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Artigos Científicos

Compliance as a tool for combating corruption: a comparative law study on anti-bribery legal instruments

Compliance como ferramenta de combate contra a corrupção: um estudo de direito comparado acerca dos instrumentos legais anticorrupção

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RESUMO

O presente artigo tem como objetivo realizar um estudo de direito comparado sobre compliance e instrumentos legais anticorrupção. No Brasil, o debate sobre o tema deriva principalmente dos protestos de combate à corrupção, que culminaram na promulgação da Lei Anticorrupção, regulamentada em detalhes pelo Decreto nº 8.420/15. Ambas as normas são importantes para enfrentar os escândalos de corrupção no país, especialmente no contexto de COVID-19. Baseado nesses fatos, o artigo pretende discutir o assunto e oferecer algumas conclusões sobre a matéria. O método adotado é o dedutivo e a pesquisa é do tipo bibliográfico-documental.

Palavras-chave: Lei Anticorrupção Brasileira; Compliance; Corrupção

ABSTRACT

The paper aims to conduct a comparative law study on compliance and anti-bribery legal instruments. In Brazil, the debate on the topic derived especially from local protests combating corruption, culminating in the enactment of the Brazilian Anti-Brybery Law, regulated in details by Decree No. 8.420/15. Both legislation will be important to face corruption scandals in the country, especially in the context of COVID-19. Based on these facts, this paper intends to discuss the matter and offer some conclusions on the topic. The adopted method is the deductive and it is a bibliographic-documental research.

Keywords: Brazilian Anti-Bribery Law; Compliance; Corruption

RESUMEN

Este artículo tiene como objetivo realizar un estudio de derecho comparado sobre compliance e instrumentos legales anticorrupción. En Brasil, el debate sobre el tema se deriva principalmente de las protestas anticorrupción, que culminaron con la promulgación de la Ley Anticorrupción brasileña, regulada en detalle por el Decreto N ° 8.420 / 15. Ambas reglas son importantes para abordar los escándalos de corrupción en el país, especialmente en el contexto de COVID-19. Sobre esta base, el artículo pretende discutir el tema y ofrecer algunas conclusiones al respecto. El método adoptado es el deductivo y la investigación es bibliográfica-documental.

Palabras-Clave: Ley Anticorrupción brasileña; Compliance; Corrupción

1 INTRODUÇÃO

The study herein investigates compliance in the light of anti-bribery legislation in the United States, England and Brazil. Thus, the work aims at analyzing the evolution of this institute in Brazil, as well as the comparative exposure of its treatment in the Unites States of America and England.

The questions raised with the literature research and literature review on the subject were (i) what is the treatment given to compliance in Brazil?; (ii) what are the institute's impacts on the legal order of the country? and (iii) what is the relation / influence exerted by the foreign legislation on the Brazilian law about the subject?

In searching for answers to these questions it was used the inductive method, with examination of the main legal diplomas on the subject in Brazil, the United Kingdom and the United States.

In terms of legislative alternative, studies on compliance are recent in Brazil, having intensified after the 1980s with the advent of several international conventions to fight bribery. However, the subject has already been deeply studied in the USA since the 1930s, with the works of Adolf Berle Jr. and Gardiner Means[1].

It is important to note that, despite of the common confusion between compliance and corporate governance, it should be borne in mind that the two institutes, although related, are not equal. While corporate governance refers to the

[1] In the work *The Modern Corporation and Private Property*, Adolf Berle Jr. and Gardiner Means (1932) were the first to discuss the potential benefits and costs of the separation of ownership and control already in place in some large corporations. Among the potential costs, the authors observed that the pulverization of the property would strengthen the managers' power, increasing the likelihood that they would act in their own interest rather than in the interests of the shareholders. *Apud* SAITO, Richard; Silveira, Alexandre Di Miceli. Governança Corporativa: custos de agência e estrutura de propriedade. **RAE**, v. 79, abr/jun. 2008. Disponível em: http://www.scielo.br/pdf/rae/v48n2/v48n2a07.pdf.

existence of rules for the good management of the company, compliance has a narrower scope and concerns the faithful compliance with legal rules, which, in a given context, are in force.

In addition, it should be emphasized that this paper has the scope of analyzing the unfolding of compliance within the scope of business law, without entering into its analysis under the bias of administrative law or criminal law on the subject.

With regard to the theories that support compliance, it is worth mentioning the deterrence theory, according to which a greater probability of sanction, followed by a perception in the enforcement agents and severe punishments, lead to a higher compliance index. On the other hand, institutionalism, applied domestically, states that the costs of noncompliance are not restricted to economic penalties, but also to other modalities, such as moral stigma and loss of reputation[2]. The behavioral decision theory, which goes beyond the previous ones, is also cited as advocating that previous cognitive concepts can influence on the so-called rational choice:

> *Behavioral decision theory* adds a deeper dimension to rationalist theories by acknowledging the role that people's cognitive biases can play in their 'rational' calculations and highlighting the importance of factors such as how a particular choice is framed (*e.g.*, people choose differently when a choice is framed as the number of lives that will be saved instead of the number of lives that will be lost) of how probabilities of detection, prosecution, and punishment are presented (*e.g.*, people choose differently when probabilities for each stage in a chain of events are presented instead of when the overall probability is presented).[3]

Otherwise, there is the regulatory theory, which will observe entities as good faith agents, who wish to comply with rules and regulations, but are unable to do so in certain situations, either because they lack knowledge of the rules, technological / financial resources and / or incentives for compliance. Thus, this theory advocates strategies of dissemination of information, technological assistance and inspections, in favor of greater cooperation among those involved.

[2]Zaelke, Durwood; Kaniaru, Donald; Kružíková, Eva. **Making law work:** environmental compliance & sustainable development. *[S.l.]:* Cameron May, 2005.
[3] Idem, pp. 59-60.

Considering the theories exposed, this paper intends to indicate which one of them is the Brazilian model of compliance, as well as its relation with the British and North American models.

