The Brazilian Clean Company Act: a comparison with the U.S. FCPA.

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1. Introduction

In 2013, a large number of Brazilians went to the streets to protest, mostly asking the politicians for a better country (Fernandes, 2013). As a result, some politicians in the three branches of the government announced some measures that they were going to implement. The Federal Congress, then, approved Federal Law 12.846/2013, named as The Anti-Corruption Act in press releases - maybe an attempt to show Brazilians that the Federal Government was sensible to all public protests.

The new act - now usually related as the Clean Company Act - was approved based on an Executive Branch Proposal that was signed by the President in February 2010 (see references, Mensagem n 52, 2010). The proposal was delivered to the President by three governmental ministries in October 2009 with the usual document that explains why the new legislation was necessary and what issues it would address - as seen in document *Exposição de Motivos* EMI N 00011 2009 - CGU/MJ/AGU.

Taking into consideration that document, the main goal of the act-to-be was to bring to the Brazilian framework the liability for legal persons in cases of misconduct against the public administration, especially corruption and fraud in public procurements and contracts. To do so, the new act would bring measures to guarantee the compensation for the damages with the assets of the legal person. The new act also would bring the use of the concept of *responsabilidade objetiva* (strict liability), which means that it would not be necessary to prove the intent or guilt

of the legal person - *dolo ou culpa*[1] - but only the misconduct itself – item 5 of EMI N 00011 2009 - CGU/MJ/AGU.

With the new act, the Brazilian framework has become in accordance with international commitments with United Nations (ONU), Organization of American States (OEA) and Organization for Economic Co-operation and Development (OECD) in fighting corruption - item 7 of EMI. In Item 10 of the document, the drafters explain that the civil and administrative liabilities were chosen instead of penal liability - for this act - because the criminal system in Brazil does not provide good and effective mechanisms to make the legal person liable, and also considering that in several cases, the legal persons are the direct beneficiaries of the fraudulent act.

> *A responsabilização civil, porque é a que melhor se coaduna com os objetivos sancionatórios aplicáveis às pessoas jurídicas, como por exemplo o ressarcimento dos prejuízos econômicos causados ao erário; e o processo administrativo, porque tem-se revelado mais célere e efetivo na repressão de desvios em contratos administrativos e procedimentos licitatórios, demonstrando melhor capacidade de proporcionar respostas rápidas à sociedade.*

So the advantages of this new system would be to allow access to the company assets to provide the compensation for damages and also the effectiveness of the administrative procedures -

[1] *Dolo* and *culpa* are the Portuguese expressions to identify culpability, as in fault or malice.

Brazil has experience of utilizing administrative proceedings as a quicker response in cases of misconduct.

Therefore, the question is: are there sufficient instruments - since the Clean Company Act - in the Brazilian Framework to make the corruption acts less likely to happen? Also, how can the government implement the new legislation to the legal person in a way that the law would be severe enough to deter companies and individuals in engaging corruption? Additionally, how can the government use the framework in order to make the bribes non profitable - with the use of compensations for damages and fines?

2. Corruption

2.1 Corruption acts - some concepts

Considering corruption as *the abuse of public office for private gain* (World Bank concept, retrieved from http://www1.worldbank.org/publicsector/anticorrupt/corruptn/cor02.htm), Brazil and the United States have tried, over the years, to provide their public branches with a legal framework to support the investigation and the penalization of all the individuals involved in the actions of abuse.

Taking that into consideration, some laws and acts were instituted and some were also improved in order to include three different spheres of penalization: the penal, the civil, and the administrative. In those three spheres all the subjects involved in the wrongdoing must be

penalized in at least, but not limited to, one of the three, in order to improve the general role of prevention and repression of the illegal conduct.

The penalties - as topic below will describe - involve loss of liberty, fines, debarment, suspension and also the compensation for damages.

2.2 Bases to the New Act - OECD recommendations

The OECD is an international economic organization founded in 1961. Its main goal is to *stimulate economic progress and world trade* (retrieved from http://en.wikipedia.org/wiki/Organisation_for_Economic_Co-operation_and_Development in 02/15/2015).

