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What can *Bilfinger* teach Olympic sponsors?

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Abstract

Bilfinger SE (Bilfinger) is a leading international engineering and services group (Bilfinger.com, 2015), and was a local sponsor of the 2014 FIFA World Cup. The company is accused of paying bribes through its subsidiary company, Mauell, (dw.com, 2015) to public officials in Brazil for contracts related to the 2014 World Cup (Cassin, 2015). The corruption allegations relate to orders to equip security command centers at twelve host cities during the 2014 World Cup in Brazil (dw.com, 2015). Because Brazil hosted the 2014 FIFA World Cup and will host the 2016 Summer Olympic Games, companies need to consider the risks of many international anti-corruption laws, such as Brazil's anti-corruption law commonly referred as The Clean Companies Act and other applicable anticorruption law like the United States' Foreign Corrupt Practices Act (Rogers, et. al, 2014). This paper will analyze the *Bilfinger* case involving corruption activity at the 2014 FIFA World Cup and offer insights for sponsors of the 2016 Summer Olympic Games.

Keywords: *Sport marketing, Hospitality, Bribery, Law, Corruption*

Introduction

Brands that are looking to use sport sponsorships to connect to potential clients and consumers must be aware of anticorruption laws. Generally speaking, "anticorruption law prohibits companies (acting through directors, officers, employees or through external companies or individuals) from offering or giving an unjust advantage to a domestic or foreign public official or to a related third party, or from financing or subsidizing such conduct" (Correia, *et al*, 2013).While there is no international anti-corruption law, countries are creating laws matching standards created by international conventions, such as the Organization for co-Economic Coordination and Development (OECD) and the United Nations Convention Against Corruption (UNCAC) (Qureshi, 2013). The member nations of these conventions criminalize bribery of foreign officials, and cooperate in the investigation and prosecution of bribery offenses (Low and Trenkle, 1999).

Corruption is also the misuse of sport sponsorship to obtain an undue competitive advantage (United Nations Global Compact, 2014). Because Brazil hosted the 2014 FIFA World Cup and will host the 2016 Summer Olympic Games, companies need to consider the risks of many international anti-corruption laws, such as Brazil's anti-corruption law commonly referred as The Clean Companies Act and other applicable anticorruption law like the United States' Foreign Corrupt Practices Act (Rogers, et. al, 2014). Sport mega-events are big business. FIFA made US$1.6 billion from the 2014 World Cup (Manfred, 2015), and the domestic sponsorship revenue in Rio de Janeiro is projected to be US$1.3 billion (Totalsportek2, 2015).

In addition to hosting the sport mega-events, companies are increasingly interested in marketing to the Brazilian consumer. Brazil is a huge target for foreign companies and investors that received US$62 billion in foreign direct investment in 2014 (Berg and Rojas, 2015).

Typically, sponsorship-related corruption connected to global sporting competitions involves either direct payments to governing bodies (Berg and Rojas, 2015), or via corporate hospitality programs (Dodds, 2015). Hospitality at high-profile sport events is very exclusive, making attendance very desirable (United Nations Global Compact, 2014), which can lead to corruptive behavior such as bribery. Companies should be aware that excessive or lavish entertainment might be interpreted as having no legitimate purpose other than corruptly influencing the recipient (Rogers, *et al*, 2014). Some sponsorship related issues involve its influence on the event outcome (Dodds and Gorse, 2015). The Bilfinger case is interesting because it is different than those examples. This paper will analyze a recent case involving corruption activity at the 2014 FIFA World Cup and offer insights for sponsors of the 2016 Summer Olympic Games.

The *Bilfinger* case

Bilfinger SE (Bilfinger) is a leading international engineering and services group (Bilfinger.com, 2015). Bilfinger is a German company that trades in the U.S. on the over the counter market under the symbol of BFLBY (Cassin, 2015) and was a local sponsor of the 2014 FIFA World Cup.

The corruption allegations relate to orders to equip security command centers at twelve host cities during the 2014 World Cup in Brazil (dw.com, 2015). The company is accused of paying bribes through its subsidiary company, Mauell, (dw.com, 2015) to public officials in Brazil for contracts related to the 2014 World Cup (Cassin, 2015). Bilfinger supplied over 1,200 security monitor walls and the appropriate software need to run the security commend centers for police, fire and emergency services (dw.com, 2015). The claims relate to suspected payments to public officials and employees of state companies (Sloat, 2015) who made the decision to hire Bilfinger. These allegations do not involve FIFA since it had no influence on the project because traffic control and security is the responsibility of the host local governments (dw.com, 2015).

