

Cleaning up its act

Brazil launches tough anti-bribery laws to tackle corruption



BRAZIL is often described as simply too big to ignore. It is the fifth largest country in the world with a population of around 200 million. Its economy is one of the world's largest, most rapidly developing and, according to the World Bank, wealthiest. It is also expected to be one of the most globally dominant by 2050.

Despite the recent marked deceleration in growth, Brazil still offers huge prospects to potential investors thanks to its rich resources, competitive market, political stability and dynamic private sector with few limitations on foreign ownership. Opportunities for foreign companies have evolved significantly since the 1990s when economic reform brought budget stability, ending the country's boom and bust cycle as well as its high inflation and foreign debt.

The UK has traded with Brazil for over 200 years and it remains Britain's most important trading partner in Latin America. There is also considerable UK investment in Brazil. Despite this Latin American powerhouse clearly presenting opportunities for businesses, like a number of other major emerging

markets, it poses significant corruption risks. Like India, it has a complex administrative system with 27 federate states and 5,500 municipalities all with the power to adopt their own constitutions and laws, albeit within the principles established by the country's Federal Constitution. There is a wide range of regulatory agencies and heavy bureaucracy, which, according to Transparency International, contributes to an increased likelihood of demands for bribes. An Enterprise Survey by the World Bank identified corruption by public officials in Brazil as a major administrative and financial burden, with 70% of firms identifying corruption as a major constraint.

Corruption has been described as endemic in Brazil, with its congress at the heart of the problem. Almost 200 legislators (a third of congress) are currently facing charges of improper conduct, ranging from embezzlement to kidnapping. According to the Federation of Industries of Sao Paulo State, corruption could have cost Brazil





as much as \$53 billion in 2013 alone. Brazilians have begun to register their opposition to this forcefully. A country more accustomed to street parties than street protests, it has seen hundreds of thousands take to the streets in repeated anti-corruption demonstrations. In response, the current president Dilma Rousseff, elected in 2011, has taken action ousting a string of government officials on corruption charges and publicly committing to tackle the problem.

The Clean Companies Act

In February of this year, new anti-corruption legislation came into effect. The Clean Companies Act, which finally honours Brazil's commitment to the Organisation for Economic Cooperation and Development anti-bribery convention, represents a major step forward in the country's fight against corruption. Under the new law, companies and individuals will be held liable for corrupt practices. Previously, the Brazilian government could only sanction individuals for 'corrupt conduct that benefitted companies'.

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The Act applies not just to Brazilian companies but to foreign companies operating in Brazil. It covers Brazilian subsidiaries as well as agents and intermediaries acting on the company's behalf and applies to activities taking place at home and abroad.

Although there are no criminal penalties under this law, officers and employees convicted of unlawful conduct are subject to potential criminal liability under other acts. However, the Clean Companies Act does impose substantial fines of up to 20% of a company's gross revenue for the fiscal year ending prior to the initiation of the investigation. If the fine cannot be calculated based on revenue, a company may face a fine of up to BRL60 million (approximately US\$25 million). Companies may also be forced to relinquish any benefits from the illegal conduct, be prevented from participating in public bidding processes, or even face enforced dissolution.

It applies to all companies, regardless of their corporate or legal form, whether foreign or domiciled in Brazil and whether the corrupt act takes place inside or outside Brazilian territory. Any

company doing business in Brazil should take note of this legislation and strengthen its anti-corruption compliance programmes accordingly.

As we have seen elsewhere, when countries tighten their anti-corruption legislation it is often the corrupt practices of foreign companies that come to the prosecutors' attention first.

Scope and impact

Like the UK Bribery Act, the new law makes the bribery of domestic and foreign officials an offence. It also bans facilitation payments – unlike the Foreign Corrupt Practices Act (FCPA) and a number of other anti-bribery laws.

It expressly prohibits promoting, offering or giving, either directly or indirectly, an improper benefit to a public official or related third party. Within public



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procurement it forbids bid rigging, the submission of fraudulent bids, seeking to obtain undue advantage and impeding the administrative process. Financing, paying for or sponsoring prohibited conduct is unlawful, as is using a person or entity as an intermediary to conceal the real interests of the identity of the beneficiaries.

