

The New Brazilian Anti-Corruption Act

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I. Introduction

In summer of 2013 the Brazilian legislator approved a new Anti-Corruption Act („Lei Anticorrupção“ – Law no. 12.846, dated August 1, 2013) (hereinafter referred to as the „new Act“), which became valid in January of this year. Even though, Brazil ratified several international conventions over the past years in this realm¹ and already obtain some acts dealing with this matter², the introduction of the new Act is considered an important step of Brazil to adjust its national regulations to valid global OECD and UN anti-corruption standards. Despite, in times of weakening euphoric boom of recent years³ and beginning of a certain mistrust – in particular fueled by upcoming social protests and apparent missing reliability in organizing, planning and conduction of global events such as the football world cup of this year and the olympic games 2016⁴, Brazil aims to reconquer foreign investors' trust and to set a landmark through a strict fight against corruption.

¹ On November 21, 1997, Brazil signed the OECD - Convention on Combating Bribery of Foreign Public Official; on October 31, 2003, Brazil signed UN - Convention Against Corruption; on March 29, 1996, Brazil signed the OAS - Inter-American Convention Against Corruption.

² Lei da Improbidade Administrativa (Lei 8429/1992); Lei da Transparência (Lei Complementar 131/2009); Lei Acesso à Informação (Lei 12.527/2011), which all include the responsibility of public officials and other involved individuals for acts in disfavor of public administration.

³ Recently, rating agency Standards & Poors downrated Brazil's investment-rating from BBB to BBB-. As a result, Brazil is just one step away from being rated as speculative. It based its decision on risk of Brazil's budget and the relative low growth perspectives within the next two years, see online-edition Manager Magazin, 25.03.2014, downloaded on 25.3.2014 under: <http://www.manager-magazin.de/finanzen/artikel/standard-poor-s-stuff-brasiliens-bonitaet-herab-a-960565.html>.

⁴ The international public media is discussing among others the poor security situation, as well as, overflowing costs and, in particular, time delays in the construction of world cup stadiums and corresponding infrastructure projects, such as airports, trains and access roads. In the light of this critics the International Olympic Committee installed recently a committee which shall supervise the national organization in Brazil on a regular basis in order to avoid any delays in the construction of the premises, see online-edition Folha de São Paulo, 9.4.2014; downloaded on 9.4.2014 under: <http://www1.folha.uol.com.br/esporte/2014/04/1438051-coi-critica-atrasos-na-olimpiada-do-rio-e-federacoes-ja-falam-em-plano-b.shtml>.

The new Act shall have effect in addition to the valid penal code, and which penalizes active bribery with prison and/or monetary penalty⁵.

In the light of acts such as the US Foreign Corruption Practice Act 1977 or the British Bribery Act 2010, the new Brazilian Anti-Corruption Act introduces a rigorous system of responsibilities for bribery and other acts in disfavour of public authorities – a special emphasize is made on the responsibility of legal entities and access to their assets.

II. Which Acts Are Prohibited?

The new Act prohibits direct and indirect bribery of Brazilian or foreign public officials or third parties which are connected in any kind of manner with such officials. In addition, the attempt to bribe is also prohibited by the Act⁶. Fraud and interferences in connection with public biddings and contracts are also included in the list of punished activities – for example by means of manipulation or falsification of to be submitted documentation or preventing of bidding participation of competing bidders⁷. Furthermore, the establishment of companies with fraudulent intention in order to participate in public biddings or to serve as a partner to a public contract is penalized⁸. The new Act also covers activities which difficult public investigations⁹, as well as, the finance or financial support of any in the new Act mentioned and penalized acts or to use third parties in order to mask its own interest or identity¹⁰.

III. Who Is Liable?

Besides liability of the acting individual, the new Acts also includes liability of legal entities in which interest or favor the act has been concluded¹¹. Such liability shall be independent of any culpable behavior¹². The legal entity shall have its registered office, a subsidiary or representing office in Brazil¹³. This means in practical terms, that the new Act applies to all German companies with subsidiaries or representing offices in Brazil. Liability also applies in the event of corporate restructuring, such as change of corporate form or mergers¹⁴. However, in case of an acquisition

⁵ Article 333, "Corrupção Ativa", Código Penal

⁶ Article 5, I of the new Act.

⁷ Article 5, IV of the new Act.

⁸ Article 5, IV e of the new Act.

⁹ Article 5, V of the new Act.

¹⁰ Article 5, II, III of the new Act.

¹¹ Article 1 of the new Act.

¹² Article 2 of the new Act.

¹³ Article 1, sole § of the new Act.