2 BACKGROUND IN BRAZIL OF THE ANTI-BRIBERY LAW (FEDERAL LAW NO. 12,846 / 2013)

In Brazil, the practice of corruption has already become a social phenomenon that directly interferes with effectiveness and credibility. Over the past years, corruption scandals generated a reflection in the public opinion, which put in question the matter of fighting this illicit practice. As a great example of these scandals, in the year of 2014, the *Lava Jato* operation was triggered by the Federal Police to investigate a scheme of money laundering involving the Brazilian state oil company Petrobras, together with other contractors and politicians. Even in 2020, the effects of the operations still being felt in the Brazilian political scenario. In April, the task force of *Lava Jato* criticizes the presence of President Bolsonaro in pro-dictatorship protests[4]. It is clear, therefore, that Brazilian population still see in the members of the task force not only an important force against corruption, but also defenders of democracy and fundamental liberties.

It is true that the Brazilian Federal Constitution of 1988 provides for a set of rules designed to ensure administrative morality (e.g. article 5, LXXIII, article 37, caput). In addition, various laws also dealt with internal corruption. Examples of these laws are Federal Law No. 8,666/93 (Law on Bidding and Administrative Contracts), Complementary Law 135/2010 (Clean Registry Act), and in the Criminal Code, Title XI "Crimes against Public Administration"[5]. However, none of them specifically addressed compliance or proved to be truly effective in fighting corruption.

[4] Senra, Ricardo. **Lava Jato cobra compromisso com democracia em resposta a ida de Bolsonaro a ato pró-ditadura**. BBC News Brasil, 20 de abril de 2020.

[5] The complete list of laws that deal with the subject is: Administrative Improbity Law (Federal Law No. 8.429 of 1992), Law of Bidding (Federal Law No. 8.666 of 1993), Money Laundering Law No. 9,613 of 1998 and No. 10,467 of 2002) , Public-Private Partnership (Federal Law 11,079 of 2004), Philanthropy (Federal Law 12,101 of 2009), Antitrust (Federal Law no. 12,529 of 2011), Regulatory Framework of the Third Sector (Federal Law 13,019 of 2014), Fiscal Responsibility Complementary Law No. 101 of 2001), on Financial Transaction Secrecy (Complementary Law No. 105 of 2000) and Law of Capital Market (Federal Laws No. 4,728 of 1965 and Law No. 6,385 of 1976).

Thus, a response from the Legislative was necessary after the popular demonstrations that have taken place throughout the country since June 2013. The role of the citizen and participatory democracy have been strengthened in this process, reaffirming the desire for greater transparency, research and less impunity and leniency with those involved. It was in this scenario that Federal Law No. 12,846, of August 1, 2013, called the Anti-Corruption Law, appeared. With the advent of this law, the mechanisms of control over acts that violate the principle of administrative morality also extended to the private agents who finance such practices. Although private agents are not subject to the principle of administrative legality, their extension to them is by no means unlawful[6].

According to Diogo de Figueiredo and Rafael Véras de Freitas, corruption itself induces to the private appropriation of public resources, resources that should aim at increasing policies that allow the achievement of fundamental rights, and, therefore, it violates the purposes listed in the Article 3, sections I, II, III and IV of the Constitution, and, ultimately, the principle of the dignity of the human person, highlighted in its 1st Article, subsection III. From this comes the constitutionality of a normative document that seeks precisely to repress the conduct of private agents who encourage the practice of immoralities by state officials[7].

The topic of anti-bribery regulations is even more important when considering the news related to Coronavirus disease (COVID-19) in Brazil. Since the beginning of the pandemic in the country, several suspicious contracts have emerged. For example, in Amazonas, the government bought inappropriate respirators at a price four times bigger than the market's price at a local wine store[8]; In Santa Catarina, the government bought 200 respirators. Besides the delay, each device cost at least 65% more than

[6] Moreira Neto, Diogo de Figueiredo; FREITAS, Rafael Véras. **A juridicidade da Lei Anticorrupção – Reflexões e interpretações prospectivas**. Available at: http://www.editoraforum.com.br/ef/wp- content/uploads/2014/01/ART_Diogo-Figueiredo-Moreira-Neto-et-al_Lei-Anticorrupcao.pdf. Accessed on June 5, 2015.
[7] Ibidem.
[8] News available at: https://revistaforum.com.br/brasil/governo-do-amazonas-compra-respiradores-a-preco-ate-quatro-vezes-maior-em-loja-de-vinhos/.

those acquired by the Federal Government[9]. In Rio de Janeiro, the *Placebo* operation investigates the misuse of public funds in the actions of the state government related to the context of COVID-19. Several search warrants were issued against authorities and companies, including the Governor Wilson Witzel[10].

In view of this scenario, and in view of the not only global, but mainly internal, demand, with the advent of Law No. 12,846 of 2013, which came into force in January 2014[11], the need to study compliance in Brazil effectively emerged. Considering that many aspects of the law were mirrored in the British and US rules, it is important to clarify the provisions of both and to make a comparison between them and the Brazilian Anti-Corruption Law.

3 ASPECTS OF THE FOREIGN ANTI-CORRUPTION LEGISLATION

The United States and British laws are the main references worldwide in the fight against corruption. On the one hand, the United States has regulated the issue since 1977 with the Foreign Corruption Practices Act and subsequently with the Sarbanes-Oxley Act. On the other hand, in 2010, the UK published the UK Bribery Act, one of the most severe anti-corruption laws in the world, also applicable to all those who, in any case, carry out any activity in British territory. These laws set forth the international standards of compliance to be followed by all legal entities.

3.1 Aspects of the Foreign Corruption Practices Act (FCPA) and the Sarbanes-Oxley Act (SOX)

The Foreign Corruption Practices Act ("FCPA") of 1977 is the oldest and most important anti-corruption law known and it still serves as a model for anti-corruption laws in many other countries. The first purpose of the law is to criminalize the practice

[9] News available at: https://g1.globo.com/sc/santa-catarina/noticia/2020/04/28/respiradores-comprados-por-sc-por-r-33-milhoes-tem-atraso-de-3-semanas-na-entrega.ghtml.

[10] News available at: https://g1.globo.com/rj/rio-de-janeiro/noticia/2020/05/26/agentes-da-pf-estao-no-palacio-laranjeiras-residencia-oficial-do-governador-do-rj.ghtml.

[11] The wording of the Brazilian law is often compared to foreign laws, such as the Foreign Corrupt Practices Act (FCPA) of 1977 applied in the United States (which even served as an influence on the OECD Anti-Corruption Convention) and the UK Bribery Act of 2010, from UK.

of bribery to foreign public officials in order to influence the employee's behavior to gain improper advantages. In other words, a company cannot give, offer, promise or authorize the donation of anything of value to a foreign government official, directly or indirectly.

