Compliance, Monitors, and the Odebrecht Case: a comparison between the FCPA and the Clean Company Act

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Introduction

During the last two decades, societies' relations have changed significantly and the way how corporations do business reached new frontiers. Due to that, business transactions have trespassed borders, and corporations operate in every single part of the globe.[2] However, corporations face challenges to compete and not rarely utilize corruption schemes such as bribe foreign public officials to obtain a government contract or finance a political party campaign to enter a new market. As a global concern, awareness to tackle corruption becomes a priority within developed and developing countries[3] for several reasons such as protecting public interest, promoting competition,[4] and, increasing fairness in public procurement.[5]

These global efforts have two effects, first countries increased enforcement to prosecute and impose sanctions on corporations.[6] Second, corporations had to protect

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[2] Meetika Srivastava, *Globalisation and Public Administration: A Study of the Term 'Globalisation', Its Nature, Meaning, Characteristics and Impact on Public Administration* (November 17, 2009).

[3] Jan Wouters, Cedric Ryngaert and Ann Sofie Cloots, *The Fight Against Corruption in International Law* (July 2012), Leuven Centre for Global Governance Studies, Working Paper No. 94.

[4] Ajit Mishra, *The Economics of Corruption*, Oxford University Press, London (2005).

[5] Susan Rose-Ackerman, *The Economics of Corruption* (February 1975), Journal of Public Economics, Volume 4, Issue 2, pp. 187-203.

[6] The U.S. Foreign Corrupt Practices Act (FCPA) was the first attempt to tackle corruption at the international level. However, over the years U.S. businesses lost competitiveness while other countries did not enhance enforcement over foreign bribery. Later, international instruments such as the OECD Anti-Bribery Convention and the United Nations Convention Against Corruption (UNCAC) increased fairness in business with provisions criminalizing foreign bribe. *See*, Martine

themselves, preventing, detecting, enforcing, and remediating wrongdoing to minimize government sanctions.[7] In this sense, corporate compliance traditional approach has changed significantly as several regulations and statutes require corporations to develop effective compliance programs instead of just comply with regulations.[8]

In regards to multinational companies operating oversees, corporate wrongdoing is difficult to prevent and even harder to be dismantled by enforcement authorities since it usually utilizes a sophisticated method to be executed and may occur in a C-Suite meeting or appointment of a key person to act as a briber, or as in the Wal-Mart[9] or the Odebrecht[10] cases having top Executives involved in the schemes. Therefore, it is extremely difficult for regulators to discover wrongdoing without self-disclosure or corporation's cooperation. In order to incentivize such behavior, enforcement authorities have discretion to prosecute and impose huge monetary sanctions or even debar a company, but depending on cooperation might give credit reducing sanctions or not take

Boersma, *Catching the 'Big Fish'? A Critical Analysis of the Current International and Regional Anti-Corruption Treaties* (November 14, 2008), Dept. of International and European Law of Maastricht University, Faculty of Law, Working Paper, 14.

[7] Veronica Root Martinez, *The Compliance Process* (March 28, 2018). 94 Indiana Law Journal 203 (2019); Notre Dame Legal Studies Paper No. 1838.

[8] Veronica Root Martinez, *Coordinating Compliance Incentives* (November 9, 2016), 102 Cornell Law Review 1003 (2017); Notre Dame Legal Studies Paper No. 1640.

[9] An article written in 2012 by an investigative reporter in New York Times stated that "a former Wal-Mart executive described an orchestrated campaign of bribery to win market dominance and the company had paid bribes in virtually every corner of the country. David Barstow, *Vast Mexico Bribery Case Hushed Up by Wal-Mart After Top-Level Struggle*, N.Y. TIMES (Accessed on April 2, 2020 at 10:22 A.M.), https://www.nytimes.com/2012/04/22/business/at-wal-mart-in-mexico-a-bribe-inquiry-silenced.html.

[10] The Brazilian multinational company reached settlements in the U.S., Brazil, and Switzerland, but is still being investigated in several jurisdictions for foreign bribery, collusion, and fraud in public procurement among others, and while reached settlements in certain jurisdictions, admitting involvement of top executives in the scheme, including former CEO. *See*, DOJ Press Release, December 21, 2016, plea agreement between the Department of Justice and Odebrecht S.A., (accessed on April 9, 2020 at 11:12 P.M.), https://www.justice.gov/opa/pr/odebrecht-and-braskem-plead-guilty-and-agree-pay-least-35-billion-global-penalties-resolve; *See also*, for investigation in several countries (accessed on April 9, 2020 at 11:21 P.M.), https://www.bbc.com/news/world-latin-america-41109132.

action at all,[11] depending on how effective corporate compliance[12] or integrity[13] programs are managed.

Having said that, this paper will be divided into three Chapters. In Chapter One, the aim is to present the US Foreign Corrupt Practices Act (FCPA), the Brazilian Clean Company Act (CCA), and soft law, such as manuals and guidelines, and analyze main provisions related to the evaluation of compliance programs, their effectiveness, and what enforcement authorities in the U.S. and Brazil expect and consider as an effective corporate compliance program. In Chapter Two, the intent is to present how enforcement authorities from each country monitor corporations after a settlement agreement or a non-trial resolution such as a deferred prosecution agreement (DPA), a non-prosecution agreement (NPA), a plea agreement or a leniency agreement, to prevent recidivism. Finally, in Chapter 3, the Odebrecht case will be analyzed considering how enforcement authorities from each country, the U.S. and Brazil, evaluated the effectiveness of its compliance program to reach a resolution and what were the monitoring requirements, including recommendations, independent monitor appointment and monitorship period.