Bilfinger received internal information indicating potential compliance violations then immediately launched a comprehensive investigation (Bilfinger, 2015). Bilfinger pursued the internal claims through its own investigations then notified the relevant authorities (Sloat, 2015). The German engineering firm's internal investigation showed possible compliance violations related to $6.5 million worth of orders (Cassin, 2015). As a first step, Bilfinger commissioned auditors Ernst & Young to conduct a complete securing of data in Germany and Brazil then hired legal auditors from Deloitte to investigate the claims (Bilfinger, 2015). Bilfinger reportedly disclosed to Brazil's Comptroller-General that it may have paid EUR1 million to Brazillian officials (Step.org, 2015).

Bilfinger might have been banned from acquiring further contracts in Brazil but hopes that by making the self-disclosure it will be able to operate in Brazil after a payment of a fine (Step.org, 2015). Companies that are convicted for bribery could be banned from future contracts in Brazil under the law (Stauffer, 2015). If the allegations are correct, then Bilfinger may bring legal action against the subsidiary, its employees and the third party agency (Thomasson, 2015).

Bilfinger became the first international company to disclose to Brazil that it may have paid bribes as it seeks leniency under the anti-corruption law (Stauffer, 2015). The government is counting on leniency deals to minimize economic fallout from the corruption investigation (Stauffer, 2015).

Due to jurisdictional elements, Bilfinger can be brought under Brazil, USA or German anticorruption laws.

The Brazilian Clean Companies Act

Although Brazil has a well-documented history of corruption (Rogers, *et al*, 2014), it appears to be ramping up its anti-corruption enforcement activity (Berg and Rojas, 2015). Until the Clean Companies Act was passed in 2014, there was no specific law imposing liability on corporations for corrupt acts committed by their employees or agents (Correia, *et al*, 2013). The Clean Companies Act makes it illegal to: "to promise, offer to give, directly or indirectly, improper advantage to a public agent or to a third party related to a public agent; to finance, pay for, sponsor or in any way subsidize the practice of the illicit acts addressed in the act; to use a third party (legal entity or individual) to conceal or disguise its real interests or the identity of the beneficiaries of the illicit acts practiced; and, to create difficulties for investigating or monitoring activities of public entities, or interfere in such activities, also with respect to regulatory agencies and agencies of the national financial system" (Navarro, 2014, p. 41). The bribery act may be committed via an intermediary or third party (Navarro, 2014). The Clean Companies Act is not limited to foreign officials nor does it require proof of corrupt intent (Correia, Bartley and Freitas, 2013).

Anything perceived as improper or undue advantage may be considered a bribe, such as: gifts, travel expenses, meals or entertainment (Navarro, 2014). Further, a public official "may not receive gifts from entities that may have interests in the official's decisions" (Navarro, 2014, p.44) or even just "promising or offering improper advantage to a public official" (Navarro, 2014, p. 44). However, gifts with minimal value (under 100 reais) may be acceptable depending on the governmental agency (Navarro, 2014).

"Both individuals and companies may be held liable for bribery of a foreign official, however only individuals may face criminal liability whereas companies are subjected only to civil and administrative liability" (Navarro, 2014, p. 42). Brazil does not recognize criminal liability for corporations (Correia, *et al*, 2013).

The law imposes sanctions such as dissolution, loss of public contracts and fines (Step.org, 2015). Fines may be up to 20% of the company's annual gross revenues (Correia, *et al*, 2013). Other potential consequences include publication of the decision sanctioning the breaching company in each of a local or national newspaper, notices at the company's headquarters, and on its website; and disbarment on public bids and government contracts (Debevoise and Plimpton, 2015).

The Comptroller-General and other governmental agencies has jurisdiction over enforcement of the Clean Companies Act involving corruption cases involving Brazilian federal officials (Debevoise and Plimpton, 2015).

The anti-corruption law "applies to companies, regardless of their corporate or legal form, whether foreign or domiciled in Brazil, and whether the unlawful act is committed within or outside Brazilian territory" (Varela, *et al*, 2013, p.2).

This act applies to "foreign companies that have headquarters, affiliates or any type of representation in Brazilian territory, even on a temporary basis, may be prosecuted in Brazil for foreign bribery" (Navarro, 2014, p.43). This would certainly include sponsors that only have an Olympic presence. Companies conducting business either directly or indirectly via an employee, independent contractor, or subsidiary should be in full compliance with the law (Varela, *et al*, 2013). This recommendation extends to third-party agencies.

Although there is no law prohibiting private commercial bribery other laws such as fraud may be applicable (Navarro, 2014).