The law is divided into Anti-Corruption and Accounting Control Sections. The first deals with bribes made to foreign public officials and qualifies as a crime the practices of giving or promising payments to foreign officials or members of political parties for the specific purpose of encouraging the agent to practice or omit any act that would violate his legal or official duties; to obtain or to maintain business; to direct business to any company or person; or to get any kind of undue advantage[12].

The FCPA has wide implications as it applies to US citizens and companies as well as to all those who engage into a business relationship with foreign companies that trade securities on the United States stock market and also to individuals or legal entities that maintain relations with public agents[13].

Although the legal wording is extremely descriptive and has a wide range of prohibited conducts, it is understood in the US Justice Commission that the law has its effects amplified when the act is practiced against foreign public officials, punishing any conduct that implies in obtaining an advantage, even if not pecuniary. This is because item (1), (A) of §78 dd-1 provides that the behaviors listed in item (1) are reprehensible if they are aimed at any undue advantage[14].

When referring to the accounting issue, the FCPA provides that all companies listed on the New York Stock Exchange and subject to Security Exchange Commission (SEC) regulations must issue annual and quarterly reports on transactions made; keep

[12] USA. **Cláusulas Anti-Suborno e sobre Livros e Registros Contábeis da Lei Americana Anti-Corrupção no Exterior**. Disponível em: http://www.justice.gov/criminal/fraud/fcpa/docs/fcpa-portuguese.pdf

[13] Ibidem.

[14] In that sense, it is important to note that "The FCPA does not expressly define what it means to pay "anything of value" to a government official, although the phrase has been interpreted to be far-reaching. Past practice by government regulators suggest that the phrase includes both tangible and intangible objects and services, whether payment of such objects or services is direct or through intermediaries, such as agents, consultants, and contractors. Things of value have included college scholarships, sexual favors, and offers of future employments." KORKOR, Samer; RYZNAR, Margaret. Anti-Bribery Legislation in the United States and United Kingdom: A Comparative Analysis of Scope and Sentencing. **Missouri Law Review**, v. 76, n. 2, pp. 415-453, 2011. Disponível em: http://ssrn.com/abstract=1903903.

accounting books, records and accounts in true correspondence with their respective transactions; that such books ensure that all transactions have taken place in accordance with the authorization of the management of the company; and guarantee access to the data relating to its assets[15]. Under the law, accounting records do not need to be accurate, but reliable and reliable enough to ensure the verification of the financial transactions performed[16].

It should be noted that the FCPA valued transparency and accountability, two of the most important aspects of governance, and that the FCPA established parameters of conduct to be followed by legal entities, valuing the adoption of compliance measures.

The "said" severity of the FCPA comes from the high value of the fines applied. There is no doubt that it was these sanctions that changed the behavior of companies before public agents. On the other hand, under the FCPA provisions, if the company has implemented an effective compliance program, the applicable civil and criminal penalties may be reduced by up to ninety-five percent (95%)[17].

The Sarbanes-Oxley Act was published in 2002 following scandals involving some of the big corporations in the United States (Enron and Worldcom). The law, authored by Michael Oxley and Senator Paul Sarbanes, analyzed all crimes and misconduct committed in the Enron case and sought to prevent similar acts from occurring again in the United States, classifying them as crimes.

However, the SOX is harshly criticized, both in the legal and administrative field, for the understanding that the anti-corruption law has brought more harm than good to the US capital market, since it binds its application to all companies trading securities[18] on the New York Stock Exchange or companies that own holding companies

[15] FCPA, § 78. Ibidem.

[16] Korkor, Samer; Ryznar, Margaret. Anti-Bribery Legislation in the United States and United Kingdom: A Comparative Analysis of Scope and Sentencing. **Missouri Law Review**, v. 76, n. 2, pp. 415-453, 2011. Disponível em: <http://ssrn.com/abstract=1903903>.

[17] Korkor, Samer e Ryznar, Margaret assert that "Specifically, a corporation qualifies for the credit if its compliance and ethics program: (1) requires those with operational responsibility of the compliance and ethics program to report directly to government authority or its subgroup, such as an audit committee of the board of directors; (2) detects the offence before its discovery outside the organization or before such discovery was reasonably likely; (3) requires the organization to promptly report the offense to the proper government authorities; and (4) is such that "no person with operational responsibility in the compliance program participated in, condoned, or was willfully ignorant of the offense."" Anti-Bribery Legislation in the United States and United Kingdom..., Ibidem.

[18] Securities named ADR – *American Depositary Receipt*.

that do so. As a result, the costs of compliance are raised to levels never seen before, barring the natural movement of the markets to structure themselves in a scenario whose culture is mostly of self-regulation[19].

In fact, the SOX has brought several changes, among which we highlight the creation of a non-governmental council dedicated to the analysis of independent auditing companies; the need to improve the internal control levels of companies and the adoption of compliance programs[20]. SOX also sought to ensure that companies adopt compliance measures because, on several occasions, the text refers to integrity programs and fraud prevention and detection procedures.

However, it can be said that the first controversial issue of the SOX is the imputation of objective responsibility upon the managers in regard to the fiscal balance published by the company[21]. The SOX provisions put managers (Executive Directors and Chief Financial Officers) in a very delicate position, in which they are practically guarantors, in solidarity with the companies they manage, of the content of the

[19] In this sense, Skapinker affirms that "[...] the Sarbanes-Oxley Act, another attempt to eliminate any risk that legislative fatherhood could conceive. I am totally in favor of companies being subject to the law. Nor is there anything wrong with the way Sarbanes-Oxley deals with certain abuses, such as the Enron style of creating special purpose entities to hide liabilities. What bothers is that the creators of Sarbanes-Oxley tried to identify every tiny detail of what went wrong on Enron, and then modeled a law based on the premise that the law would be able to prevent such misconduct from coming to you. repeat. (omissis) A good part of the business would have been illegal under any legal system in force; "you shall not steal" would account for most of them [...]. Much more effective than the "practice-codes-for-this" and "liability-for-statements" is to see what happens to those who transgress the law. [...]. Effective enforcement of the law is more important than detailed changes in the law. Seeing others paying the price is a salutary shock to the entire system - the business equivalent of grating your knees." (free translation) Skapinker, Michael. Uma Legislação Superprotetora**:** Lei Sarbanes-Oxley exagera em detalhes ao tentar anular todas as chances de abusos. **Valor Econômico**, São Paulo, 2 dezembro 2004.

