What can be expected from Brazil's new Anti-Corruption Law?

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Brazil's new Anti-Corruption Law (Law nº 12,846 of August 1st, 2013) entered into force on January 29th, 2014 and it is expected to change the landscape of enforcement against corrupt practices in the country. In August 2000 Brazil became a party to the *Organisation for Economic Co-operation and Development (OECD) Convention on Bribery of Foreign Public Officials*, under

which it committed to introducing a comprehensive statute and to stepping up the prosecution and sanctioning of corruption. Congressional review of the anti-corruption bill was initiated in 2010, and after a little more than two years, it became law in the midst of a wave of protests against corruption all around Brazil. The protests were triggered by several factors, including the beginning of the adjudication by Brazil's Supreme Court of an investigation of prominent public officials and businesspeople for bribery and other corruption offenses.[1]

Because the new law simplifies prosecution and establishes severe sanctions for a broad range of corrupt practices, it is likely to have relevant ramifications for all companies doing business in Brazil.

Could you detail some of the significant features of the law?

Law nº 12,846/2013 introduces strict corporate liability and provides for a combination of administrative and civil sanctions against Brazilian and foreign companies with headquarters, branches or offices in Brazil. Pursuant to the Law, any of these parties may be held accountable for directly or indirectly (*i.e.*, via third parties or intermediaries), promising, offering, giving bribes or financing the corruption of Brazilian or foreign officials (including officers of public international organizations). Likewise, the law's broad definition of corruption encompasses fraud or any interference with public tenders and government contracts, as well as the obstruction of government investigations.

What are the relevant sanctions?

Administrative fines range from 0.1% to 20% of the company's gross revenues in the year prior to the initiation of the investigation (or BRL 6,000 to 60 million if not possible to determine the company's revenues). Additional sanctions may be sought before Brazilian Courts, such as (i) confiscation of assets, (ii) suspension of the company's activities, and (iii) prohibition of receiving tax breaks and other incentives. Corporations found guilty of corruption may also be required to pay compensation for damages. Parent companies may be held accountable as well, but liability in this case is limited to the payment of fines and damages. Finally, the law creates the *National Registry of Punished Corporations* (Cadastro Nacional de Empresas Punidas – CNEP, in Portuguese) that will consolidate and make public all administrative and civil

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[1] Criminal Case No. 470 has been known as Brazil's "trial of the century" and resulted in most of the defendants being sentenced to serve jail terms.

sanctions imposed by Government, Congress and Courts at the Federal level for corrupt practices.

Furthermore, executives, employees and third-parties that act on behalf of the company are also liable for corrupt practices and may be subject to criminal sanctions under Brazil's Criminal Code (Decree nº 2,848 of December 7th, 1940). Individual liability for corruption crimes is dependent on proof of intent and prosecution is conducted separately by state and federal prosecutors. Still, it is likely that criminal prosecution of the individuals will be increased as a result of the introduction of strict corporate liability enforcement against legal entities, as the new Anti-Corruption Law specifically establishes that government agencies shall inform criminal prosecutors of the conclusion of the administrative case, so that the individuals may also be investigated.

Is there any way to mitigate corruption investigations?

As is the case with the FCPA and the UK Bribery Act, Brazil's Anti-Corruption Law gives credit to companies that adopt internal auditing and self-reporting procedures, as well as rules on ethics and corporate conduct. Adoption of effective compliance programs may result in the reduction of fines and other sanctions. The law also provides that companies under investigation that cooperate with the authorities may be entitled to a reduction of the applicable sanctions.

Brazil's Anti-Corruption Law establishes a Leniency Program under which self-disclosure of corrupt practices and cooperation by corporations could result in a reduction of up to 2/3 of the fine and immunity from some, but not all, sanctions. Although the Law refers to "*Leniency*", it does not allow for the possibility of full exemption from sanctions and establishes that the authority may afford the defendant lenient treatment even if there are no additional parties involved in the investigation. Therefore, the rules in the law are similar to those of a leniency program, but are not strictly equivalent.