Chapter 1: Compliance: the FCPA and the CCA

Initially, a clarification is necessary. Traditionally, literature, statutes, and regulations in the U.S. use the term compliance programs or compliance and ethics programs.[14] On the other side, instruments and legislation such as the United Nations Convention Against Corruption (UNCAC)[15] and the CCA[16], instead, refer to integrity or

[11] *See* A Resource Guide to the U.S. Foreign Corrupt Practices Act, known as the FCPA Resource Guide at https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2015/01/16/guide.pdf.
[12] *See* USAM § 9-28.000 *et seq*.
[13] Article 7 of the Law n. 12,846/2013, known as the Brazilian Clean Company Act (CCA).
[14] The vast majority refer to compliance programs and few documents as the U.S. Sentencing Guidelines Manual refers to Compliance and Ethics Program, (accessed on March 28, 2020 at 2:32 P.M.), https://www.ussc.gov/guidelines/2018-guidelines-manual-annotated. The FCPA Resource Guide refers to compliance program.
[15] Article 12 of the UNCAC.
[16] Article 7 of the CCA.

integrity programs. If someone curious decides to research the meaning of each word he may encounter different meanings for compliance and integrity. Nevertheless, for the purpose of this paper, both terms will be considered as synonyms.

Main concern relates to the effectiveness of compliance programs as guidance, legislation, evaluation, and monitoring will be always focused on answering the following questions: Is the compliance program in place effective enough to prevent, detect, and deter wrongdoing within the corporation when wrongdoing occurred? Is it now?

Generally speaking, when someone read or hear the word compliance an automatic connection with the FCPA from 1977 comes out, even though there are several regulations which also require corporations to have a compliance program,[17] in some cases even before the FCPA.[18] However one thing is certain, no statute has ever had such impact worldwide as the FCPA, leading to the enactment of dozens of international conventions and domestic regulations criminalizing foreign bribery, all of them carrying out the same rationale: incentivize corporations to adopt effective compliance programs.[19]

Following this global movement and as a signatory party of the Organization for Economic Cooperation and Development (OECD) Anti-Bribery Convention and the UNCAC, the Brazilian Congress passed the Clean Company Act in 2013, a regulation with provisions related exclusively to legal persons and the first of its kind in Brazil

[17] After the Enron and Arthur Andersen scandal and the financial crisis of 2007-2008 the U.S Congress passed two statutes, in 2002 the Sarbannes-Oxley Act and in 2010 the Dodd Frank Act, to enhance enforcement over corporations and additional disclosure requirements. *See*, Brandon L. Garrett, *Too Big to Jail: How Prosecutors Compromise with Corporations* (2014), The Belknap Press of Harvard University Press.

[18] *Supra note* 6, at 1010.

[19] The UNCAC and the Anti-Bribery Convention have provisions incentivizing private sector to have compliance programs, sometimes referred to as ethics or integrity systems. Besides, as agreed on the above-mentioned instruments, several countries have promulgated domestic regulations prohibiting several forms of corruption and giving credit to corporations that have compliance programs. For instance, 44 countries are signatories of the Anti-Bribery Convention, (accessed on March 28, 2020 at 11:47 A.M.), http://www.oecd.org/daf/anti-bribery/countryreportsontheimplementationoftheoecdanti-briberyconvention.htm.

explicitly awarding benefits for corporations that maintain an effective compliance program.[20] The CCA entered into force in January 2014 and a few months later an ordinary criminal case which began with a money laundering investigation has become one of the biggest corruption schemes in history, the Car Wash case, involving all major Brazilian infrastructure, Oil and Gas, and engineering companies and several multinational corporations that committed wrongdoing while doing business with Petrobras, a state-controlled enterprise, considered at that time one of the fifteen largest oil corporations in the world.[21]

As new enforcement regimes entered into force compliance industry flourished all around the globe and corporations are investing significative amounts of money to implement or reinforce compliance programs. Nevertheless, there is a need to find a right balance between what is expected from enforcement authorities and what is accomplished by corporations, which may give a lot of latitude and discretion to enforcement authorities performing evaluations but, in fact, to promote corporate cooperation and effectiveness the process shall be as clear, predictable, and transparent as possible, to level the playing field and incentivize corporations to do the right thing and not just have a so-called window dressing compliance program.

1.1. The U.S.: Regulation and Guidance

Despite of being the most cited legislation related to compliance involving corporate corruption, surprisingly, the FCPA has no provisions requiring companies to have a compliance program or even mentioning that enforcement authorities from the Department of Justice (DOJ) or the Securities and Exchange Commission (SEC) will

[20] Mariana Mota Prado, Lindsey D. Carson and Izabela Correa, *The Brazilian Clean Company Act: Using Institutional Multiplicity for Effective Punishment* (October 13, 2015). Osgoode Legal Studies Research Paper No. 48/2015.