[20] (i) The creation of the Public Company Accounting Oversight Board (PCAOB) a nongovernmental and independent council responsible for inspecting audit firms to protect the interests of investors and to promote public trust in auditors' reports. (ii) The requirement of a new level of corporate governance, structuring of internal controls and corporate risk management. In this sense, companies should implement effective internal controls for all business processes and carry out tests on the effectiveness of these controls, in order to ensure that the financial data related to these processes are correctly presented and reflected in the financial statements. Reports on the effectiveness of the company's internal controls should be disclosed along with the annual financial statements. It also requires the creation of an Audit Committee composed of independent members. (iii) The adoption of procedures for the prevention and detection of fraud by companies. (iv) The establishment of criminal and pecuniary punishments for Chief Executive Officers (CEOs) and Chief Financial Officers (CFOs). These executives are responsible for the integrity and reliability of the financial statements and, failing their annual certification, may be subject to fines of up to $ 5 million and imprisonment for up to 20 years. (v) The change in the ways of auditing companies. The Sox, in its second chapter, exclusively devotes itself to the regulation of independent auditors and discusses, in particular: 1. Prohibition on the provision of certain services by auditors to their clients; 2. Pre-approval to hire the auditor by the Audit Committee of the client; 3. Relationship of the independent auditor with the Audit Committee; 4. Conflict of interest in hiring staff from audit firms. SILVA, Adriano Gomes da; Junior, Antonio Robles. Os impactos na atividade de auditoria independente com a introdução da lei Sarbanes-Oxley. **Revista Contabilidade e Finanças**, São Paulo, v.19, n. 48, set/dez. 2008. Disponível em: http://www.scielo.br/scielo.php?script=sci_arttext&pid=S1519-70772008000300010&lang=pt.

[21] Colares Oliveira, Marcelle; Silva LInhares, Juliana. A Implantação de Controle Interno Adequado às Exigências da Lei Sarbanes-Oxley em Empresas Brasileiras - um estudo de caso. **Revista Base (Administração e Contabilidade) da UNISINOS**, [*S.l.*], n. 4, 2007. Disponível em http://www.redalyc.org/articulo.oa?id=337228632007.

accounting documents published and according to which they can - and are - held responsible for any mistake that may cause losses to shareholders. In addition, some of the SOX standards are too costly (such as the standards regarding audit committees), which makes them difficult to apply and unprofitable, even if they improve long-term trust levels in companies.

3.2 Aspects of the U.K. Bribery Act

The U.K. Bribery Act of 2010 is one of the most severe regulations on the subject, as its list of injurious acts is extensive: (i) to offer, promise, pay, require, agree to receive or accept advantage; (ii) to bribe a foreign official; and (iii) to fail to prevent bribery; Describing then four crimes: (i) offer bribery to public and private individuals, (ii) receive bribery from public or private individuals, (iii) bribery of foreign officials, and (iv) failure of commercial organizations to prevent bribery[22].

Prior to the Bribery Act, there were in England three different treatments for bribery crimes. Two of them had statutory origins – the Prevention of Corruption Act and the Public Bodies Corrupt Practices Act - and another one proceeded from common law.

The Prevention of Corruption Act of 1906 classified as criminal the conducts of benefiting any agent with the purpose of performing any act or any favor to any person in relation to their business. The Public Bodies Corrupt Practices Act of 1899, on the other hand, considered a crime of bribery to give, promise, or offer any gift or advantage to a public service agent. These laws, even if directed at fighting corruption, did not classify bribery of foreign government agents as a crime.

In 2001, with the amendment of the Prevention of Corruption Act by the Anti-Terrorism Crime and Security, England began to consider it a crime to make payments of bribes to public agents on board. This same legislative amendment modified the law of 1899 and extended the concept of public bodies to British analogous bodies, but outside England. However, even with the 2001 legal amendments, the British anti-

[22] Information obtained from the brochure Felsberg about the Anti-Corruption Law. Available at: http://www.felsberg.com.br/wp-content/uploads/2014/08/A-Lei-Anticorrup%C3%A7%C3%A3o.pdf. Accessed on June 12, 2015.

corruption system has not complied with the Organization for Economic Co-operation and Development (OECD) anti-corruption conventions to which England is a signatory.

Therefore, in 2010, the British legislator edited the U.K. Bribery Act, a law by which corruption of foreign government agents by corporations came to be considered a crime. Two other acts defined as acts of corruption by English law were to offer bribery to anyone and to accept bribery. In addition to these conduct, the U.K. Bribery Act also classified as a corporate crime the non-prevention of bribery[23].

Nevertheless, the Bribery Act uses the system of subjective responsibility of agents who commit acts of corruption. Exception to the rule occurs in cases of failure to prevent bribery, since the understanding is that companies have a legal obligation to prevent their employees from violating anti-corruption laws. Therefore, responsibility for the crime of failure to prevent bribery is objective.

Although the U.K. Bribery Act applies to both legal persons and individuals who commit acts of corruption, the act provides that the existence of compliance programs will be taken into account when the illegal behavior is submitted to the courts. In this way, it can be said that the U.K. Bribery Act encourages the formulation of compliance programs within the companies that are subject to it[24].

Notwithstanding the delay in its edition, the U.K. Bribery Act has emerged as one of the most severe anti-corruption laws in the world and has provided for various categories of criminal conduct. In addition, the penalties provided for by the British law are criminal in nature[25].

23 The crimes of bribery listed in the Bribery Act are extraterritorial, as English law is enforced if the offense occurs within England or if a legal person or British citizen, or even a person resident in England, is involved in the crime of corruption, even if the offense was committed outside the British territory. The U.K. Bribery Act applies even to legal entities who, even if not based in UK, engage into a corrupt activity outside England and develop activities within the British territory. Korkor, Samer; Ryznar, Margaret. Anti-Bribery Legislation in the United States and United Kingdom: A Comparative Analysis of Scope and Sentencing. **Missouri Law Review**, v. 76, n. 2, pp. 415-453, 2011. Disponível em: http://ssrn.com/abstract=1903903.