However, it does not cover commercial bribery such as kickbacks between companies. This is particularly confusing in Brazil where there are many semi-public companies, for example Petrobras and Banco do Brasil, which are part of the country's indirect administrative state. Robust due diligence of ownership is therefore essential to avoid situations such as the one faced by Dutch firm SBM Offshore, currently under investigation for allegedly paying bribes to oil giant Petrobras.

Company response

Companies operating in Brazil are being advised to tighten up their anti-corruption compliance programmes. Organisations found to be in breach of the new law can reduce their exposure by demonstrating that they have implemented a strong compliance programme.

Precise details as to what this entails have not yet been specified, however, GoodCorporation strongly recommends the following as a minimum:

- Develop a code of conduct and internal policies that reflect the company's zero tolerance of bribery
- Conduct robust due diligence to verify ownership, evaluate procedures and expurgate any activities that may contravene the new laws – this must include all agents, intermediaries and third parties acting on the company's behalf
- Carry out appropriate auditing procedures
- Ensure effective training in and communication of

the new policies and procedures

- Implement risk-free speak-up systems to encourage internal disclosure

UK listed companies operating in Brazil should be doing this anyway to comply with the Bribery Act's adequate procedures. However, unlike the Bribery Act, such actions will not constitute a defence, but rather they will contribute to mitigation; a 'credit' which will significantly limit the company's exposure under the new law.

It is also expected that voluntary disclosure, before discovery by the authorities, will reduce any fines by as much as two-thirds.

The compliance challenge

Due to its federal structure and the wide range of regulatory agencies, the likelihood of receiving a demand from a public official for some form of payment remains high. This has been especially problematic in public procurement, with multiple scandals emerging of politicians and bureaucrats taking kickbacks for awarding public contracts. For companies this is a recipe for confusion. Good local knowledge and an in-depth awareness of the potential pitfalls are essential.

There has also been concern that there is no overall agency charged with enforcing this new law. Given the track record of corruption at a local level, there exists the very real possibility that some authorities may simply extort money in exchange for looking the other way. Good due diligence and a transparent system for monitoring payments is crucial.

With Brazil hosting both the World Cup and the Olympics in the next two years there have been considerable worries that opportunities for corruption would run high. Brazil's expenditure on the World Cup alone is estimated at \$18 billion. Both foreign





and indigenous companies working on infrastructure projects for these events will be doing so either directly or indirectly for the Brazilian government. As such they are liable under Brazil's Clean Companies Act and those listed in the US or the UK will also be liable under the extra-territorial reach of both the FCPA and the UK Bribery Act.

Other high-risk areas

The Brazilian tax system has also been reportedly prone to corruption. Tax laws are not uniform, so businesses need to be aware of and comply with different regulations. Tax authorities are also said to ask for bribes to relax assessments and inspections or to refrain from pursuing fraud allegations. A 2003 study by *Transparência Brasil* revealed that half of Brazilian businesses had received tax collector requests for bribes.

Other high-risk areas for businesses include extensive state involvement in key industries such as energy, relatively underpaid civil servants in all levels of government and the widespread use of third-party intermediaries interacting with government officials. This is worrying for UK companies that would be caught out under both UK and Brazilian law if third parties were caught paying bribes on their behalf.

Robust due diligence of agents, intermediaries and third parties is absolutely essential. As with the UK Bribery Act, the Clean Companies Act holds organisations liable for any unlawful activities carried out by subcontractors or service providers acting on their behalf. It is vital that organisations take action if due diligence raises any 'red-flags'. They must also take the time to check local laws and constitutions to avoid being caught out by regional variances. Anti-corruption compliance provisions should be inserted into third party contracts as standard. In addition, companies should insist on the right to audit provisions and anti-corruption certifications as well as insisting that contractor invoices are regularly reviewed and carefully scrutinised.

Since coming to power, Rousseff has demonstrated a commitment to tackling the country's high tolerance of corruption. Politicians and legislators have long been able to carry on criminal activity with impunity. Indeed, until the *Fecha Limpa Lei* (Clean Record Law) was passed in June 2010, candidates with a criminal record could stand for office. The government has also passed the Access to Information Law, which guarantees Brazilians access to federal, state, provincial and municipal public documents in a bid to combat misconduct through greater openness and transparency.

Companies operating in Brazil either directly or through third parties need to be aware that the landscape is changing fast. Companies that fail to recognise this and respond accordingly through enhanced compliance programmes and robust due diligence are running the highest risk of all.

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