Because of leniency rules, the fine may be "reduced up to two-thirds, the company may not be required to publish the decision and/or become banned from receiving incentives, grants or other forms of public funding in the future" (Scott and Pozolo, 2014, n.p.). Leniency deals are very new for Brazil and is being used to minimize the economic fallout from corruption investigations (Stauffer, 2015). As Brazil pursues more corruption charges, those companies being investigated are scrapping infrastructure projects leading to job layoffs (Stauffer, 2015). The government hopes that leniency agreements will help identify more corrupt behavior from the organizations themselves.

The U.S. Foreign Corrupt Practices Act

In 1977, the U.S. Congress created the Foreign Corrupt Practices Act (FCPA) to criminalize bribery and corruption by U.S. persons and businesses to foreign officials for business purposes (Department of Justice, 2012). Cash, travel, and entertainment may be considered corrupt payments under the Act (Cassin, 2008, p.15). Foreign officials include governmental officers, employees, representatives (Cassin, 2008, p.45) or employees of an organization that is considered an instrument of the government (Dodds, 201X). To be considered an instrument of the government, an organization needs to receive subsidies for its costs, the government may appoint the organization's officers, or the government appointed the entity for a particular purpose (*Esquenazi,* 2014).

The law has two components: an anti-bribery provision, and an internal controls provision. For each violation, corporations are subject to a $2 million criminal fine and a civil penalty of up to $10,000. Any individual [officer, director, or stockholder] who willfully violates the provisions of the law is subject to a $100,000 criminal fine, and a five-year imprisonment (Department of Justice, 2012). Further, a corporation may be held criminally liable for acts conducted by an employee within the scope of his/her job performance, even when that conduct is directly contrary to company policy (Cassin, 2008).

The FCPA has jurisdiction over all U.S. persons and businesses, U.S. and foreign public companies listed on U.S. stock exchanges, and foreign persons and businesses acting within U.S. territories (Department of Justice, 2012).

Chart 1

Comparison Chart between FCPA and CCA

	FCPA	**CCA**
Member OECD	Yes	Yes
THE BRIBE		
INTENT TO BRIBE	Yes	No
STRICT LIABILITY	No	Yes
THIRD PARTY AGENTS	Yes	Yes
FACILITATION PAYMENTS	No	Yes
PUBIC OFFICIALS		
FOREIGN PUBLIC OFFICIALS	Yes	Yes
DOMESTIC PUBLIC OFFICIALS	No	Yes
WHO IS LIABLE?		
CORPORATE CRIMINAL	Yes	No
CORPORATE CIVIL	Yes	Yes
CORPORATE EXECUTIVES	Yes	
INDIVIDUALS	Yes	Yes
PENALITES	CORPORATION: $2 MILLION CRIMINAL, $10,000 CIVIL	FINES EQUAL TO OR GREATER THAN THE BENEFITS GAINED FROM THE ACT
	INDIVIDUAL: 5 YEAR IMPRISONMENT, $250,000	PUBLICATION OF ADVERSE JUDGEMENT
STATUTE OF LIMITATIONS	5 YEARS FROM TIME THE SEC BEGINS INVESTIGATION	5 YEARS FROM TIME VIOLATIONS IS KNOWN

OECD ENFORCEMENT	**ACTIVE**	**LITTLE**
BRIBE FRIENDLY CULTURE	No	Yes
CAN CORPORATE HOSPITALITY BE IMPLICATED?	**YES**	**YES**

Two recent FCPA cases provide sport examples of the FCPA. As the Weatherford International and BHP Billiton cases show, it is vital for sport sponsors to develop compliance procedures to avoid FCPA prosecution.

During the 2006 FIFA World Cup in Germany, Weatherford International, a Swiss oil services corporation with substantial operations in Houston, authorized bribes with improper travel and entertainment, including match tickets, travel, and entertainment to officials of a state-owned company in Algeria to ensure the renewal of oil contracts (SEC.gov, 2013). Weatherford International paid over US$120 million for violating anti-bribery and other export control laws (*Securities*, 2013) and almost US$115 million on the investigation itself (FCPAblog.com, 2013). Weatherford International was also fined US$1.875 million for lack of cooperation with the investigation (SEC.gov, 2013).

As part of their local sponsorship of the 2008 Summer Olympic Games in Beijing, China, BHP Billiton, an Australian mining company, supplied the materials for the gold, silver, and bronze medals (Paul and Hornby, 2013). BHP Billiton provided corporate hospitality to government officials and officials from state-owned steel-making firms that included event tickets, luxury hotel accommodations, and sightseeing worth over US$16,000 per trip (SEC.gov, 2015). BHP Billiton self-reported these violations to the SEC (Cassin, 2014), which was settled by paying a $25 million fine.

