraw from the board and the management of the fund, leaving a relevant legacy to Brazilian society.
- **Sustainability/perennially:** existing financial instruments allow large funds, such as a 600-million-dollar fund, to be sustainable and occasionally even perennial. “Endowments”, for instance, is a good strategy: by saving parts of the annual payments, an endowment could generate revenue in the future, via interests. As funding development activities is always challenging, having such endowment is a huge gain.
- **Good governance:** once the compensation fund for social damage is a public-interest enterprise, the governance should follow the best practices in terms of transparency, civic participation, accountability, and compliance protocols. Also, it is crucial to count on tools for measuring impact and for monitoring and learning. Whereas the company and civil society manage the fund, the state, via the prosecutors’ office and the Judiciary, oversees the whole process.

In terms of disposition, the strategy should follow the rationale behind strengthening social accountability and access to basic rights. That is: considering that i) grand corruption involves high-level officials and/or top political leaders and/or the economic elite and ii) grand corruption captures policies, in benefit of corrupt companies and civil servants/politicians at the expenses of a more universal public policy, it is advisable that anticorruption funds i) strengthen actors outside government; especially civil society groups and investigative journalism so as they are able to better control the governments and ii) strengthen actors and processes that facilitates access to basic rights, such as Education, Health, Sanitation – here, the compensation fund may seek to identify which basic right(s) has(have) been affected with the corruption act unveiled and sanctioned.

GFAR Principles – a new proposal for principles 9 and 10

In December 2017, at the Global Forum on Asset Recovery (GFAR), the two co-hosts (UK and US) and the four focus countries (Nigeria, Ukraine, Tunisia, Sri Lanka) developed and adopted ten principles for disposition and transfer of confiscated stolen assets. These are known as “the GFAR Principles”. These principles are an interesting move in the right direction: as grand corruption cases are more and more investigated as a result of institutional development in a variety of regions, it is crucial to start designing principles and standards.

However, the experience with concrete cases teach us that compensating for social damages cause by grand corruption is far more challenging that it appears. Thus, it is crucial to agree on standards for management and disposition, not only for the sake of transparency but also as a catalyser for the whole process of asset recovery. Once there is relevant international consensus on standards for management and disposition of returned funds and assets, the very process of confiscating will improve, due to the predictability over the destination of the funds and assets recovered.

In that sense, GFAR Principles 9 and 10 should be reviewed so as to incorporate the lessons learned. Below, two proposed new redactions for the principles most related to management and disposition (additions in boldface):

PRINCIPLE 9: PRECLUSION OF BENEFIT TO OFFENDERS

*All steps should be taken to ensure that the disposition of confiscated proceeds of crime do not benefit persons involved in the commission of the offence(s). **Prior to receiving confiscated assets, governmental agencies entitled to compensation should dismiss from senior management all persons involved in the commission of the offence(s) and implement a compliance program.***

PRINCIPLE 10: INCLUSION OF NON-GOVERNMENT STAKEHOLDERS

*~~To the extent appropriate and permitted by law, i~~ (I)ndividuals and groups outside the public sector, such as civil society, non-governmental organizations and community-based organizations, ~~should be encouraged to~~ participate in the asset return process, including by helping to identify how harm can be remedied, contributing to decisions on return and disposition, and fostering transparency and accountability in the transfer, disposition and administration of recovered assets. **While most of the confiscated assets and returned funds should return to government agencies affected, a share of the amount should be used to strengthen social accountability and access to peoples' basic rights.***

The anticorruption language always stresses the painful impact of corruption in society and in the lives of the people. The management and disposition of returned assets can play a crucial role in compensating such damage in a concrete and visible way. That would benefit not only benefit the people, especially the most vulnerable, but also the improve the credibility of the fight against corruption and the confidence in democratic institutions.