

The Use of COAF Data in Investigative Proceedings - Some Brief Considerations on the Recent Decision of Justice Dias Toffoli

In order to prevent future decisions from being “poisoned by nullity due to violations of the Constitutional mandates of data privacy and confidentiality (art. 5, sections X and XII, of the Federal Constitution)” as a result of “criminal prosecutions based on the sharing of tax and banking information by control and inspection administrative organs with the Public Ministry, without an adequate demarcation of the limits on the information transferred”, the current president of the Federal Supreme Court (“STF”), Justice Dias Toffoli, in a single-justice decision issued in the case of Extraordinary Appeal nº 1.055.941/SP (Issue 990 in the Issues of General Repercussion management system), and in response to a motion filed by the attorneys for the defense of Senator Flávio Bolsonaro, issued a preliminary injunction suspending the investigation against the latter that was begun based on a Financial Intelligence Report (“RIF”) issued by the Financial Activities Control Council (“COAF”) and provide to the Rio de Janeiro branch of the Public Ministry.

Despite the expected criticism that the decision in the case in question would engender, the justice also ordered the suspension of “all ongoing judicial proceedings in the country” concerning the same question, extending the decision to include criminal investigations and proceedings which, according to the text of the decision, had “begun without the supervision of the courts nor any prior authorization of the sharing of data by inspection and control organs”. In short, the emphatic decision analyzed the Constitutional precepts regarding data privacy and confidentiality and whether or not any citizen’s tax and banking data, regularly obtained by COAF, could be shared with the Public Ministry for criminal law purposes, without the prior intermediation of the courts.

According to the analysis by the justice in the decision referred to, in its analysis of the constitutionality of Supplementary Law no. 105/2001¹, the STF did not authorize the use of constitutionally protected information by the Public Ministry without a basis in a specific and well-grounded court order, having

¹ This law deals with the confidentiality of financial institution transactions and the possibility of sharing information with the Public Ministry for criminal law purposes, as well as the banking and tax information obtained by the Federal Tax Authority (“Receita Federal”) in the legitimate exercise of its inspection duties, without prior authorization by the courts.



Débora Motta Cardoso
dmotta@dmktadvocacia.com.br
T (+55) 11 2501 0475



Karin Toscano Mielenhausen
ktoscano@dmktadvocacia.com.br
T (+55) 11 2501 0475

Débora Motta & Karin Toscano
Advocacia Criminal – DMKT
Av. Brigadeiro Faria Lima, 1826
cj. 906 – 01451-908 – Jardim
Paulistano – São Paulo/SP
T (+55) 11 2501 0475
www.dmktadvocacia.com.br



Débora Motta & Karin Toscano
advocacia criminal

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 Advocacia Criminal – DMKT
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 cj. 906 – 01451-908 – Jardim
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www.dmktdadvocacia.com.br



been “*emphatic in stating that access to banking operations be limited to identification of the accountholders involved in the transactions and to the total amount transacted each month, that is, to the generic registration data of the accountholders, the inclusion of any element that allows for the identification of the origin or [the] nature of the expenses being prohibited*”. In other words, for Justice Dias Toffoli, the prior decision of the STF recognized the constitutionality of Supplementary Law no. 105/2001 exclusively with regard to the sharing of information between financial institutions and inspection and control organs, such that the Public Ministry and the Federal Police were not authorized to use such information to initiate investigations designed to uncover the practice of any crimes. Thus, the suspension of each and every investigative proceeding in which data shared by COAF had extrapolated the limits of identifying the accountholders of certain banking operations and the total amounts involved was both legitimate and necessary, until the appeal could receive a final judgment.

Without any disregard for the arguments employed by Justice Dias Toffoli in his initial decision in the case, but at the same time raising the issue in light of the enormous impact that that decision may have on the activities of the Brazilian financial intelligence organ, we must ask what the proper role of COAF is?

As is the case in other countries (Spain, France, Germany, and Switzerland), our financial intelligence office is more in the way of an administrative agency than one with police powers, being responsible for identifying money laundering and terrorism financing operations. In practice, in addition to acting as a regulator, COAF aids criminal investigations by identifying possible flows of illicit funds that might have their origin in various criminal activities, especially public sector corruption, but it is not authorized to investigate those possible activities.

It is important to note that the purpose of COAF is not to determine whether a crime has occurred, nor could it be, as that is an attribution of the police. Instead, it operates as a control mechanism to receive, examine, and identify information in situations in which there is a suspicion of money laundering and to notify the competent authorities so that they may begin investigative proceedings. Moreover, COAF coordinates and exchanges information with foreign financial intelligence agencies, in order to facilitate rapid and efficient action to combat crime².

Put simply, COAF has an important role in investigating money laundering, performing its activities based on notifications of suspect transactions realized in

² According to COAF’s own account, in 2018 alone, it was responsible for producing and remitting 7,345 financial intelligence reports to the competent authorities, as well as for aiding in the blocking of BRL 176 million of suspicious origin. Currently, its database holds more than 16.7 million financial transaction registries.

the context of the sectors which are obliged to report to it³. That is the information that gives rise to an RIF, which is nothing more than a collection of data that, by itself, is insufficient to be the grounds for a formal accusation, as it comes bare of the circumstances surrounding the transaction being highlighted.

COAF is not a Brazilian creation but rather the fruit of a worldwide desire and effort to combat transnational organized crime, which routinely uses the criminal expedient of money laundering to achieve its ends. With a history of success, it has conferred greater transparency on Brazilian financial transactions for more than twenty years, in compliance with the international commitments the country has made.

The STF has a difficult task ahead as it will be necessary to take into account the necessary balance between the effective nature of the information shared by financial intelligence organs and the Constitutional protection of the individual rights.

³ Among the players who are subject to mandatory COAF reporting are: financial institutions, factoring companies; real estate agencies; accounting offices; insurance brokers; companies offering various consulting and financial assistance services; and traders in jewelry and precious stones and metals.

Débora Motta & Karin Toscano
 Advocacia Criminal – DMKT
 Av. Brigadeiro Faria Lima, 1826
 cj. 906 – 01451-908 – Jardim
 Paulistano – São Paulo/SP
 T (+55) 11 2501 0475
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