

# BRAZIL

## BENEFICIAL OWNERSHIP TRANSPARENCY

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Brazil is only fully compliant with one of the G20 Principles (Principle 10). The country still lacks an adequate definition of beneficial ownership and mechanisms to ensure that competent authorities are able to identify the beneficial owners of domestic and foreign legal entities operating in Brazil. While Brazil does not recognize the concept of nominee shareholders, measures should be taken to ensure that front man are not used to circumvent the law, allowing the corrupt to hide.

### G20 PRINCIPLE 1: BENEFICIAL OWNERSHIP DEFINITION

Score: 0%

Brazil is not compliant with the G20 Principle 1. The Company Law does not differentiate between legal ownership and de facto control. As the concept of nominee shareholder does not exist in Brazilian law and bearer shares are not allowed, those appearing as the legal owners are accepted as the real owners of a legal entity.

The anti-money laundering law in Brazil also does not contain any provision defining beneficial ownership, as is the case in other countries where the company law does not make such differentiation.

Regulations related to anti-money laundering proposed by regulatory bodies imply that the beneficial owner is always a natural person. The Circular 3461/2009 of the Central Bank of Brazil (BACEN) provides that financial institutions are required to identify the beneficial owner of legal persons, which means following the chain of shareholders until a natural person who qualifies as the final beneficiary is reached.

Nevertheless, existing rules fail to define how someone could qualify as the final beneficiary. There is no mention for example that the final beneficiary could be a person who does not hold shares but exercise direct or indirect control over the legal entity.

### G20 PRINCIPLE 2: IDENTIFYING AND MITIGATING RISK

Score: 0%

Brazil has not conducted an assessment of the anti-money laundering risks in the last three years and therefore is not compliant with Principle 2. The working group under the Ministry of Justice responsible for anti-money laundering policy – the National Strategy against Corruption and Money Laundering (ENCCLA) – has as part of its 2015 action plan the development of a national risk evaluation (action 7), but so far no mention of this evaluation has been found.

### G20 PRINCIPLE 3: ACQUIRING ACCURATE BENEFICIAL OWNERSHIP INFORMATION

Score 25%

Current laws and regulations do not require legal entities, other than those with anti-money laundering obligations to maintain information on beneficial ownership. Consequently, there is also no requirement that the beneficial ownership information is maintained within Brazil.

Legal entities are however required by law to keep a shareholder register stating the name of the shareholders and the number of shares they hold, among others (Law 6.404/76). In this case, the shareholder may not necessarily be a natural person. There is no legal requirement that the shareholder should inform the company about changes in share ownership, but only requirements to maintain public records up-to-date. As the concept of nominee shareholder does not exist in the Brazilian legal framework, there is also no requirement that the nominee shareholder should disclose the identity of the real owner.

### G20 PRINCIPLE 4: ACCESS TO BENEFICIAL OWNERSHIP INFORMATION

Score: 14%

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Timely access to beneficial ownership information by competent authorities in Brazil is restricted. In the absence of a national beneficial ownership registry or requirements for legal entities to maintain information on beneficial ownership, the information collected by regulated entities as part of their anti-money laundering obligations (if performed properly) may be considered as the most comprehensive source of information on beneficial ownership. The anti-money law specifies that the financial intelligence unit may have access to the information collected by financial institutions and DNFBPs. Tax, law enforcement and prosecutorial authorities may access the records of financial institutions by way of court order at any phase of a criminal investigation, inquiry or judicial proceeding (Complementary Law 105/2001).

Beneficial ownership information regarding foreign companies and legal ownership regarding domestic legal entities may also be available in the registry maintained by the Federal tax authority (RFB). All legal entities doing business in Brazil, including foreign companies, are required to register with RFB. Upon registration the RFB issues a unique tax identification number (CNPJ). In order to register, a legal entity must provide detailed information about the shareholders, including name and number of shares held. In the case of foreign companies, the law only requires the name of the company administrator in Brazil to be disclosed, but not the actual shareholders. This information is made available online through a centralised database called QSA, which can be accessed by other competent authorities.

There is currently a debate regarding the registration of foreign companies. According to the Public Prosecutor's Office the current rules facilitate money laundering by allowing foreign companies to hide information on legal ownership and control. The RFB in an attempt to address this problem is now requesting information on the final beneficiary upon the registration of foreign companies.<sup>1</sup> However, the current system still allows foreign companies to state that they do not know who the beneficial owner is and still proceed with the registration.