24 As early as 2010, the Secretary of State of England released a draft, which listed six principles for detecting acts of bribery and for preventing corruption: i. risk assessments; ii. high level of commitment; iii. due diligence in the investigation of the companies hired by the company; iv. clear, practical and accessible policies and procedures; 5. effective implementation; and v. monitoring and risk assessment. Korkor, Samer and Ryznar, Margaret. Op. Cit.

25 There is no provision for civil or administrative indemnification in the U.K. Bribery Act. If a person commits an act of corruption, he may be charged with a penalty of up to ten (10) years plus a fine. In cases of crimes committed by companies, fines are unlimited and may even entail the dissolution of the companies and compulsory loss of assets. FERREIRA, Luciano Vaz. **A Construção do Regime Jurídico Internacional Antissuborno e seus Impactos no Brasil:** Como o Brasil Pode Controlar o Suborno Praticado por Empresas Transnacionais. 2015. 284f. Tese (Doutorado em Estudos Estratégicos Internacionais) – Programa de Pós-

4 COMPLIANCE IN THE BRAZILIAN LEGAL SYSTEM WITH THE ADVENT OF THE ANTICORRUPTION LAW

The fight against corruption in Brazil did not begin with the entry into force of the Anti-Corruption Law. However, two great innovations that the Law provides are the presence of compliance in companies, as a way of mitigating the penalties applied and the legal provision of types that constitute acts of corruption.

Briefly, one can extract the concept of compliance from subsection VIII of Article 7 of the Anti-Corruption Law: "mechanisms and procedures for integrity, auditing and encouragement to the reporting of irregularities and the effective application of codes of ethics and conduct within the legal entity." These mechanisms must be contained in the internal relations of the legal entity, in its relations with the Government and in its relations with other legal entities. One of the main ways of exercising this control is by establishing a Code of Ethics for the legal entity.

As regards internal corruption, abuses in contractual relations must be fought, preventing the manipulation of internal bids by individuals who are members of commissions, in order to acquire personal advantages.

The fight against corruption in relations with the Government aims to prevent the legal entity from committing the crimes listed in section IV of Article 5 of the Anti-Corruption Law. In relations with other legal persons it must prevent the formation of a joint criminal behavior to harm competitors, the market or people who are consumers of goods and services[26].

On this subject, Modesto Carvalhosa stresses the importance of the presence of an internal audit structure, a governance committee and the permanent training of its employees and managers. The internal audit must, among other obligations, verify the accounts and observe the legitimacy of the legal business that originated them, maintain a system of risk analysis and a permanent service to receive complaints. The

Graduação em Estudos Estratégicos Internacionais, Faculdade de Ciências Econômicas, Universidade Federal do Rio Grande do Sul, Porto Alegre, 2015. Disponível em: http://www.lume.ufrgs.br/bitstream/handle/10183/109268/000950746.pdf?sequence=1.

[26] Carvalhosa, Modesto. **Considerações Sobre a Lei anticorrupção das pessoas jurídicas**. São Paulo: Editora Revista dos Tribunais, 2014. Pages 323-332, *passim*.

Governance Committee must exist when the legal entity has a collegiate body. Among its duties are: to promote the legal, economic and financial audit of contracts, to investigate the internal conduct of its officers and employees, to receive internal complaints and address them to the board of officers, that is, to investigate, to disclose and to denounce illegal acts[27].

Accordingly, Federal Law No. 12,846 of 2013 has created objective rules for corporate governance, such as requirements for the existence of internal mechanisms and procedures for integrity, auditing and incentive to report irregularities and the effective application of codes of ethics, as foreseen in Article 7, subsection VIII.

Although the national legislator innovated by establishing that certain practices in disagreement with good governance are crimes and by determining the implementation of compliance programs, in several points of the legal text, open and indeterminate concepts were used. Another important characteristic to note is that the law did not provided criteria describing good governance practices.

Thus, the Brazilian anti-corruption legislation, unlike the United States (FCPA and SOX), created a duty to comply with good corporate governance standards, but did not describe or set forth objective criteria for regulation of the corporate activity.

Thus, due to the high complexity of the topic and the abstraction of the legal text, especially when it comes to compliance - application and faithful compliance with corporate governance standards - the application of Federal Law No. 12,846 may cause legal uncertainty because its concepts need to be studied, broadly debated and need further definition.

The anticorruption law came into force on January 29, 2014 applicable upon acts and infractions committed since then. However, its effectiveness was not immediate since it depended on further regulations by the member states of the Brazilian federation. Some States still not yet regulated the matter.

[27] Ibidem.

4.1 Objective Responsibility of the Legal Person in the Light of Integrity Programs

First, one must understand what Article 2 of Federal Law 12,846 of 2013 represents for the legal entity[28]. In providing for objective liability as a sanction for the practice of acts harmful to the national or foreign public administration, such article provides for the punishment of the legal person regardless of guilt or fraud, causing the company to respond for the acts practiced by any of its representatives when proved the unlawful conduct, the damage and the causal link with the act of corruption. If the legal entity manages to prove that there was no violation of the legal order, or that the act did not come from one of its representatives, the entity cannot be objectively liable[29].

According to Diogo de Figueiredo Moreira Neto and Rafael Véras de Freitas, the objective of the objective responsibility of the juridical person would be to foment that the own ones create systems that control the conducts of its agents, in order to avoid the practice of acts violating the administrative morality[30].

4.2 Compliance as a Mitigation of the Penalty

The Article 7 of Federal Law 12,846 of 2013 provides that the presence of an integrity program structured with the purpose of preventing and detecting unlawful acts is used as a basis for mitigating the penalty that the legal person will receive in the event of involvement with acts of corruption[31]. In this way, the anti-corruption law innovated in the legal order of the country when it considered relevant the existence of mechanisms and tools that seek to act in a preventive way and even to curb crime - compliance programs. Therefore, the presence of audits, periodic audits, the use of codes of ethics, as well as the permanent control of the execution of the contracts

[28] "Article 2. The legal entities will be objectively responsible, in the administrative and civil spheres, for the harmful acts foreseen in this Law practiced in their interest or benefit, exclusive or not". (free translation)

[29] Carvalhosa, Modesto. **Considerações sobre a Lei anticorrupção das pessoas jurídicas**. São Paulo: Editora Revista dos Tribunais, 2014, Page 37.