> It is a forum of countries describing themselves as committed to democracy and the market economy, providing a platform to compare policy experiences, seeking answers to common problems, identify good practices and coordinate domestic and international policies of its members (retrieved from http://en.wikipedia.org/wiki/Organisation_for_Economic_Co-operation_and_Development in 01/03/2015).

To achieve their goal, the countries involved promote conventions addressing specific issues, like the OECD Anti-Bribery Convention (named as OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions) - signed in 1997 - both US and

Brazil are parties. With this Convention and the OECD Recommendation for Further Combating Bribery of Foreign Public Officials in International Business Transactions, the International Organization provides the member countries *legally binding standards to criminalise bribery of foreign public officials in international business transactions and provides for a host of related measures that make this effective* (Retrieved from http://www.oecd.org/corruption/oecdantibriberyconvention.htm in 01/03/2015).

2.2.1 The elements of the OCED Convention

The approach for implementing the measures to fight international corruption includes some articles that explain how the legislation should be implemented in the countries, as well as the elements of the crime and the type of responsibility and liability that must be used to penalize the subjects. It describes the need to establish liability for active bribery - punish the subject that pays or tries to pay the bribe with the following framework:

a. any person
b. that offer, promise or give
c. any pecuniary or other advantage of any type
d. direct or indirect to
e. a foreign public official - also direct or indirect
f. for this official to act or refrain from acting (official duties)
g. in order to obtain or retain business or other improper advantage
h. in the conduct of international business.

The elements from *a* to *f* are clearly the same elements used in the legislations that criminalize corruption in Brazil. The elements *g* and *h* have a more specific use, as they are relating corruption to international business - as will be discussed in a further chapter, the criminal framework of national corruption in Brazil applies deprivation of liberty even if the bribe - pecuniary or not - is paid without the intention of obtaining or retaining business, requiring only the act or refraining from acting (besides the improper advantage and the other elements).

The OECD standard includes element *a* - any person, legal or not. On that matter, as the standard is related to criminal liability, the Convention - in the Article 3 - includes the note that if criminal responsibility of legal person doesn't apply by the legal framework of the Country, than proportionate and dissuasive non-criminal sanctions must be used, specially monetary sanctions of comparable effect. The act, element b, is the offer, the promise or the giving, that means that there is no need of really consuming the conduct - the giving itself - but only the promise or the offer must be sufficient to be criminalized, and the public officer advantage, *c,* can be pecuniary or not. That characteristic is really important as we can notice from practice that some advantages seem to be not pecuniary, like plane tickets and hotel reservations for vacations. Some say that these advantages can be monetarily measured, but the Convention does not require that, so there is no need for the Countries to discuss if the offer had or had not any pecuniary value. This counterpart - the bribe itself - can be offered/given/promised direct or indirect, *d,* by the businessman or anyone on his behalf to a foreign public official, *e*, also in a direct or indirect way.

The advantage has to be related to the action or inaction (act or failure to act) an official duty - item f - in other words, the payment can be related to the public officer doing something that he wasn't supposed to do - give a license to some company that doesn't have the requirements. Or even to refrain to do something - like refrain from applying the country's legislation in a case that the public official should cancel a contract or any payment. The letter *d* of the 4th item of the Article 1 also explains about the act or failure to act.

> *c) "act or refrain from acting in relation to the performance of official duties" includes any use of the public official's position, whether or not within the official's authorised competence.*

And all those actions - positive or negative - should be related to international business - item g and h. It seems important to highlight that the Convention claims that the countries criminalize bribes to foreign officials the same way they penalize bribes to domestic public servants, in order to assure equivalence among the measures - Preamble and Article 1.

Some other rules are presented in the document, such as the necessity to criminalize complicity, in cases like incitement, aiding and abetting or even authorization of an act of bribery and also the attempt and conspiracy to bribe. All these liabilities should have the same consequences as attempt and conspiracy to bribe public officials of the Party on the Convention.

The Convention also has some articles concerning Mutual Legal Assistance between the parties, extradition framework and rules about the necessity of establishment of Jurisdiction and

Enforcement. Furthermore, the Convention has a specific note that states that neither national economic interest nor potential effect upon relations with another State or identity of legal persons involved shall influence the enforcement - Article 5.