[21] Monica Arruda de Almeida and Bruce Zagaris, *Political Capture in the Petrobras Corruption Scandal: The Sad Tale of an Oil Giant*, The Fletcher Forum of World Affairs, Vol. 39:2, Summer 2015, https://pdfs.semanticscholar.org/89f1/3f101a008c7d8c1648bcf3e687c11c7f9015.pdf.

consider the existence of a compliance program during an investigation or prosecution as a defense factor to reduce sanctions. Hence, there is some critique from scholars and private practitioners advocating amendment into the FCPA to include provisions crediting the existence of a compliance program as an affirmative defense.[22]

In practice, complementary guidance issued by the DOJ, the SEC, and the U.S. Sentencing Commission have been used as main sources, providing enforcement authorities guidance on which policy and standards shall be required.

The Justice Manual (JM)[23] has a specific section called Foundational Principles of Corporate Prosecution[24] that emphasizes priority given by DOJ to prosecute corporate crime in general. According to the principles, one of the main factors to be considered by enforcement authorities while deciding to bring charges or negotiating a settlement is "the corporation's remedial actions, including, but not limited to, any efforts to implement an adequate and effective corporate compliance program or to improve an existing one."[25] To determine it three fundamental questions shall be considered:

1. Is the corporation's compliance program well designed?
2. Is the program being applied earnestly and in good faith? In other words, is the program being implemented effectively?;
3. Does the corporation's compliance program work in practice?

Since DOJ has jurisdiction to enforce different statutes beyond the FCPA, such as the Sarbannes-Oxley Act, the Dodd-Frank Act, and the Sherman Act, general guidance within the JM besides providing broad discretion to prosecutors allow its use in several ways when prosecutor decide to open an investigation.

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[22] Cyavash Nasir Ahmadi, *Regulating the Regulators: A Solution to Foreign Corrupt Practices Act Woes*, 11 J. Int'l Bus. & L. 351, 363 (2012); *see also,* Andrew Weissmann and Alixandra Smith, *U.S. Chamber Institute for Legal Reform, Restoring Balance: Proposed Amendments to the Foreign Corrupt Practices Act* 6 (2010).

[23] The Justice Manual used to be called the United States Attorney's Manual (USAM) and was issued in 1953.

[24] JM 9-28.010.

[25] Id. at 9-28.300.

The U.S. Sentencing Commission Sentencing Guidelines (USSG) [26] in chapter 8, which is designed specifically for the sentencing of organizations, establishes as a general principle regarding monetary sanctions that "the fine range for any other organization should be based on the seriousness of the offense and the culpability of the organization." Also, one of the two mitigating factors to be considered for reducing a monetary sanction is "the existence of an effective compliance and ethics program." Conversely to the JM, which helps prosecutors deciding whether to bring charges against corporations, the USSG was created to foster uniformity for judges while sentencing a corporation. For instance, in a plea agreement in which there is an admission of guilty the potential fine may be reduced up to 95 percent if there is an effective compliance program in place.[27] Although, prosecutors have used USSG parameters as a standard to evaluate corporate compliance programs while negotiating a NPA or a DPA.[28]

The DOJ and SEC have jointly issued the so-called FCPA Resource Guide in 2012, which covers a variety of topics and examples of real cases guiding multi-national corporations and small businesses operating abroad.[29] The document provides a whole chapter with detailed information about what shall be considered an effective compliance program by enforcement authorities and is still considered by corporations and

[26] The USSG Sentencing Commission is an independent agency in the judicial branch of government created by the Sentencing Reform Act of 1984. Congress enacted the SRA in response to widespread disparity in federal sentencing, ushering in a new era of federal sentencing through the creation of the Commission and the promulgation of federal sentencing guidelines, (accessed on March 22, at 10:58 P.M.), https://www.ussc.gov/about-page.

[27] Paula Desio, *An Overview of the Organizational Guidelines* (accessed on April 13, 2020 at 1:03 P.M.), https://www.ussc.gov/sites/default/files/pdf/training/organizational-guidelines/ORGOVERVIEW.pdf.

[28] Steven D. Gordon (2018). Implementation of Effective Compliance and Ethics Programs and the Federal Sentencing Guidelines (Ed. 1), *In Corporate Compliance Answer Book*, (accessed on April 13, 2020 at 1:44 P.M.), https://legacy.pli.edu/product_files/Titles/2470/%23205998_02_Corporate_Compliance_Answer_Book_2018_P3_20170915151415.pdf.

[29] DOJ Criminal Division and SEC Enforcement Division, *A Resource Guide to the U.S. Foreign Corrupt Practices Act* (2012), https://www.sec.gov/spotlight/fcpa/fcpa-resource-guide.pdf.

enforcement authorities worldwide as the main reference guidance related to foreign bribery.[30]

Notwithstanding, even with formal guidance aforementioned, compliance programs must be evaluated in the specific context of an investigation, considering a variety of factors such as the nature of the business, region and industry which operates, size of a corporation, and a variety of factors, analysis of risk profile differ from each corporation being evaluated.

Besides, as cases become more sophisticated and prosecutors needed to gain more expertise evaluating compliance programs, in 2015 the DOJ hired a compliance expert to help prosecutors develop appropriate evaluation standards.[31] As a result, in 2017 DOJ issued soft law guidance called Evaluation of Corporate Compliance Programs (ECCP),[32] that aimed to help enforcement authorities to evaluate if a compliance program is effective at the time of the offense and to decide its effectiveness while deciding to bring charges, to reach a resolution, to impose a monetary sanction, and, lastly, to recommend compliance obligations such as requiring monitorship. The document does not innovate on the core basis for analysis and is based mainly on the above-mentioned guidance, the JM, the USSG, and the FCPA Resource Guide.