[30] Moreira Neto, Diogo de Figueiredo; Freitas, Rafael Véras. **A juridicidade da Lei Anticorrupção – Reflexões e interpretações prospectivas**. Available at: http://www.editoraforum.com.br/ef/wp- content/uploads/2014/01/ART_Diogo-Figueiredo-Moreira-Neto-et-al_Lei-Anticorrupcao.pdf. Accessed in June 5, 2015.

[31] "Art. 7 - It shall be taken into account in the application of penalties: [...] VIII - the existence of internal mechanisms and procedures for integrity, auditing and encouraging the reporting of irregularities and the effective application of codes of ethics and conduct within the legal entity". (free translation).

signed by the legal entity with the entity or body of the public administration are desirable actions and measures.

In this way, compliance becomes a measure that tends to reduce / mitigate the penalties applied to the legal entity. It urges to point out that this mitigation shall only occur when the legal entity has proven to seek to implement fraud protection mechanisms within the scope of the activity that it performs and it is verified the effectiveness of such mechanisms.

It is perceived that the legislator aimed to boost the creation of these internal policies, since, unlike in the US, the absence of structures considered mandatory for compliance is not deemed as a crime and it is not criminally relevant. The problem that arose was the lack of normative provision on which would be the procedures that should be considered as compliance, once the concept presented in subsection VIII of Article 7 is very abstract.

This problem was solved with the edition of Decree No. 8.420 of 2015, which in its Article 42 lists all the policies and structures that are part of the compliance program and the ways in which they shall be analyzed. The article considers, for example, standards of conduct, code of ethics, integrity policies and procedures, applied to all employees and managers, regardless of position or function[32].

Diogo de Figueiredo Moreira Neto and Rafael Véras de Freitas affirm that, once regulated in item VIII of Article 7, its application would be a tied administrative act, meaning that, once the requirements contained therein were fulfilled, no margin of choice would be open for the judging commission to apply the benefit[33].

4.3 The Regulation of Anti-Corruption Law

As established in the Anti-Corruption Law, the competence to establish the regulations and consolidate understandings, criteria and concepts brought by the

[32] It is also taken into consideration in the evaluation of the parameters treated in the article, the size of the company, the sector in which it operates, the countries in which it operates, the complexity of its hierarchy, among other listed factors.
[33] Moreira Neto, Diogo de Figueiredo; Freitas, Rafael Véras. **A juridicidade da Lei Anticorrupção – Reflexões e interpretações prospectivas**. Available at: http://www.editoraforum.com.br/ef/wp- content/uploads/2014/01/ART_iogo-Figueiredo-Moreira-Neto-et-al_Lei-Anticorrupcao.pdf. Accessed on June 5, 2015.

Federal Law is the Federal Comptroller's Office (*Controladoria Geral da União* – CGU). Thus, among the measures proposed by the Anti-Corruption Package, the most awaited was Decree No. 8,420 of March 18, 2015. This is because, despite its entry into force in January 2014, the Anti-Corruption Law still lacked complementary regulation.

Among the clarifications brought by the Decree, the most important was the definition of the expectations and criteria for the establishment of a compliance program to be implemented by the companies in Brazil, since the compliance programs previously adopted by them were based on their mostly on foreign models.

Accordingly, Decree No. 8,420 of 2015 provided several criteria to be followed by private agents so that the compliance program adopted by them is considered valid[34], all based on control and transparency. In addition, the program must be applicable to the company so that there is mitigation of responsibility due to the existence of the compliance program.

It is in this sense that the Decree determines that microenterprises and small businesses will have compliance programs with differentiated parameters that do not comply with clauses III, V, IX, X, XIII, XIV and XV of Article 42. Therefore it is not necessary: (i) to regulate the conduct of third parties; (ii) to make periodic risk analyzes for adequacy of integrity programs; (iii) to exist independence between the person responsible for implementing the compliance program and its respective inspection; (iv) to provide internal and external complaints channels; (v) to implement procedures for

34 Art. 42. For purposes of the provisions of paragraph 4 of Article 5, the integrity program shall be evaluated, as to its existence and application, according to the following parameters: I - commitment of the high management of the legal entity, including the boards, proved by the visible and unequivocal support to the program; II - standards of conduct, code of ethics, integrity policies and procedures, applicable to all employees and managers, regardless of position or function performed; III - standards of conduct, code of ethics, and integrity policies extended, when necessary, to third parties, such as suppliers, service providers, intermediary agents and associates; IV - periodic training on the integrity program; V - periodic risk analysis to make necessary adaptations to the integrity program; VI - accounting records that fully and accurately reflect the transactions of the legal entity; VII - internal controls to ensure the prompt preparation and reliability of reports and financial statements of the legal entity; VIII - specific procedures to prevent fraud and unlawful acts in the context of bidding processes, in the execution of administrative contracts or in any interaction with the public sector, even if intermediated by third parties, such as payment of taxes, subjection to inspections or obtaining authorizations, licenses, permits and certificates; IX - independence, structure and authority of the internal body responsible for implementing the integrity program and monitoring compliance; X - channels for reporting irregularities, open and widely disseminated to staff and third parties, and mechanisms for the protection of good faith complainants; XI - disciplinary measures in case of breach of integrity program; XII - procedures that assure the prompt interruption of irregularities or infractions detected and the timely remediation of the resulting damages; XIII - appropriate procedures for contracting and, as the case may be, supervision of third parties, such as suppliers, service providers, intermediary agents and associates; XIV - verification, during mergers, acquisitions and corporate restructuring, of irregularities or illegal behavior or of the existence of vulnerabilities in the legal entities involved; XV - continuous monitoring of the integrity program aiming at its improvement in the prevention, detection and combat of the occurrence of the harmful behaviors foreseen in Article 5 of Federal Law 12,846, of 2013; and XVI - transparency of the legal entity regarding donations for candidates and political parties.

hiring, regardless of vulnerability inspection, in the merger, acquisition and corporate restructuring processes; and (vi) the continuous monitoring of the integrity program for its improvement.

Thus, for a time society wondered what the rules would be for the implementation of compliance programs in micro-enterprises and small enterprises, since some of the most important rules for the establishment of integrity programs would not apply to these entities. It was for this purpose that, in September 2015, the *CGU* and the Agency of Micro and Small Enterprises (*Secretaria da Micro e Pequena Empresa*) issued the Joint Ruling No. 2,279, to regulate compliance standards that should be adopted by micro and small companies.