2.2.2 Book-keeping provisions

The Article 8 of the Convention brings some rules on book-keeping and accounting provisions of the framework to be implemented in the Party Countries. The core of the Article is to criminalize the use and existence of off-booking accounts, incorrect book-keeping or falsified documents used to bribe foreign public officials or to hide such bribery.

The provision should bring civil, administrative or criminal penalties sufficient to stimulate the correct use of account registers, a matter that will be addressed in the relevant chapter of US legislation.

2.3 Corruption and Legal Framework - Brazil

2.3.1 Brazilian Criminal Law

In Brazil, the Penal Code - a federal law that is valid in all the national territory - brings the concepts and crimes related to Public Administration, dividing them into Crimes committed by Public Officials and Crimes committed by Private Persons. The first one of the chapters discusses the crime of passive corruption/bribe, which is when the public official takes a bribe.

The second chapter talks about active corruption, which is when someone offers or promises a bribe. For purposes discussion in this paper, the main focus will be on active corruption/bribe - the same focus of the OECD Convention- while there will be a few notes on passive corruption/bribe when necessary.

The Brazilian Penal Code, in the article 333:

> "Oferecer ou prometer vantagem indevida a funcionário público, para determiná-lo a praticar, omitir ou retardar ato de ofício"

Article 333 states that it is a crime to offer or promise an improper advantage to a public official, in order to encourage inappropriate action or discourage official duty action (direct translation). For the Brazilian legislation we have the following elements:

a. any person (taken by the title of the chapter)
b. offer or promise
c. improper advantage
d. to a public official
e. for the official to act, refrain to act or omit - in official duty

Taking aside the essence of the OECD convention - foreign public official and the conduct of international business - we can also notice the lack in the Brazilian Penal Code of the elements:

- direct or indirect bribes

- in order to obtain or retain business or other improper advantages

The first missing element does not bring a relevant difference in the use of legislation since Brazilian Courts tend to analyze the participation, co-participation and use of an intermediary as implicit in the model the criminal use to realize the conduct. However, the second element seems to facilitate application of Brazilian law - there is no need to prove the urge to obtain or retain business or other improper advantage.

So the proof that bribes were offered or promised to a public official - elements *a* and *d* - is enough - which means there is no need to prove the actual payment of the bribe or the improper advantage - item *c*. Note that the Penal Code emphasizes that the advantage must be improper - although the Principles used in Criminal liability also determines that only illicit conduct is subjected to criminal liability - which means that the regular advantage or payment would never be subjected to penal persecution. Under the Brazilian Penal Code, this is still considered a crime even if the public servant's action or inaction is legal. For example, if one promises a police officer some money in order to fine the competitor food truck across the street - even if the fine is warranted and part of the police officer's duty, the offer itself is illegal and subjects the payer to criminal liability.

It is relevant to note the paragraph for the Article 333:

Parágrafo único - A pena é aumentada de um terço, se, em razão da vantagem ou promessa, o funcionário retarda ou omite ato de ofício, ou o pratica infringindo dever funcional.

This provision means that the penalty will increase by one third if the public official postpones or omits the act that he was supposed to do. The increase will also take place if the public official acts in breach of a statutory duty.

For all these related issues, the Penal Code broadly defines what a Public Official is in Article 327. The Penal Code determines that anyone who acts on behalf of Public Administration is equivalent to a Public Official in the eyes of criminal law, even if the person is a temporary public official, a volunteer, a State-owned company worker or an outsourced worker.

2.3.3. Brazilian Civil Law

In Brazil, corruption is a concept usually restricted to criminal law. But in many different cases the act of offering and receiving bribes is described as illicit. For public officials, there are several different legislations from states, cities and some federal laws that prevent the act of receiving illegal advantage on duty. For example, Federal Law 8.112/90, the Federal Public Servants Regimen, Article 117, item IX, prohibits the public official from creating improper advantage acting in detriment of the public interest, either for him or herself or for someone else:

Art. 117. Ao servidor é proibido: (…)

> IX - valer-se do cargo para lograr proveito pessoal ou de outrem, em detrimento da dignidade da função pública;

With respect to the Legal Person, the Federal Law 8.666/93 - General Regimen of Public Procurement – does not conceptualize the act of corruption, but penalizes cases of illicit acts that are practiced by companies or their employees or representatives. It is relevant to note that among the penalties of this Law there is the **debarment** - article 87 item IV. This penalty can be imposed should partial non-execution of the public contract or illicit actions that frustrates the objectives of a public procurement take place - article 88.