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[30] Charles Duross and Kara Novaco Brockmeyer, *40 Years of FCPA: The Untold Story of the Resource Guide* (accessed on 04.04.20 at 12:11 A.M.), https://www.law360.com/articles/992781/40-years-of-fcpa-the-untold-story-of-the-resource-guide.

[31] In a press release, the DOJ Fraud Division announced new compliance counsel, which reported directly to the former Chief of the Fraud Section (accessed on 04.04.20 at 01:08 A.M.), https://www.justice.gov/criminal-fraud/file/790236/download; *see also*, Andrew Weissmann the Chief of the Fraud Section at the DOJ Fraud Section and Hui Chen the Compliance Counsel participated in a roundtable discussion at the New York University Law School in 2015 explaining the importance of hiring a compliance expert (accessed on 04.04.20 at 01:15 A.M.), https://www.youtube.com/watch?v=pRTGZmmbc5o.

[32] DOJ Criminal Division, Evaluation of Corporate Compliance Programs, Updated in April 2019, (accessed on 04.03.20 at 10:22 P.M.), https://www.justice.gov/criminal-fraud/page/file/937501/download.

Apart from that, having a compliance expert at the DOJ surely helped to produce a document that enhanced clarification, uniformity, and transparency which not only helps enforcement authorities but also corporations to design and implement compliance programs. Besides, considering the three questions from the Justice Manual, ECCP presents predefined critical factors, each one with specific questions to be addressed, explanations on rationales and examples, as follows:

• **Is the Corporation's Compliance Program Well Designed?**	• **Is the Corporation's Compliance Program Being Implemented Effectively?**	• **Does the Corporation's Compliance Program Work in Practice?**
A – Risk Assessment	A – Commitment by Senior and Middle Management	A – Continuous Improvement, Periodic Testing, and Review
B – Policies and Procedures	B – Autonomy and Resources	B – Investigation of Misconduct
C – Training and Communications	C – Incentives and Disciplinary Measures	C – Analysis, and Remediation of Any Underlying Misconduct
D – Confidential Reporting Structure and Investigation Process		
E – Third-Party Management		
F – Mergers and Acquisitions		

All in all, existing proposals for amendments on the FCPA aim to incentivize corporations to create compliance programs and to credit companies that maintain effective programs to use it as an affirmative defense,[33] but different administrations within the U.S. government have advanced significantly to clarify what is expected by enforcement authorities and what corporations must achieve or pursue to get credit as wrongdoing happens and prosecutors initiate an investigation and decide whether to bring charges or reach a settlement agreement.

[33] *Supra note* 21, at 7.

1.2. Brazil: Regulation and Guidance

As a civil law jurisdiction, there is a tradition in Brazil to issue regulations and respective legal procedures about all sorts of matters as detailed as possible. Thus, on the contrary of the FCPA, the Clean Company Act[34] has specific provisions recognizing internal integrity procedures, reporting mechanisms, and code of ethics as key components to be considered by enforcement authorities while carrying out investigations and deciding sanctions to impose. Under Article 7, VIII of the CCA, as follows:

> Article 7. In applying the sanctions, the following will be taken into consideration:
> VIII – the existence of internal mechanisms and procedures of integrity, audit, and incentive for the reporting of irregularities, as well as the effective enforcement of codes of ethics and conduct within the scope of the legal entity;

However, more clarification was necessary as provisions did not provide much guidance on what exactly ought to be considered as an effective compliance program. The scenario got more complicated as the CCA entered into force in January 2014 and the Car Wash case initiated just a few months later. Due to that, the Office of the Comptroller General (CGU) opened several administrative liability proceedings against national and multinational corporations and some of them wanted to reach a resolution under leniency agreements.[35]

Lack of guidance affected private and public sectors and created a lot of uncertainty and instability. From the government side concerns about ongoing investigations and guidance for evaluation of compliance programs. On the other side, corporations did not have predictability and transparency on what was expected by

[34] The Clean Company Act is a result of compromises made by the Brazilian government with the United Nations (UN) and Organization for Economic Co-operation and Development (OECD) as a signatory of the United Nations Convention Against Corruption (UNCAC) and the OECD Anti-Bribery Convention (Anti-Bribery Convention)to foster enforcement against legal persons.
[35] Article 16, Paragraph 10 of CCA: "The Office of the Comptroller General (CGU) is the competent authority to enter into leniency agreements in the federal Executive Branch, as well as on cases of wrongful acts committed against the foreign public administration."

enforcement authorities and what might be the benefits or rewards to invest huge sums on risk assessment, hiring and training personnel, developing policies and procedures, and issuing a code of ethics, to implement robust compliance programs.

In March 2015, a federal decree[36] was enacted and parameters were posited and clarified. Not surprising, the regulation is in line with guidance required by the U.S. and under Article 41 an integrity program is defined as follows:

> Article 41. For the purposes of the present Decree, an integrity program consists – for a legal entity – of a set of methods and internal procedures addressing integrity, audit and whistleblowing encouragement, as well as the effective implementation of codes of ethics and conduct, policies and guidelines, to detect and remedy any deviations, fraud, noncompliance and illegal actions committed against the Brazilian or foreign public administration.