The Joint Ruling, in addition to disjointing the items of Article 42 of Decree No. 8,420 of 2015, underlines that, in order for the measures to be evaluated when investigating acts of corruption to verify responsibility and mitigate penalties, micro and small companies should present profile and activity reports.

The profile reports should include the area of activity, those responsible for the management, the number of employees and the organizational structure and level of relationship of micro or small companies with the Government, including the contracts they maintain with the Public Administration. In the activity reports, the micro or small business should indicate the operation of the measures adopted and that these measures contributed to the detection and remediation of illegal acts[35].

There is the interesting issue regarding the effectiveness of compliance programs. Considering that the topic of compliance is recent in Brazil, legal commentators still investigate if the legislative requirements will lead to effective programs or just to formal documents lacking any kind of effectiveness, created with the only purpose to mitigate possible sanctions. In fact, it is important that Brazilian courts and monitoring bodies be aware of these risks. Thus, in each case, the judges and authorities must establish tests and requirements to check the compliance

[35] BRASIL. Controladoria Geral da União. Decisão Conjunta nº. 2.279, de 9 de setembro de 2015. **Diário Oficial da União:** Brasília, DF, n. 173, p. 2-4, 10 setembro 2015.

programs effective. What cannot occur is to disregards the presence of the program in case, despite the Brazilian legal provisions.

In this respect, Ana Frazão and Natália de Melo Lacerca analyze the case TC 016.991/2015-0, from the Brazilian Federal Court of Accounts (*Tribunal de Contas da União* – TCU)[36]. The case debated the application of sanctions of disreputable status for a period of 5 years. One of the parties filed a motion for clarification, arguing that there was no consideration in the decision about compliance elements of the company. According to the motion, the effectiveness and implementation of the compliance program were proven by the certifications ISO 19600:2014 and ISO 37001:2016[37], as well as by the recognition of compliance by the Federal Comptroller's Office, in 2016, with a score of 9 in the Pro-Ethics Program.

Ana Frazão criticizes the decision. According the commentator, the existence of an effective compliance program should be analyzed by the Court of Accounts in situations like this. The ideal would be the exclusion of the administrative liability from the company considering the lack of misconduct, without prejudice to the company's civil liability for compensation in case of any damages caused by persons on behalf the company[38].

Finally, it is important to mention the Ordinance No. 57/2019 of the Federal Comptroller's Office, edited under President Bolsonaro's government, which stipulated a deadline for independent governmental agencies, foundations and ministries to create compliance programs. The re-edition of the order aims to reinforce the new government's anti-corruption agenda. In its art. 1, §1, the ordinance provides that "the

[36]Frazão, Ana; Lacerda, Natália de Melo. Desafios aos programas de compliance. **Jota – constituição, empresa e mercado**, coluna do dia 23.10.2019. Disponível em: https://www.jota.info/opiniao-e-analise/colunas/constituicao-empresa-e-mercado/desafios-aos-programas-de-compliance-23102019.

[37] These ISO regulates compliance. According its own site, ISO 37001:2016, for example, "specifies requirements and provides guidance for establishing, implementing, maintaining, reviewing and improving an anti-bribery management system. ISO 37001:2016 addresses the following in relation to the organization's activities: bribery in the public, private and not-for-profit sectors; bribery by the organization; bribery by the organization's personnel acting on the organization's behalf or for its benefit; bribery by the organization's business associates acting on the organization's behalf or for its benefit; bribery of the organization; bribery of the organization's personnel in relation to the organization's activities; bribery of the organization's business associates in relation to the organization's activities; direct and indirect bribery (e.g. a bribe offered or accepted though or by a third party). ISO 37001:2016 is applicable only to bribery. Is sets out requirements and provides guidance for a management system designed to help an organization to prevent, defect and respond to bribery and comply with anti-bribery laws and voluntary commitments applicable to its activities [...]". Available at: https://www.iso.org/standard/65034.html.

[38] Frazão, Ana; Lacerda, Natália de Melo. *Op. Cit.*

commitment of the high administration must be reflected in high standards of management, ethics and conduct, as well as in strategies and actions for the dissemination of the culture of integrity in the body or entity". The ordinance defines a compliance program as the “structured set of institutional measures aimed at preventing, detecting, punishing and remedying corrupt practices, fraud, irregularities and ethical and conduct deviations” (Art. 2, II) . The Federal Comptroller's Office is the entity responsible for monitoring the phases and deadlines granted to the public administration.

The Ordinance No. 57/2019 of the Federal Comptroller's Office proves to be quite important in the context of the COVID-19 pandemic[39]. As mentioned above, there are unfortunately several cases of fraudulent contracts in Brazil. The existence of orders focusing on public administration is also of great value in reducing the risk of corruption.

5 SOME CRITICS TO FEDERAL LAW NO. 12,846/2013: A COMPARATIVE ANALYSIS TO THE FCPA AND THE U.K. BRIBERY ACT

It is clear that Law 12,466/13 was strongly influenced by both the OECD's international anti-corruption conventions and by the FCPA and the UK Bribery Act. Thus, the three laws, the United States, the British and the Brazilian, have points in common. Notwithstanding that, the treatment given to the compliance institute in the three legal rulings differs in some aspects.

An example of the above statement is in the treatment of liability in the three laws. The U.K. Bribery Act and the FCPA prefer the subjective liability in corruption cases. The exception to the rule is restricted in the FCPA to the acts practiced by the managers

39 However, the set of norms created in the pandemic crisis' scenario resulted in the flexibility of bidding procedures and public contracts. An example here is the Federal Law 13.979/20, which defines the exceptional measures for this period and provides exemption from public bids for the acquisition of goods and services destined to face the COVID-19 pandemic. The Federal Law 13.979/20 allows, *verbi gratia*, the hiring of disreputable companies and the exemption of technical studies in some cases. Unfortunately, it has been widely publicized by the media that the economic crisis faced by the country and majored by COVID-19 is being used for the practice of irregularities in several Member-States, either by the public pressure on governmental agents or simply due to the lack of knowledge of the norms to be applied in cases of calamity. Thus, the conduct of agents involved in public contracts during this period probably will be subject to civil proceedings under the norms of anticorruption legislation.

in cases concerning the rendering of accounts and in the U.K. Bribery Act to cases of negligence in the prevention of bribery, that is, the failure to prevent bribery.

