

The New Brazilian Anti-Corruption Law

By Carlos MOURA[†]

Abstract. This piece is intended to call the attention of directors, businessmen and company managers to a fact of great relevance. With the enactment of Law 12,846/13, its first and second articles imposed the accountability, administrative and civil liability of legal entities when of the perpetration of acts against the domestic or foreign Public Administration, meaning a relevant risk as the companies will liable regardless of guilt in the practice of corruption committed in its own interest or benefit.

Keywords. law, anti-corruption, companies.

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1. Introduction

The purpose of this article is to describe, analyze and reflect on the law that comes to fill the existing gap in the legislation when assigning the liability of legal entities. Therefore with the issue of Law # 12,846/2013, more commonly known as the 'Anti-Corruption Law, legal entities become civilly and administratively liable for the perpetration of illicit acts against the public administration, either domestic or foreign.

In the mid 2013's thousands of Brazilians flooded the country's streets to protest against government corruption and its aftermath, thereby forcing Brazil in wide strides to create a decree with the anti-corruption law. On August 1 the Brazilian president Dilma Rousseff approved Law # 12,846/2013, forbidding direct and indirect acts of bribery or attempted bribery of public servants, whether domestic or foreign.

It is difficult to establish a universal conceptualization of corruption, since it has different connotations and hues in various parts of the world. The term involves sociological, culture and religious aspects and even a particular type of conduct, such as endemic corruption, institutional corruption, functional corruption, among others." Obtaining a broad legal concept is likewise challenging, since it is always subject to the natural controversies in the world of Law. (CNC, 2014)

Authors stress that corruption is a deviation of power, in which a person acts in connection with any public entity for the purpose of obtaining an advantage for himself or herself or someone else. (Petrelluzzi et al, 2014)

This includes not only a donation or bribery offer, but also the donation of any financial or other support to the bribery activity or the dissimulation thereof, and the utilization of the third party to implement or assist in the bribery scheme.

In this context the new Anti-Corruption Law may be enforced upon companies that corrupt public agents, defraud tenders or public contracts or, by means of an agreement or covenant, thwart the competitive nature of a tender procedure, among

[†] Brasdril Sociedade de Perfurações Ltda., Administrative and Financial Manager, Brasil.

☎. 02122992094332. ✉. cmoura@dodi.com

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other irregularities. Companies that in any way hinder the investigation or oversight activity of public bodies may also be punished.

According to [Magalhães \(2014\)](#), it is noticed that the Law explicitly assigned a subjective accountability only to managers and administrators, providing nothing on the liability of individuals foreign to the staff of legal entities who perpetrate harmful acts to the Public Administration. In this case, for this category of particulars, one must ask if there is some form of liability, and if so, would it be of an objective or subjective nature.

Hence one of the major provisions brought in by the new law is the introduction of the accountability of a legal entity, on a civil and administrative basis, for the acts of corruption committed on its behalf or in its benefit. Therefore the law allows the company to be held accountable regardless of the accountability of the individuals involved and does not require proof that the company managers or owners intended to harm the Treasury.

Continuing on, the legal entity's accountability will not exclude the individual accountability of its managers or administrators, or of any other natural person as a perpetrator, accessory or participant in the illicit act.

On the other hand, in the administrative sphere, fines of up to 20% of the company's gross revenues for the year before the inception of the administrative proceeding, or up to R\$ 60 million real when this calculation is not possible may be enforced. Another possible administrative penalty is the extraordinary publication of the conviction sentence in widely-circulated means of communication.

Regarding the legal sphere, the loss of property, rights and moneys, suspension or partial interdiction of activities, in addition to the illegibility to receive incentives, subsidies, subventions, donations or loans from public bodies or entities and from public or public-controlled financial institutions may be decreed for a period of one to five years.

It is worth stressing that the law also provides mechanisms to prevent new legal entities incorporated by disreputable company partners - in their own names or in a covert fashion - from entering contracts with the public administration. Parent, subsidiary and affiliated companies, or consortium members within their respective contracts shall be jointly liable for the perpetration of acts provisioned in the new law, and such liability is limited to the requirement to pay a penalty and fully compensate the harm caused.

From this point of view another novelty is the possibility of the public administration signing lenience agreements with companies that effectively cooperate in the investigations. Once the lenience agreement is signed, the companies may be exempt from certain penalties or have them reduced. The purpose of this provision is to encourage spontaneous company denouncement.

Seen from another aspect, it is important to stress that the new Anti-Corruption Law encourages the effective enforcement of codes of ethics/conduct, the adoption of internal integrity, audit and irregularity denouncement mechanisms and procedures, that is, the adoption of Compliance programs. The law provides that such existing mechanisms shall be taken into account when enforcing the administrative sanctions.