Also, Article 42 highlighted 16 parameters that would be considered on evaluations such as commitment of Senior Management, codes of conduct and integrity policies, periodic risk analysis, compliance body independence, training, among others. Moreover, it was clear that effectiveness should be considered taking into account business characteristics, a sector in which a corporation operates, and risks faced by each legal entity.

In 2018 CGU issued a manual to serve as practical guidance for evaluation of compliance programs in administrative liability proceedings[37] and negotiation of settlement agreements.[38] Basically, enforcement authorities evaluate how organization structure is connected to a compliance culture; analyze mechanisms, policies, and procedures in place to prevent, detect and deter wrongdoing; and, how the corporations

[36] Federal Decree No. 8,420/2015.
[37] The administrative liability proceeding is established in Chapter IV of the CCA and under its Article 17 can result in debarment from government contracts if the wrongdoing is related to fraud in public procurement.
[38] Practical Manual for Evaluation of Integrity Programs in Administrative Liability Proceedings (September 2018) (accessed on April 10, 2020, at 10:23 A.M.), https://www.gov.br/cgu/pt-br/centrais-de-conteudo/publicacoes/responsabilizacao-de-empresas.

acted to remediate the offense under investigation and to prevent recidivism. The manual serves nowadays not only as a guide for the enforcement authorities but also for the private sector to implement compliance programs and to be better understand enforcement authorities' expectations.

Despite using the same rationale, there are some practical differences between DOJ and CGU during the evaluation of compliance programs' effectiveness.

Within the U.S., after balancing analysis of documents, policies, and procedures regarding compliance programs with the level of wrongdoing, enforcement authorities decide the level of deference the corporations deserve and if monitorship is necessary. This rationale allows those directly involved in the investigation to analyze if and in which level the program failed and what are the improvements necessary to the program.

Conversely, in Brazil, the negotiation committee is not in charge of the evaluation of compliance programs, but a specific area called Directorate for Integrity Promotion (DIG).[39] So, the goal is that the evaluation of compliance programs is performed by trained public officials with expertise to give support to the negotiation committee. In addition, instead of a broad discretion by each negotiation committee and potential lack of uniformity, evaluations are conducted by DIG, which shall send a clear signal that evaluations will be unbiased and even though each case has its own specificity, similar issues tend to be treated equally.

Chapter Two: Monitoring

Once enforcement authorities and corporation representatives decide to reach a resolution based on the analysis of the effectiveness of compliance programs an important issue must be addressed, rehabilitation.

[39] Article 67 of CGU Bylaw No. 3553/2019.

In order to promote rehabilitation and ensure corporations are following improvement recommendations monitorship is a fundamental instrument for assisting assessment on necessary changes, development of new ethics codes, foster management engagement, enhance internal controls, issuance of new policy and procedures, and so on.

Usually, two forms of monitorships exist, select a professional to act as a monitor, and address specific responsibilities and roles. Another possibility is the government by itself performs the task for a certain period. The DOJ adopted the first model about FCPA-related issues and in some cases appoint a third-party, called independent monitor to assess and monitor if a corporation is following the terms of the agreement to reduce the risk of wrongdoing and new enforcement actions.

Nevertheless, some concerns and criticisms over the U.S. traditional monitorship model relate to conflicts of interest within the DOJ as selected monitors are former prosecutors, the lack of transparency on the selection process, and if a monitor can improve corporate compliance.[40] In a positive response to that, a memorandum was issued in 2018 specifying personal requirements such as qualifications and a due selection process.[41]

The Brazilian model is a direct government monitorship, in which CGU evaluates corporate compliance program at the time of negotiations for settlement, and later the same team serves as monitors. This model also receives critiques since enforcement authorities tend to be biased and have not the required impartiality to recognize the corporation's improvements.

2.1. FCPA Independent Monitors v. CCA Government Monitorship

[40] Cristie Ford and David Hess, *Can Corporate Monitorships Improve Corporate Compliance?* (January 2, 2009). Journal of Corporation Law, Forthcoming.

[41] See generally Memorandum from Brian A. Benczowski, Assistant Attorney General, Selection of Monitors in Criminal Division Matters (October 11, 2018), https://www.justice.gov/criminal-fraud/file/1100366/download.

Utilizing independent monitors in FCPA-related resolutions such as DPAs or NPAs has been in place since the enactment of the FCPA but has increased within the last fifteen years. According to available data,[42] since 1977 from all 421 resolutions in 54 (13%) cases a certain from of monitorship was required, being 47 (87%) of cases from 2004 to 2020. These numbers may be due to a high number of enforcement actions for the last two decades (92% of all enforcement actions by DOJ and SEC)[43] and the seriousness and complexity of the offenses.[44]

Choosing this model has some practical reasons as DOJ has not capacity to oversee all cases since it would require hiring and training new personnel.[45] Another reason is to reduce costs as the independent monitor will be paid by the corporation allowing DOJ to focus expenditure on investigations, hiring prosecutors, acquiring tech tools, and training.[46] Further, enforcement authorities handling NPAs or DPAs are prosecutors which may have not all the expertise and experience required to improve corporate compliance requirements.