Federal Law No. 12.846/13, on the other hand, defends an objective responsibility for the practice of acts of corruption. The mere fact of bribery (a crime of active or passive corruption) is deemed sufficient for law enforcement. In this sense, Brazilian law approximates with the U.K. Bribery Act, which also provides for the possibility of objective liability of companies for the acts practiced by their managers. The difference between the two lies in the fact that Brazilian law does not discriminate what acts are practiced by individuals and in which positions subject the legal person to objective liability, maximizing the imputation of this type of responsibility[40]. Thus, more than in other countries, the implementation of a compliance program is essential in Brazil in order to avoid deviations that could lead to direct and objective accountability of the company.

One point in common of the three laws is that of extraterritoriality. Both the FCPA and the U.K. Bribery Act and Federal Law 12,846/13 are extraterritorial. This means that all legal entities that in some way carry out their activities in the territories of the United States, England and Brazil must conform to the rules of the three countries. In other words, they will have complementary character if the legal person carries out its activities transnationally. International cooperation will be needed to define a universally accepted compliance model.

The creation of such a model, however, can be difficult, since the laws bring in their different definitions different condemnable conducts. While the FCPA considers the corruption of a foreign public agent illegal, and still allows the company to offer an advantage to agents from other countries, if the laws of these states so authorize, Federal Law No. 12.846/13 brings a wide range of conduct considered illegal, including the offer of undue advantage to a foreign or national public agent. Although this provision is more comprehensive, it can be said that the UK Bribery Act is even more severe, given that, in addition to criminalizing the offer of bribery to internal and

[40] According to Carvalhosa, Modesto. **Considerações sobre a Lei Anticorrupção das pessoas jurídicas.** São Paulo: Editora Revista dos Tribunais, 2014, pg. 357-370, *passim*.

external public agents, such as Brazilian law, it also considers illegal the receipt of undue advantage. In addition, the British and Brazilian laws do not make any exception on the unlawfulness of receiving the improper advantage, that is, there is no possibility of lawfulness of such conduct.[41]

Another feature to be highlighted is the possibility of reducing penalties due to a compliance program. The three laws, each in its own way, deal with the subject.

The FCPA expressly determines this possibility and, in addition, it brings in its body the measures necessary for a compliance program to be considered good. If companies comply with the FCPA, penalties can be mitigated.

The U.K. Bribery Act, in a different way, makes it possible to extinguish liability by verifying an effective compliance program within the entity, which occurs even if an employee of the company has engaged in an illegal bribery practice. However, British law does not define what an adequate compliance program is, nor does it outline guidelines for the implementation of integrity programs. These guidelines are determined from time to time by the Ministry of Justice, which makes it difficult to implement these programs.

Federal Law No. 12,846/13 has similar aspects to those of the U.K. Bribery Act when it refers to compliance. The national law, while providing for the possibility of mitigating the penalty due to the verification of integrity programs, such as the FCPA, does not determine what measures are necessary to verify the validity of these programs. Perhaps for this reason the issue was regulated in Decree No. 8,420/15, which brought the guidelines for perceiving what should be included in a good compliance program, albeit openly[42].

[41]Ferreira, Luciano Vaz. **A Construção do Regime Jurídico Internacional Antissuborno e seus Impactos no Brasil:** Como o Brasil Pode Controlar o Suborno Praticado por Empresas Transnacionais. 2015. 284f. Tese (Doutorado em Estudos Estratégicos Internacionais) – Programa de Pós-Graduação em Estudos Estratégicos Internacionais, Faculdade de Ciências Econômicas, Universidade Federal do Rio Grande do Sul, Porto Alegre, 2015. Disponível em: http://www.lume.ufrgs.br/bitstream/handle/10183/109268/000950746.pdf?sequence=1.

[42] Based on the federal regulation on the topic (Federal Decree No. 8,420/15), some Brazilian states have chosen to require that compliance programs must be implemented by legal entities that enter into contracts with the public administration. Although Federal Law no. 12,846/13 does not expressly determine which compliance mechanisms should be used, the adoption of such instrument constitutes a requirement for companies to be able to negotiate with bodies and entities of public administration. Here are some examples of these states: the states of Rio de Janeiro (Law no. 7,753/17), Rio Grande do Sul (Law no. 15,228/18), Amazonas (Law no. 4,730/18), and the Federal District (Law no. 6,112/18).

Thus, a similarity of the Brazilian anti-bribery legislation can be verified with both the US and the British laws, because the Brazilian rules - it is important to stress that the reference is a set of rules - bring elements of the two worlds, which are: first, the lack of definition of the compliance program and then the exhaustive regulation of the conduct to be adopted by private agents.

6 CONCLUSION

It is true that the Brazilian legislator has grown a great deal in providing and then regulating the compliance institute, giving it importance within the legal system, especially with the edition of Federal Law No. 12,846/13 and Decree No. 8,420/15.

In addition, by establishing standards similar to those internationally required, Brazil collaborates to adapt its companies to the best standards of transparency and global market governance practices, with reference to the legislation of countries with a high degree of regulation and, consequently, fostering development of more ethical and competitive business relations. However, the rules adopted for the establishment and implementation of an integrity program are mere mitigating factors for penalties, and other measures will be necessary so that managers and controllers of legal entities, regardless of size, understand the need and importance of compliance for its development and to qualify the market itself.

It is curious to point out that Brazil has regulated compliance according to the theory of deterrence. Hence, compliance with standards of integrity will only become a reality through the application of penalties. Regulatory theory has applied, to a certain extent, to the regulation of compliance for micro and small enterprises, which will have different treatment. This same understanding has also prevailed in England and the United States. These two countries also regulated compliance by the theory of deterrence, that is, by applying severe penalties to legal entities that do not conform to the rules of compliance. Despite the success of foreign laws that have adopted the same position, it will still take time to verify whether Brazilian law will have similar

effectiveness as foreign laws, as well as to "measure" the degree of efficiency achieved by the implementation of integrity programs in different business models.

Without any kind of doubt, periods of crisis are a major challenge for the development and consolidation of compliance policies, especially because, at these times, generally, measures are impose to soften legal standards aiming to provide adequate response to the emergencies, which leaves room for unfair practices. However, compliance programs are instruments capable of helping, both states and companies, in the control and inspection of the activities performed, which is essential to overcome any crisis.

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