Authorities may also consult basic legal ownership information recorded in the company registry. Legal entities in Brazil are required to register with the trade board (*junta comercial*) at the state they are incorporated. The trade boards collect information on shareholders, director, article of incorporation and legal form and status. The information on

shareholders registered may refer to another legal entity – one would have to consult the registration of this other legal entity to find out who the partners are. The general public can usually consult company registration information in person at the trade board regional offices. In the case of the state of Sao Paulo, the information is available online upon registration.

The government also established a central company registry (CNE) that collects all the information registered at the sub-national level. This registry can only be consulted by competent authorities.

One of the main problems is that the information contained in the company registry may not be accurate with regards to the actual beneficial owner (for example, use of nominees/front men in violation of Brazilian law) given that, as long as the information reported in the company registry is consistent with corporate documents, no additional checks are performed. Another of ENCCCLA's goals stated in the 2015 action plan (action 12) is to improve administrative verification mechanisms in legal entities formation to avoid fake registries as well as improve correctional measures to avoid misuse of purpose.

The law does not specify within which timeframe authorities may gain access to beneficial ownership. In practice this will depend on the sources of information used. Some sources may be available immediately or, at least, in a timely manner (e.g. information contained in registries or databases); others may require formal requests and the timeframe to respond such requests is variable.

## G20 PRINCIPLE 5: TRUSTS

Score: 33%

Brazilian law does not recognise the concept of trust, but foreign trusts can be administered in Brazil directly or through a resident trustee and administrator. In these cases, the law does not specify that the trustee should maintain information on the beneficial owners, including all parties to the trust. The availability of information concerning foreign trusts with a link to Brazil is therefore ensured by general record-keeping requirements under anti-money laundering rules and tax law.

Within this framework, lawyers, accountants, private corporate service providers are required to maintain information on all parties to the trust (trustees, settlors and beneficiaries) when they act in a fiduciary capacity. Financial institutions, if they accept a foreign

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<sup>1</sup> ENCCCLA Newsletter June/2015.

<http://enccla.camara.leg.br/boletim/15Boletimenccla.pdf>

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trust as a customer, are also required to collect information on the financial beneficiaries.

## G20 PRINCIPLE 6: ACCESS TO BENEFICIAL OWNERSHIP OF TRUSTS

Score: 17%

The law does not specify which competent authorities should have timely access to beneficial ownership information on foreign trusts, but they may access information held by professional trustees and financial institutions.

There is no registry of foreign trusts. However, if a foreign trust wishes to acquire assets or directly invest in Brazil will need to be register with the BACEN or with the Securities Exchange Commission (CVM). In these cases, the identity of the parties to the trust must be disclosed.

## G20 PRINCIPLE 7: DUTIES OF BUSINESS AND PROFESSIONS

Score: 76%

### Financial Institutions

Score: 63%

Financial Institutions (FIs) are required to identify the beneficial owners of the legal person, which means following the chain of shareholders until a natural person who qualifies as the final beneficiary is reached. (BACEN Circular 3461/2009; Anti-Money Laundering Law). However, as discussed in Principle 1, the lack of a clear definition of beneficial owner may impact how financial institutions implement this requirement.

Financial institutions have to adopt procedures and controls to verify the identity of the customers. When necessary, they may also consult information provided by customers with information available in private or public databases (Circular BACEN 3680/2013 updated by Circular 3727/2014). Nevertheless, financial institutions do not have access to government databases containing information on the actual owner of legal entities that could be consulted.

Measures should be taken to identify if a customer is a domestic or a foreign politically exposed person (PEP). In case of the customer or the final beneficiary is a PEP, enhanced due diligence should be

conducted. This includes requiring senior management approval for initiating or continuing a business, identifying the sources of the funds involved in the transaction and verifying the need to submit a suspicious transactions report (STR) to the financial intelligence unit (BACEN Circular 3461/2009, art.4-5).

Financial institutions should not proceed with a transaction if the beneficial owner has not been identified, but there is no requirement that a STR should be submitted under this circumstance.

The COAF, Brazilian's Financial Intelligence Unit, and the Central Bank are the bodies responsible for overseeing financial institutions anti-money laundering obligations. Sanctions for non-compliance, including fines and suspension among others, can be applied to financial institutions and to directors.

### DNFBPs

Score: 85%

The 2012 amendment to the anti-money laundering law extended customer due diligence requirements and requirements to report suspicious to several DNFBPs. As such, DNFBPs<sup>2</sup> with anti-money laundering obligations in Brazil include:

- Corporate service providers (CSPs):
- Lawyers
- Accountants
- Auditors
- Real estate agents
- Dealers in precious metals and stones
- Dealers in in luxury goods, including goods of rural or animal origin, if above the threshold;
- Notaries
- Individuals involved in managing sports athletes, artists, and organising events and fairs

In the case of service providers, lawyers, accountants and auditors, they are subject to the rules when providing, even if sporadically, services related to management of assets, accounts or other investments, fiduciary services, commercialization of properties, among others.