Within the U.S. monitorship is required by authorities just in some negotiated agreements and the term independent corporate monitor means he is not a corporation employee, neither a public official, also is not an agent from the government or the corporation, even being paid at corporation's expense.[47]

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[42] According to the FCPA Clearinghouse, a joint initiative from the Stanford Law School and the law firm Sullivan & Cromwell LLP, which operates as a database, a repository of original source documents, and a supplier of analytics, providing detailed information relating to the enforcement of the FCPA (accessed on April 13, 2020, at 2:21 P.M.), http://fcpa.stanford.edu/statistics-analytics.html?tab=6.

[43] Ibid.

[44] The top 40 FCPA-related cases totaling USD 17 billion were resolved within the last 12 years (accessed on April 16, 2020 at 8:25 P.M.), https://fcpablog.com/2020/03/06/the-fcpa-top-40-surges-past-17-billion/.

[45] Veronica Root Martinez, *Modern-Day Monitorships* (March 20, 2015). 33 Yale Journal on Regulation 109-164 (2016); Notre Dame Legal Studies Paper No. 1505.

[46] *Id.* at 39, The average monthly cost for an FCPA-related investigation is USD 1,855,032.

[47] The DOJ issued a document to guide the selection and use of monitors in deferred prosecution agreements and non-prosecution agreements with corporations; See generally Memorandum from Craig S. Morford, Acting Deputy Attorney General, Heads of Department Components United

In Brazil, the Office of the Comptroller General, differently from the U.S. model is required to perform monitorship in all resolutions, involving grand corruption or not. There is a specific clause regarding government monitorship in every settlement agreement describing the role of CGU and corporation's obligations. So, the monitorship is executed by the same government officials that evaluated the effectiveness of the compliance program over negotiations.[48]

Another aspect, enforcement authorities in the U.S. require retention of an independent monitor just in some cases, depending on the sanction imposed and how mature a compliance program is while "considering potential benefits a monitor will have for the corporation and the public, the cost and impact of the monitor on the operations of corporations."[49]

On the other side, in Brazil, all negotiated agreements have a government monitorship which lasts for at least three years.[50] In most cases, monitorship lasts for several years since corporations faced financial problems and asked for longer payment periods to pay monetary sanctions.[51] Further, in exchange for accepting the request, CGU will be allowed to monitor the corporation for the whole period.

Chapter Three: Odebrecht case

Odebrecht is a Brazilian conglomerate operating in several sectors such as infrastructure, oil and gas, energy, chemicals, engineering, and real estate in more than

States Attorneys (March 7, 2008), https://www.justice.gov/sites/default/files/dag/legacy/2008/03/20/morford-useofmonitorsmemo-03072008.pdf.

[48] *Id.* at 35.

[49] *Id.* at. 44.

[50] All settlement agreements reached under the CCA are publicly available and have specific clauses providing monitorship requirements and obligations. For more information see https://www.gov.br/cgu/pt-br/assuntos/responsabilizacao-de-empresas/lei-anticorrupcao/acordo-leniencia.

[51] *Id. See also*, in at least 8 of a total 11 settlement agreements reached by CGU the monitorship will last for more than 10 years

20 countries. During 2014 investigations related to the Car Wash case found evidence that Odebrecht, among other corporations, paid millions of dollars to public officials and politicians to obtain contracts with Petrobras. The scheme involved an impressive amount of approximately USD 788 million in bribes to public officials in several countries and was so complex that the corporation created a specific area called Division of Structured Operations to manage and operate unrecorded funds utilizing two computer systems to pay bribes via black market operators and small banks located in countries with strict bank secrecy laws.

In June 2015 the Car Wash case within its 14th phase, called *Erga Omnes*, arrested Odebrecht CEO Marcelo Odebrecht and in July 2015 indicted for money laundering, active and passive bribery, and involvement in a criminal organization, being sentenced to 19 years in prison in March 2016. [52] Besides, Odebrecht's behavior was also under investigation by DOJ and SEC. In December 2016 a plea agreement was settled with the U.S. and in July 2018 a leniency agreement with CGU was reached.[53]

3.1. Resolution and Monitorship in the U.S.

According to the plea agreement[54] with DOJ the following factors were considered at the time of negotiations. First, the corporation did not voluntarily disclose information regarding wrongdoing. Second, even considering the seriousness of the offenses, Odebrecht received full credit for cooperation with the investigations. Third, prosecutors credited remedial measures are taken, such as terminating employment contracts with 51 individuals for misconduct; 26 individuals received suspensions,

[52] Marcelo Odebrecht is a grandson of Odebrecht's founder Norberto Odebrecht and was one of the most powerful businessmen in Brazil at the time. The 14th Phase of Car Wash case called *Erga Omnes*, which means in Latin "towards all" or "towards everyone" was a clear signal that no one was above the law.

[53] Leniency Agreement with CGU (accessed on April 17, 2020 at 4:21 P.M.), https://www.gov.br/cgu/pt-br/assuntos/responsabilizacao-de-empresas/lei-anticorrupcao/acordo-leniencia/acordos-firmados/odebrecht.pdf.

[54], U.S. v. Odebrecht S.A., Cr. No. 16-643 (RJD), December 21, 2016.

monetary sanctions, and demotion to non-managerial roles; creation of Chief Compliance Officer position reporting directly to the Audit Committee of the Board of Directors; and, to reduce risk of misconduct, agreed to have an independent compliance monitor since has not yet fully implemented or tested a compliance program.