Unlike the Leniency Program established in the Antitrust Law (Law nº 12,529 of November 30th, 2011), the benefits of the Leniency Program in the new Law are not extended to the individuals involved, which could still be liable under Brazil's Criminal Code and other statutes, such as the Public Tender Law. Furthermore, filing for Leniency before the authority in charge of investigating corruption activities in a case potentially involving both bid-rigging and corruption charges will not automatically ensure Leniency under the Antitrust Law. A separate

application process before the Administrative Council for Economic Defense (CADE) would have to be pursued. Equally, it is not clear under the Antitrust Law whether a grant of Leniency for cartel offences would automatically cover corruption. Although there is a specific provision that establishes a leniency grant encompassing "*other crimes directly related to cartel offences such as those established in the Public Tender Law and under Article 288 of Criminal Code (criminal association)*", there are no regulations or case law yet on the scope of such a provision. Moreover, at a conference held in November 2013, one of the key prosecutors from the State of Sao Paulo, argued for a narrow interpretation of the provision, *i.e.*, that it should be limited to procurement crimes and criminal association.

What will the Institutional Framework look like?

Every government agency at the Federal, State and/or Municipal levels where an alleged corruption practice takes place will enforce the Anti-Corruption Law, which grants public officials broad investigative powers, including search and seizure.. In the Federal Government, such agencies will have concurrent jurisdiction with the Office of the Comptroller General, which will also be responsible for the Leniency Program.

The Federal Government is required under the new Law to issue regulations on the criteria for assessing what an effective compliance program is. The regulations are also expected to detail procedural issues that are not covered in the Anti-Corruption Law or in the Law on Administrative Procedure (Law nº 9,784 of January 29th, 1999). The Regulations have not yet been issued.

Brazil's political system is a federation thus, as happens with other federal statutes where regulations are called for establishing specific rules on enforcement in the State or Municipal levels,[2] such regulations will not be binding for the States or Municipal governments. They are required to issue their own respective regulations.

Have any of the States issued regulations?

On January 30th, 2014 the State Government of Sao Paulo published the Decree nº 60,106/2014 that regulates the enforcement of the Anti-Corruption

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[2] This is also the case with the Law on Access to Public Information (Law nº 12.527, of November 18th, 2011), where States and Municipal governments are required to regulate how the respective agencies would ensure enforcement of the federal law.

Law by government agencies in Sao Paulo. The Decree establishes rules on the investigation and decision-making process used by the State agencies and they generally mirror what has been instituted by the new law with respect to the federal agencies – *i.e.*, concurrent jurisdiction between each agency head where the corrupt act has allegedly taken place and the Comptroller's Office. Similarly, as is the case for the federal government, the Comptroller's Office will also be responsible for executing leniency agreements. Pursuant to the Decree, the State agencies will adopt the criteria for assessing the effectiveness of compliance programs to be established by the Federal Government. Lastly, it creates the *State Registry of Punished Corporations* (Cadastro Estadual de Empresas Punidas – CEEP, in Portuguese).

Tocantins was the first State to regulate the Anti-Corruption Law, on December 13th 2013. The Decree nº 4,954/2013 repeats several provisions set forth in the Anti-Corruption Law and sets forth procedures for investigation and adjudication of charges on corruption that are similar to the ones in place for the Federal Government.

What do you think the impact of this new law will be?

The coming into force of Brazil's Anti-Corruption Law this year marks a significant legal milestone, but there are still many questions about how it will be enforced in practice. Key questions include whether agencies in the Federal, State and Municipal levels will adopt similar criteria on sanctioning a corrupt practice and how cooperation with criminal prosecutors with respect to individuals will take place. Relevant substantive and procedural issues are involved in both matters. This is also the case with respect to the interface between investigations on corruption and bid-rigging, and particularly on how the Offices of Comptroller and the other State and Municipal agencies will implement their respective Leniency Programs and work together with CADE in cases where there is also a leniency applicant in the antitrust investigation.

Many companies are preparing or enhancing existing compliance codes and have begun awareness training for their employees. Some have extended this training to third parties operating on their behalf, although this appears to be less common and more challenging. Despite all the challenges and even before the remaining regulations are issued and many of these issues are settled by practice or by courts, the overall message is clear: Prevention is the best strategy.

February 2014

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