The COAF and self-regulatory bodies have published further rules related to the identification of customer and submission of suspicious transaction report. A resolution passed by the professional accountancy body requires accountancy firms and individual accountants to establish procedures to identify the

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<sup>2</sup> Casinos are prohibited in Brazil.

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ultimate beneficiary of the services they provide and keep records of the beneficial owners or the steps taken to identify them.

All regulated DNFBPs are required to register with the supervisory body and with COAF. The public can consult the list of registered bodies and individuals online.

DNFBPs also need to conduct due diligence if the customer or the beneficial owner is a PEP. The law does not prohibit DNFBPs to proceed with a business transaction if the beneficial owner has not been identified, but requires the submission of a STR in case of suspicious or transactions above a certain threshold. All transactions above the determined threshold have to be reported to the COAF within 24 hours. There is also a requirement that on an annual basis DNFBPs have to communicate to the self-regulatory body or COAF that none of the transactions regulated by AML law took place.

DNFBPs are supervised by COAF or by self-regulatory / professional associations. Sanctions for non-compliance can be applied to DNFBPs and senior management, including warning, pecuniary fine, temporary disqualification for a period of up to 10 years for the administration position of legal entities and withdrawal or suspension of authorization to exercise the activity, operate or function.

## G20 PRINCIPLE 8: DOMESTIC AND INTERNATIONAL COOPERATION

Score: 46%

Investigations into corruption and money laundering require that authorities have access to relevant information, including regarding beneficial ownership. In Brazil, there is no centralised database that can be used by domestic or foreign authorities to consult beneficial ownership information. Domestic authorities can consult available registries containing information on legal ownership (QSA, CNE) or request information held by the financial intelligence unit (FIU) and other financial supervisory bodies.

Information-sharing across authorities may be restricted by bank secrecy laws. However, a law adopted in 2001 allows competent authorities, including COAF, Central Bank, tax agency and the public prosecutor's office, to share information related to financial crime among themselves based on

bilateral agreements (MoUs) rather than court order. The constitutionality of this law has been challenged in several occasions. Some believe that the law is against constitutional principles that protect individual privacy.

COAF also has powers to request information from third parties.

Brazilian competent authorities are allowed to use their power and investigative techniques to respond to formal requests from foreign authorities.

The central authority responsible for dealing with formal international cooperation requests is the Department of Assets Recovery and International Legal Cooperation of the National Secretariat of Justice (DRCI/SNJ). There is no specific provision governing international cooperation requests for the purpose of accessing beneficial ownership information. There are only general guidelines on the process for submitting mutual legal assistance requests.

## G20 PRINCIPLE 9: BENEFICIAL OWNERSHIP INFORMATION AND TAX EVASION

Score: 75%

Tax authorities in Brazil do not have direct access to beneficial ownership information, except from the information recorded in the QSA. They are however allowed to use their powers to request information from other authorities and legal entities, including summoning individuals and legal entities to show books, documents or provide any information. The FIU and other supervisory body may also exchange information with the tax agency based on bilateral agreement or written request.

The Tax Code provides for rules on international and domestic exchange of information. Tax authorities in the country may exchange tax information with other countries through international treaties, agreements or conventions. According to the law, Brazilian authorities may decline an exchange of information request only if the disclosure of such information would be contrary to public order, national sovereignty or the principle of morality. There is a subdivision of the Secretariat of Federal Revenue Service that deals specifically with international cooperation on tax matters, the DIRIN24 (*Divisão de Relações Institucionais Internacionais*).

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As of March 2013, Brazil had signed 60 agreements, including Tax Information Exchange Agreements (TIEAs), Double Tax Conventions (DTCs) and the Multilateral conventions on Mutual Administrative Assistance in Tax Matters (MACs).

## G20 PRINCIPLE 10: BEARER SHARES AND NOMINEES

Score: 100%

### Bearer shares

Score: 100%

The issuance of bearer shares is prohibited in Brazil.

### Nominee shareholders and directors

Score: 100%

The concept of nominee shareholder does not exist in the Brazilian legal framework. Under Brazilian law, it is not possible to hold shares on behalf of a third person: the shareholder is meant to be the owner of the share. As such, acting on behalf of a third party as a front man or providing false identity information is considered a fraud.