Due to that, Odebrecht received a 25 percent reduction of the bottom to the applicable U.S. Sentencing Guidelines fine range, reaching an amount of USD 4,5 billion.[55]

Odebrecht conceded to retain an independent monitor for a 3-year term and appointed three candidates with experience on FCPA and other anti-corruption laws, design of corporate compliance policies, and independency to ensure impartial performance, to be chosen by the DOJ within 60 days of a plea agreement.

In sum, the compliance requirements regarding compliance were: a continuous review of its existing internal controls, policies, and procedures, which includes a high-level commitment by its directors and senior management, development of clear written policies and procedures against violations of the FCPA and foreign anti-corruption regulations, periodic risk assessments, training and guidance, internal reporting and investigation, enforcement and discipline, third party relationships, mergers and acquisitions, monitoring and testing, and proper oversight and independence assigning implementation and oversight responsibility to senior executives, that have authority to report directly to the Board of Directors.

The independent monitor role is to evaluate if compliance terms above were in place or being implemented, and its effectiveness, through evaluations of features such as accounting controls, record-keeping, financial reports, and management commitment

[55] *Id.* at 17, Odebrecht represented for a fine reduction due to its inability to pay the full criminal penalty and agreed to pay USD 2,6 billion.

to agreed terms. Hence, he must have access to documents, files, employees, and all resources considered necessary to perform its duties.

However, some concerns shall be pointed out. First, the evaluation of the compliance program was done by the DOJ, including presentations, material, evidence, document analysis, and personal meetings. Once an enforcement authority is evaluating the program several questions and doubts arise and there are opportunities for clarification and adjustments. Also, during negotiations, there is a natural but fruitful tension from both sides. The enforcement authorities' skepticism on the measures taken by Odebrecht to deter corruption, which in this case was led by C-Suite personnel and, on the other side, the corporation's efforts to provide information and convince authorities on its efforts to reach rehabilitation. So, once an independent monitor is retained after the resolution there is an important timing loss and even though whole material gathered is available to the monitor will take a long time to understand, in which level the compliance program in place is reliable.

Second, the 3-name list was chosen by Odebrecht what seems at least strange. Certainly, names picked tend to be of recognized professionals, but, on the other side, surely, they were contacted previously to learn about the possible task and challenges and, not surprisingly, agreed to be on the list sent to enforcement authorities.

Additionally, even not its agent, the monitor is being paid by Odebrecht. The original monitorship term was supposed to expire last February but the company had failed to implement it and did not honor its financial obligations. The monitorship term was postponed for 9 months but uncertainty remains on how robust the compliance program is after 3 years of resolution.[56]

[56] Wall Street Journal news about issues regarding Odebrecht plea agreement and monitorship: Brazil's Odebrecht Agrees to Extend Monitorship for Another Nine Months (accessed on April 17, 2020 at 5:19 P.M.), https://www.wsj.com/articles/brazils-odebrecht-agrees-to-extend-monitorship-for-another-nine-months-11580859505.

3.2. Resolution and Monitorship in Brazil

The CGU evaluation team after analyzing Odebrecht's compliance program recommended several improvements[57] based on the parameters provided upon Federal Decree No. 8,420/15 and required a presentation of an action plan within 90 days after execution of the agreement with a following 60 days to CGU to analyze, determine changes, and additional clarification.

Since Odebrecht operates in several countries there was a concern regarding adherence to international standards and CGU required the company to reach not only compliance levels established by the CCA but also accepted internationally and required Odebrecht to obtain ISO 37001 certification in a time limit of 3 years after the settlement agreement.[58]

The company agrees to pay an amount of USD 700[59] million dollars and under clause 10 of the leniency agreement CGU will perform monitorship of the compliance program for all resolution period, which in this case will last for 22 years due to financial issues.

The monitorship includes reports analysis, oversight, personal inspections, interviews with employees, submission of perception tests, other necessary actions, and all travel costs incurred by CGU officials regarding monitoring will be at Odebrecht's expense. Moreover, Odebrecth costs with monitorship in Brazil tend to be significantly lower than those related to the U.S. and, at least in theory, will not be affected by its financial concerns.

[57] Detailed recommendations are under Annex VI and are not publicly available.
[58] The International Organization for Standardization (ISO) is an independent, non-governmental international organization that develops market relevant International Standards, and the ISO 37001 is the first international anti-bribery management system standard designed to specifically to help organizations to combat bribery risk (accessed on April 17, 2020 at 7:13 P.M.), https://www.iso.org/iso-37001-anti-bribery-management.html.
[59] The total amount agreed was R$ 2,7 billion reals. The exchange used as per July 18, 2018 is USD 1,00 = R$ 3,84.

3.3. Constraints and Challenges

Comparing the U.S. and Brazil anti-corruption legislation and treatment given to compliance programs and the way how monitorship is handled lead to a conclusion that models used are quite different.

Regarding guidance, the U.S. model privileges soft law guidance as to its main policy. The advantage is that prosecutors have discretion since the beginning of an investigation to settle, to bring charges, and to reach a resolution. Besides, guidance on the evaluation of the effectiveness of corporate compliance programs has some advantages such as the possibility to be updated in a much easier process than a law amendment. But some constraints would favor a FCPA amendment. One of the key aspects to incentivize companies to cooperate with the government effectively is being predictable and stable. So, every change within the administration may present doubts and uncertainty if a new memo or a policy change will be proposed.