These cases offer illustrations of a FCPA investigation. Neither Weatherford International nor BHP Billiton is a US-based company nor were the sporting events within the USA, but both companies fell under the jurisdiction of the SEC for the FCPA violations (Dodds, 201X). Both companies had a business presence in the USA. Weatherford International has a headquarters in Houston, Texas and BHP Billiton stock trades on the New York Stock Exchange (Dodds, 201X).

The bribery activity involved mega-sporting events and involved corporate hospitality. The claims involved tickets, travel, and entertainment used in corporate hospitality to support the company's event sponsorship (Dodds, 201X). However, they are distinguished from Bilfinger since the corrupt acts were directed to actors not affiliated with the event itself.

The cases highlight the importance of cooperation with the legal authorities.

Weatherford International was penalized an additional US$1.875 million and had significantly higher fines than BHP Billiton that did cooperate with the SEC (Dodds, 201X)[1]. BHP Billiton hired outside legal counsel to conduct the internal investigation and then created a compliance group within the legal department that is separate from its business units (In re BHP Billiton, 2015). Weatherford International did not cooperate with the investigation and was penalized for it.

Key learnings from Bilfinger

Although the Brazilian nation might have political incentive to prevent corruption, local officials may not share that same point of view and continue their corrupt behavior (Donatti, 2014). Sport event bribery activity is not limited to corporate hospitality. Infrastructure projects associated with mega-events create situations where corruption may be prevalent, especially in countries with bribery friendly business cultures.

There is a vital need for effective compliance policies and procedures (Berg and Rojas, 2015). This involves a review of procedures, documents, and payments surrounding contracting throughout the organization and the diligence of third-party intermediaries and agents (Berg and Rojas, 2015). A special emphasis should be made when the other company is affiliated in any way with a foreign government. An effective compliance program must include recognition of all applicable jurisdictions. In Bilfinger, Brazil, USA and Germany may bring prosecutions against the company. Because there is no, single international law, all three may potentially bring prosecutions against Bilfinger.

The CCA grants Brazil's Federal Comptroller General with exclusive jurisdiction to enter into leniency agreements with subjects of investigations and set forth criteria for assessing companies' compliance programs (Berg and Rojas, 2015). A leniency agreement may be granted if a corporation takes the initiative to approach the government, ceased the misconduct, admitted guilt, fully and permanently cooperates with the authorities, and provides proof of the misconduct (Debevoise and Plimpton, 2015). A leniency agreement may extend to corporate entities, such as Bilfinger and its subsidiary Mauell, as long as they jointly execute the agreement (Debevoise and Plimpton, 2015). However, the leniency agreement may not prevent or lessen a USA prosecution (Debevoise and Plimpton, 2015).

Even if the bribery allegations do not directly connect with FIFA, there

1 The authors acknowledge that the discrepancy in fines are not solely related to the cooperation of the companies.

is a negative impact to the organization. Sport entities, such as FIFA, need to "establish measure to combat corruption ... in their own organization ... to avoid potential liabilities" (United Nations Global Compact, 2014, p. 13). Even though this corruptive behavior is not with FIFA or its individual members, it is their event and reflects poorly on FIFA. Corruption poses serious risks to a company's brand name (Bonime-Blanc, 2014). FIFA suffers reputational consequences (negative publicity) and is tainted because of this corruption in the eyes of fans, media and other sponsors. Unfortunately for FIFA, any anticorruption plan becomes reactionary and not proactive to prevent this issue in the first place.

Recommendations for compliance with the anticorruption laws

Compliance with anticorruption law needs to be ratified at the highest organizational levels. Senior leadership needs to commit to a bribery-free organization (United Nations Global Compact, 2014) by implement mechanisms and procedures to ensure corporate integrity (Varela, *et al*, 2013). A policy against corruption, a code of conduct and compliance policies and procedures, complete oversight and autonomy, training, incentives and disciplinary measures (Department of Justice, 2012) need to be developed. The organization then communicates its best practices throughout the organization (United Nations Global Compact, 2014) to train all corporate personnel (Varela, *et al*, 2013) and third-party agencies on the company's ethical culture.

Conduct due diligence training that includes activity that may be suspect under all applicable foreign anti-corruption laws (Varela, *et al*, 2013). This includes a review of all third party agents. Companies should be cautious if a third party agent has violated any laws in the past, especially bribery laws, or makes an unusual request for additional money such as a bonus or one-time payment without proper authentication.

This training should also include information about passive bribery. Passive bribery occurs when a foreign official asks for an illegal payment. This behavior needs to be reported to the compliance office and should never be authorized.

As the Weatherford and BHP Billiton cases show, an effective compliance and ethics program that embraces self-reporting, cooperation, and remedial efforts (Department of Justice, 2012) can greatly reduce any potential violations and penalties.

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