As far as it is related, the companies that have Compliance programs are therefore expected to have their efforts recognized and their sanctions reduced. The new law was published in the Federal Law Gazette of August 02, 2013 and came in effect on February 01, 2014.

For follow-up and evaluation, in a piece published by [Rolli \(2014\)](#) of the "Folha de São Paulo" newspaper on 15-Dec-04, the journalist comments on the Companies' difficulty to adapt to the said law, that is:

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'Six in every ten companies are not prepared to comply with the anti-corruption law in Brazil, which came in effect almost a year ago and punishes companies involved in public contract frauds with fines of up to 20% of their gross revenues.'

In view of these considerations, a survey was conducted with 300 Brazilian companies by Grant Thornton international consulting (one of the leading independent audit and consulting firms in the world), which showed that most of the companies have not yet adopted internal controls to increase transparency or rules to train employees and punish perpetrators.

These are companies from various regions and sectors, mostly mid-size and located in São Paulo. 'Brazil is a country that reacts to corruption but has no prevention culture', says Cynthia Catlett, the partner in charge of the fraud investigation area of the consulting firm.

'Companies are at a standstill, since the law has not been regulated yet. This is why the law needs to be enforced and the punishments levied indeed, just like it happens in the U.S., the country with one of the most feared anti-corruption laws.' (Rolli, 2014).

And so the wording of the decree that will regulate the anti-corruption law is being reviewed at the President's Cabinet since the first semester, and according to Jorge Hage, Controller General (CGU), few details need to be worked out such as the weight of the criteria in the enforcement of the penalties.

It is worth noting that one of the points that companies need to stress in their anti-corruption programs are the relations with business partners and suppliers, according to attorneys and specialists in internal illicit act prevention mechanisms (Compliance).

In fact, Luciana Malara, Dell's Legal and Compliance Director, says that for years the company has had clauses that allow auditing and investigating partners in case of a suspicious procedure, from a bill of sale containing an erasure to a payment made to an individual instead of a legal entity. (Rolli, 2014)

For review, the ten foremost cases investigated and punished by Justice in the U.S. involved problems with third parties. (Rolli, 2014)

In this sense, among the companies that reported having taken some action to comply with the law (32.4%) in the study, the 'systematic' oversight of the relation with suppliers is one of the mentioned items, next to investments in information technology systems.

It is important to emphasize that a company in the financial business reported having fired an employee after confirming by monitoring emails that he remarked on confidential information to a third party. Another one was terminated for cause after having been monitored and caught opening a competitor company.

Let it be stressed that at Serasa Experian an employee was punished after posting in a social media a photo of a cat lying on a company notebook and stating he had closed for business while working at home. (Rolli, 2014).

'The problem is the image conveyed by the act', says Rogéria Gieremek, Serasa Experian's Compliance program consultant. 'Ethics and lawfulness are not in great acts, but in day to day'. (Rolli, 2014).

This taken, the major difference of the new punitive measures in relation to laws already existing in Brazil, which only managed to punish direct individuals, make these programs much more than a temporary whim, but mechanisms that will become ever more essential in corporate structure, particularly in multinationals that may be also subject to foreign law on the same matter. (Neves, 2013).

Another novelty is the possibility of the public administration signing lenience agreements with companies that effectively cooperate in the investigations. Once the lenience agreement is signed, the companies may be exempt from certain

penalties or have them reduced. The purpose of this provision is to encourage spontaneous company denouncement (Kim & Almeida, 2014).

We may clearly perceive that in the last few years Brazil's economic boom turned the country in to an emerging world power and attracted a rush of multinational organizations and foreign capital investments. With the enactment of an important anti-corruption law at the end of last month Brazil is joining a new class of nations - which imposed new actions in fighting public servant bribery by companies.

2. Final considerations

For the managing class, it is of utmost importance the fine tuning with the new times arising from the society's public clamor for not peacefully accepting the cheating that is ravaging our present days, the corruption, the administrative abuses and illicit and open enrichment of political leaders and heads of government. Constant surveillance, internal controls, sector and routine audits have to be the corporate tenor. Another important factor is the very special caution with the key business manager who has the decision-making power, and constant attention when, in the heat of solving a particular demand, he/she would be induced to agree to the participation in a scheme that in principle would solve the matter. What hypothetically presents itself as a great business to the manager may become a nightmare to the company, with costs and derangements that will render the business unfeasible. This would be the greatest message conveyed by the recent Anti-Corruption Law, by establishing the accountability of companies and their managers.

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