About evaluation of compliance programs, guidance is so vast, complex, and detailed that probably the DOJ should hire compliance experts to evaluate compliance programs in its best way. The DOJ Fraud Section is mostly formed by prosecutors, which even though they have some compliance training are not experts in the field. So, there is much discretion on prosecutors while deciding to bring charges or to settle as, in some situations, they have an adjudicatory power that resembles a judge. Thus, one possible solution is to create a specific area within the DOJ responsible to evaluate compliance programs, which shall provide predictability, transparency, and uniformity. By doing so prosecutors tend to focus on investigations issues such as evaluation of evidence, international cooperation, increasing enforcement, and leave this task to other public officials.

Concerning the Brazilian model, it seems that priority was given to predictability and uniformity since both, the CCA and a federal decree provide information concerning what is to be considered an effective compliance program. However, this is far from a panacea since in practice cases tend to present different challenges, such as level of cooperation, evidence provided, the seriousness of the offense, and level of maturity of corporate compliance programs, among others. So, there is no other way than issuing soft law and guidance to help those enforcement authorities in charge of evaluation to better perform their tasks.

Concerning monitorship, the U.S. model has been tested, criticized, and improved over the years. First, the Morford and later the Benczowski memos are in place to provide guidance on what is the role of a monitor and to mitigate chances of privileging former prosecutors[60] and level the playing field within the selection process. Lastly, on April 14 the DOJ published for the first time the list of active monitors, corporations, and the year the monitorship began.[61]

A possible improvement would be the possibility of members of DOJ to act closer to the monitors to ensure credibility. Certainly, those appointed as monitors have a reputation in the compliance market and any mistake or lack of commitment may harm future monitorship assignments. Nevertheless, the cost is high and even though monitors are not a corporation agent there is no doubt a close relationship might emerge, and impartiality tends to be shady. Therefore, if DOJ appoints a prosecutor or a public official that participated in the evaluation process to check regularly the work performed by a monitor,

[60] Critics point out that monitorship has created a lucrative market for former prosecutors and small consulting firms (accessed on March 17, 2020 at 10:08 P.M.), https://globalinvestigationsreview.com/chapter/1179179/monitorships.

[61] There are 13 corporations and 14 independent monitors since the year 2016 (accessed on April 18, 2020 at 11:49 P.M.), https://www.justice.gov/criminal-fraud/strategy-policy-and-training-unit/monitorships?mod=djemRiskCompliance.

including visit the corporation with a mandate to analyze documents and require clarification the chances of recidivism tend to reduce.

Lastly, monitorship by CGU might raise some concerns since it is performed by the same public officials that evaluated the effectiveness of the compliance program. The downside of that is the possibility of being biased instead of having an open mind for rehabilitation. As mentioned before, most of the cases settled to date involved grand corruption, bribery of public officials, politicians, and well-known businessmen, and, thus, sounds difficult to accept that previous business model based on corruption and bribes switched to investments in innovation and competitivity. Thus, a possible negative effect is that government actors are too sensitive and skeptical that a corporation has a real intent to change its corporate culture and stop wrongdoing.

Conclusion

Combating corporate wrongdoing is a complex and challenging mission. Aware of that, government agencies have increased efforts to promote a culture of compliance rewarding corporations that have an effective compliance program in place. But to evaluate its effectiveness is not simple and efforts are being performed all around the globe to find a fair, reliable, and predictable way to accomplish the task.

The U.S. initiated the process and as enforcement increased, more corporations wanted to reach a settlement agreement and compliance requirements evolved. With soft law guidance, the DOJ has impacted a whole compliance industry that flourished in almost all parts of the world, from consulting on the implementation of corporate compliance programs to training on how to become a compliance officer.

Following this path, since 2014 Brazil enacted the CCA and the change in how companies do business has changed significantly. From a personal perspective as a public official at CGU since the enactment of the new legislation and a member of several

settlement agreements, it is possible to perceive how corporations have improved its compliance programs, from cosmetic compliance in the first years to sophisticated programs within the last two years.

The U.S. also pioneered the oversight of corporations using an independent monitor. This model is reasonable as the U.S. market used with the compliance culture for at least twenty years and a compliance industry well developed. So, even though there were critiques regarding the selection process and clear definition of the role, no doubt there are dozens of experienced professionals able to perform the job and meet enforcement authorities' expectations.

In Brazil, there is a different scenario in which, unfortunately, corruption prevails, and the compliance industry is relatively new with few experts on the field. So, there is a need for government oversight and direct monitorship for some years and maybe in a decade, a transition to the U.S. model shall be possible.

All in all, even adopting different models for evaluation of compliance programs and adoption of monitorship, the rationale is the same, government authorities are not able to investigate all wrongdoing and foreign bribery is even more difficult to discover. Thus, a corporation must have a culture of compliance and once wrongdoing happens enforcement authorities will evaluate how prepared a corporation was to prevent, detect and enforce wrongdoing, what was the remediation action adopted and if a resolution is reached and a monitorship is required how the corporation will improve its compliance program to avoid recurrence.