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## Law No 12.846/2013 – The new Anti-Corruption Law in Brazil and the “compliance”

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**Abstract:**

The new Anti-Corruption Law No 12.846 of 1<sup>st</sup> August 2013 came into force last 29<sup>th</sup> January 2014. It provides for administrative and civil liability of legal persons involved in acts of corruption against the national or foreign public administration. It also aims at preventing, combating and prosecuting corruption acts, by *inter alia* promoting the adoption of effective compliance programs, which could mitigate the penalties applied to companies infringing the law.

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Law No 12.846/2013, also known as Anti-Corruption Law, enacted by President Dilma Rousseff in August 2013, came into force last 29<sup>th</sup> January. It introduces essential provisions in preventing and combating corruption acts committed against national or foreign public administration.

This law has been adopted in order to harmonize relationships between companies and the government, following the global legal trend of preventing, combating and prosecuting corruption acts. The main “inspirational” texts for its drafting were the “Foreign Corruption Practice Act – FCPA”, adopted in the United States in 1977, as well as the UK “Anti Bribery Act” of 2010.

The new law also intends to internalize and maintain Brazilian legislation in line with international treaties that Brazil is signatory and bound to, namely (i) the Inter-American Convention against Corruption (1996); (ii) the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions of the Organization for Economic Co-operation and Development (1997); and (iii)

the United Nations Convention against Corruption (2003).

It is important to underline that the American and British rules on the topic, as well as the international treaties abovementioned, intend to materialize the repression of corruption, by criminalizing and holding liable the responsible ones involved in acts of corruption of companies and public officials, both domestic and foreign.

In this perspective, the new Brazilian legislation innovates concerning penalties, by creating specific instruments for punishing companies involved in acts of corruption. Prior to this law, those companies were not held liable. The law also brings novelties regarding its national and extraterritorial application, seeing that the new legal framework foresees the possibility of condemning a company committing an act of corruption abroad.

Previously, the conducts and the penalties foreseen by the Brazilian Criminal Code, being them pecuniary or restrictive of freedom, were only applied to natural persons that were actively and/or passively involved in corruption

crimes (directors/company representatives and public servants).

Thus, the new law already in force, specifically provides for the administrative and civil objective liability of legal persons.<sup>1</sup>

Amongst the practices which are subject to penalties in the Anti-corruption Law, it is worth highlighting the following: (i) to promise, offer or give, directly or indirectly, an undue advantage to a public official; (ii) to defraud, manipulate or otherwise interfere with the competitive character or any acts of public bids; (iii) trying to exclude or excluding a bidder, by defrauding or offering any kind of advantage; (iv) to create, by fraudulent means, a legal entity for participating to a public bid or administrative contract resulting therefrom; and (v) to manipulate or defraud the economic and financial equilibrium of contracts with the public administration.

The new set of rules provides severe administrative pecuniary penalties, with fines ranging from 0.1% to 20% of the gross turnover (of the company) of the year prior to the commencement of the investigation, or when it is impossible to adopt such a criterion, fines will range between R\$ 6,000.00 (six thousand reais) to R\$ 60,000,000.00 (sixty million reais).<sup>2</sup>

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<sup>1</sup> Article 1 of the Law No 12.846/2013 – This law provides for the civil and administrative objective liability of legal persons committing acts of corruption against the public, domestic or foreign administration. Sole paragraph. This Law applies to corporations and simple companies, with or without legal personality, regardless of the form of organization or corporate model adopted, as well as to any foundations, associations of persons or entity, or foreign companies having their registered office, branch or representation in the Brazilian territory, constituted in fact or by law, even temporarily.

<sup>2</sup> Article 6 of the Law No 12.846/2013.

In order to determine the value of the fines applied, the characteristics of each concrete case will be taken into account, such as the gravity of the offense committed, the advantages obtained or envisaged, the degree of damage and the economic situation of the offender.

In the judicial sphere, the legal entities having participated in acts of corruption against the public administration, might be subject to the following sanctions: (i) confiscation of assets, rights and/or values obtained from the offense; (ii) suspension or partial ban of the company's activities; (iii) prohibition of receiving incentives, subsidies, grants, donations or loans from public entities<sup>3</sup> during 1 (one) to 5 (five) years; and (iv) compulsory dissolution of the company.

As regards the possibility of dissolution of the company, it will be possible if proven that the legal personality has been used to hide the identity of the beneficiaries of the offense, or if that legal entity is commonly used to promote illegal acts.

It is also important to mention the creation of the National Register of the Sanctioned Companies (Cadastro Nacional de Empresas Punidas - CNEP)<sup>3</sup>, aiming at listing –and making public- all the companies sanctioned by the bodies and entities of all levels of the public administration.

An extremely interesting aspect, which has raised a series of discussions on the new law, is the possibility of concluding a “leniency

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<sup>3</sup> Article 22 of the Law No 12.846/2013 – Within the Federal Executive Branch, it is created the National Register of Sanctioned Companies (Cadastro Nacional de Empresas Punidas – CNEP), which will list and make public the sanctions applied by the bodies and entities of the Executive, Legislative and Judicial Branches of all levels of government, on the basis of this Law.

agreement"<sup>4</sup>, which has a subjective nature. Nonetheless, the effects of such an "agreement" in relation to the extinction of the criminal punishment still remain unclear.

Moreover, even if there is the possibility of exemption and/or reduction of sanctions under the Anti-Corruption Law by concluding a leniency agreement with the government, the most effective way of reducing the risks of liability for the company involved in corruption cases, is the creation and adoption of compliance rules.

The adoption of compliance programs aims at establishing a set of procedures that result in the transparency and accountability of the activities carried out by the company. It also contributes at denouncing, investigating and punishing acts of corruption, yet preventing the occurrence of misconducts by the company or its representatives. Finally, when effective, these programs can be a mitigating circumstance in the imposition of fines foreseen by the Anti-Corruption Law.

Although there are still several issues under discussion on the applicability and effectiveness of the Anti-Corruption Law, the latter aims at fostering an efficient market environment, bringing a number of benefits to firms considered as being "clean" ("ficha limpa"), such as for example, the possibility of obtaining loans at lower interest rates.

Thus, it is clear that the new law stimulates competition and meritocracy just as corruption is combated and repressed, also urging that company directors rigorously and effectively collaborate in combating –and mainly– preventing corruption.

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<sup>4</sup> The highest authority of each body or public entity may enter into a leniency agreement with the legal persons responsible for being involved in the acts foreseen by this law, when they effectively collaborate to the investigations and to the administrative proceedings. Such a cooperation shall result in :

- I - the identification of the others involved in the offense, when appropriate, and
- II - the swift gathering of information and documents proving the offense under investigation.