¹⁴ Article 5, I – V of the new Act.

by another company or a merger with another legal entity the liability of the succeeding entity regarding the imposed punishment is limited to the transferred/acquired assets, unless fraud or bad faith is absent¹⁵. An important landmark of the new Act is the rule regarding joint and severable liability¹⁶: Not only the acting legal entity shall be liable, but also the controlling mother company, as well as, controlled subsidiaries, legally affiliated entities or so-called members of a consortium based on the underlying consortium agreement shall be jointly and severable liable¹⁷. Therefore, it will be crucial to apply even higher due diligence standards in connection with M&A activities in Brazil, in particular regarding possible signs which might lead to corruption evidences in its targets. It is recommendable to adjust due diligence checklists and corresponding legal documentation. At the same time, higher attention shall be applied when certain activities are planned and intended – for example joint ventures with local partners in Brazil or earlier mentioned consortia grouping. The latter are commonly used in infrastructure projects or other project of larger scale.

IV. Legal Consequences

The new Act imposes rigorous and heavy financial penalties: applicable are fines in an amount between 1% and 20% of the last annual gross revenue, or, in case such figures are not available, fines in an amount between 6,000.00 and 60 million reais¹⁸. As an ultima ratio the new Act also foresees the closing of individual business units or even forced liquidation of the infringing company¹⁹. Moreover, the company might be banned for a period of up to five years from receiving public subsidies or loans²⁰. A conviction shall not exclude the obligation to indemnify of the overall damage. The new Act also include the publication of infringements and infringing parties, as well as the registration of the infringing party in a specific register, including name, tax number and infringing act²¹.

As to how the acting company will be subject to the full amount of the applicable harsh penalties, depends on the circumstances of each individual case. The legislator grants to the respective authorities a wide margin of discretion. In order to exercise such discretion, the new Act includes a catalogue to measure the specific circumstances of the case: among other facts,

¹⁵ Article 4, I of the new Act.

¹⁶ Article 4, II of the new Act.

¹⁷ According to articles 278, 279 of the Brazilian Stock Corporation Act, a kind of working alliance of companies, which - without giving reasons for an own legal personality – to affiliate for specific business activities.

¹⁸ Calculated on the exchange rate as of today, this would amount to ca. EUR 20 millions. Article 6, IV of the new Act.

¹⁹ Article 19 I of the new Act.

²⁰ Article 19, IV of the new Act.

²¹ Article 22 of the new Act. The registration shall be made into the register „Cadastro Nacional de Empresas Punidas“.

the authorities shall take into account the scale of the infringement, the intended or obtained advantage, the economic situation, as well as the efforts of the infringer to cooperate with the authorities or existing and valid internal compliance policies²².

V. Compliance and Notification

In the light of reducing penalty two issues are of high importance: installation of own compliance policies, as well as, voluntary information disclosure and cooperation with the authorities. The respective authority might close a deal with the infringing company and reduce the penalty up to an amount of 2/3 of the originally applied penalty²³. However, such penalty reducing deal only might be closed under specific circumstances – first of all, a voluntary notification by the infringing company is required. Such step include that the entity must be the first to notify about the infringing act. In which form or based on what motivation such notification shall be made, is not defined. In addition, the company shall cooperate in all aspects with the authorities and admit the legal wrongdoing²⁴. In case other companies are involved, such cooperation must lead to their identification. In general, negotiations and draft agreements are kept in confidence. The agreement itself just becomes public when signed, unless investigative and/or administrative reasons impede such disclosure²⁵. Important to know is that in the event such negotiations might fail, the negotiations of a reduction of the penalty are not considered as an admission of guilt²⁶.

An applied penalty reduction, however, shall not release the infringer from the caused damage. Moreover, it will be still responsible for the compensation of thr whole damage²⁷. Such agreement might be extended to other companies of the same economic group – under the condition that these companies also sign the agreement²⁸. In case, the signing entity does not comply with the regulations of the agreement, it shall not sign a new agreement with the authorities within the next three years. In addition, the new Act includes advantages for companies with corresponding compliance policies²⁹. Worthwhile to mention is that – in contrast to regulations such as the UK-Bribery Act – a valid and efficient compliance policy shall not exempt the infringing party from

²² Article 7 of the new Act.

²³ Article 16, II of the new Act, via an so-called „Acordo de Leniência“ agreement.

²⁴ Article 16, I of the new Act.

²⁵ Article 16, VI of the new Act.

²⁶ Article 16, VII of the new Act.

²⁷ Article 16, III of the new Act.

²⁸ Article 16, V of the new Act.

²⁹ Article 7, VIII of the new Act.

penalty. It is much more an aspect which the respective authority must take into consideration when exercising its discretion³⁰.

The new Act foresees that the federal legislator shall decree among others an executive order with guidelines regarding the evaluation of corresponding compliance policies³¹. Such order has not been decreed until today. Thus, an efficient compliance policy is essential as part of a prevention strategy against law infringing behaviour, including corruption. In case of a concret infringement of the new Act, however, impacts of such infringement, as well as the option of a voluntary notification and full cooperation with the authorities, must be carefully analyzed and included with priority in the company's defence strategy.

VI. Enforcement

It is of utmost importance that written law is enforceable in practice. In this aspect the new Act has heavy shortcomings. It does not define clear powers of application or enforcement. Instead of delegating such powers to a specific and central organ, the new Act decentralizes the competences and includes a wide definition of the responsible authority. The new Act foresees that the highest management level of each organ or institution of the legislative, judicative and executive, which is affected by the prohibited act, can apply corresponding measures³². Such responsibility even might be subdelegated to others. In practical terms this might lead to the situation that diverse parties can apply provisions – e.g. public authorities, public prosecutors or public regulating bodies. This imposes the conclusion – that in absence of uniform application parameters for the new Act and a superior public interest – the new Act might be exercised in different and, even, contradicting manners. In order to counter such criticism isolated statebased legislators decreed public orders – in particular the state of São Paulo, one of the most important locations for German business activities, has been pioneer in this aspect. The state of São Paulo already issued such decree together with the new Act, regulating responsibilities on state level and other administrative issues³³. As an example, São Paulo foresees in general the centralization of responsibilities in a short number of authorities³⁴. Such approach has the advantage that responsible authorities are able to build up specific know-how and conflicting decisions of several

³⁰ Article 7 of the new Act.

³¹ Article 7, sole § of the new Act.

³² Article 8, I of the new Act.

³³ Decreto Nr. 60.106, dated January 29, 2014, published on January 30, 2014 in Diário Oficial, Vol. 124, Nr. 20.

³⁴ Competing competence: (i) state secretary or general public prosecutor, or (ii) Corregedoria Geral da Administração (general supervisory organ of public administration).

authorities are avoided. At the same time competence for negotiations of exemption from punishment is allocated to just one single authority³⁵.

VII. Opinion

This legal novelty is to be considered as an important administrative step in the fight against corruption and as an adjustment to international standards. However, it must be questioned, if this Act also will be able to bring Brazil closer to global standards in the fight against corruption in practical terms and, therefore, will reduce significantly the level of perception of corruption – Brazil ranks actually on number 69 among 174 countries³⁶ - or even reconquer the trust of international investors (as also intended). In particular, inconsistencies and technical errors of the Act's wording are large blunders. Even though, the state of São Paulo has issued certain statelevel competences, the absence of specific federal regulations, might be reasons for investment risks for foreign investors.

Authorities on federal, state or regional level might be competent – but, each of them might also have a distinct approach on how to interpret and apply the new Act, in particular induced by different interests, may they be of economical or practical nature and based on a missing unifying legal executive order. Authorities in the highly developed state of São Paulo might decide differently than competent entities in predominant rural states. The wide legal definitions must be seen in such light. Examples are cases when companies complicate or hinder investigations of the authorities³⁷ or perturb the proceedings of a public bidding³⁸. Such cases might serve as gateways for distinct law interpretations and, thus, sufficient grounds for missing legal certainty and planning reliability, and in individual cases base grounds to implement political or specific economical interests. It might occur in practice that specific bidders are banned from public biddings and, through the subsequent publication of the penalty, might be stigmatized. More over, it might be possible that the new Act provides fertile soil for corruption itself – in particular the wide legal definitions and the discretionary power give fiscal agents, who are unimmunised against corruption, sufficient leeway for their wrongdoing.

Therefore, it is very important for investors in Brazil to act preventatively and implement rigorous compliance policies, which also include corruption combating regulations. Even, that such rules

³⁵ Art. 3, I, Decreto Nr. 60.106, dated January 29, 2014, pursuant the Corregedoria Geral da Administração (general supervisory organ of public administration) is competent.

³⁶ see 2012 Corruption Perception Index of Transparency International, downloaded on April 28, 2014, under <http://www.transparency.org/cpi2012/results>.

³⁷ Artikel 5, V des neuen Antikorruptionsgesetzes.

³⁸ Artikel 5, IV b des neuen Antikorruptionsgesetzes.

do not protect completely against punishment, they do serve as a strong protecting shield against corruption, in particular when they are based on internationally recognized anti-corruption laws. In addition, they serve as a positive balance score when Brazilian authorities apply the new Act. Nonetheless, a federal decree regarding standards of compliance policies has not been issued yet, Brazil and its fiscal agents cannot deny international recognized compliance rules and shall judge rules based on global standards as reasonable and efficient.

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