Brazil's legal framework also has a provision on civil penalties for cases of severe administrative misconduct - Federal Law 8.429/92. Penalties include the loss of assets or funds, fines, compensation for the damages as well as other non-financial penalties, such as the ban of public procurements and public incentives. These penalties need a judicial procedure to be implemented - article 17 accomplishes this, and the public officials and private individuals involved in the acts are subject to liability. Article 9 describes bribery as a severe administrative act of misconduct:

> Art. 9° Constitui ato de improbidade administrativa importando enriquecimento ilícito auferir qualquer tipo de vantagem patrimonial indevida em razão do exercício de cargo, mandato, função, emprego ou atividade nas entidades mencionadas no art. 1° desta lei, e notadamente:

The article describes illicit enrichment as the act of receiving any kind of advantage related to public duties, and describes some conducts as examples in the items that follow.

Since 2013, the Federal Law 12.486 - considered the Brazilian FCPA - or Clean Company Act - does not clearly define corruption, but instead conceptualizes the framework of civil and administrative responsibility in cases of legally recognized actors acting against national or foreign public administration. It is relevant to note that, in the Brazilian framework on fighting corruption, this is the only strict liability law.

3. Sanctions for Corruption (civil, penal and administrative sanctions)

3.1 General laws and Sanctions in BR for Legal Persons

Although there exists several pieces of legislation that classifies bribes as an act of corruption in the Brazilian Framework, only two laws applies penalties on a Legal Person: Federal Law 8.666/93 - Public Procurement Law, and New Federal Law 12.486/13 - also know as The Brazilian Clean Company Act.

The main penalties for bribery are described in Article 87, Federal Law 8.666/93; they include: a - written warning; b - fine according to the contract or public procurement regimen; and c - debarment. Debarment makes impossible for a Legal Person to make a contract of any kind with the Public Administration. Only the highest public official of the Ministry (or State Secretariat or other authority of the same level) can impose Debarment to a firm - § 3o of the article 87.

The Clean Company Act has the following penalties (to be applied on Administrative Procedures):

- Fines - ranging from 0,1% until 20% of gross annual earnings of the Legal Person (of the latest accounting period, excluding the paid taxes); and
- the publication of the administrative decision — article 6 and items.

The same article in the first item predicts that the fine will never have a lower value than the illicit advantage - when applicable.

There are some federal acts that have penalties for cases of misconducts of Legal Person - like the legislation that is related to the election process and also the Federal Court of Accounts. However, in the first case the penalties are applied by a judicial court and in the second case by a Court of Accounts.

For cases of internal bribes, the penalties of both laws are implemented, which means that a legal person may possibly receive a fine and a debarment.

The Public Procurement Act has some provision about the compensations for the damages caused by the firms, and these compensations are related to the ability to participate with public procurements. In other words, the law links the end of the suspension and debarment periods with, among other elements, the due compensation of damages - article 87, item IV. But then, in this case, the company or firm that suffered the suspension or debarment can request the release

of the penalty only if they prove that they made the compensation for damages. Under Article 80 there is an authorization to the Public Administration to promote the retention of credits that the firm may have until the total amount of the compensation for the damages is paid. So there are two ways of imposing the compensation - the retention itself of the due value, or the condition of proof of compensation in case the firm requires the cancelation of debarment.

Furthermore, the Clean Company Act has a provision that the penalties that may be applied are not going to exclude the obligation of compensation for damages - article 6, item § 3o. Under Article 13 there is the provision of an administrative procedure to promote the whole compensation for the damages. It is relevant to note that the existence of this procedure will not prevent the use of any other penalty or sanction and, should the company or firm not provide the compensation, the credit will be registered as tax debit and subject to administrative and judicial debt enforcement proceedings - article 19, § 4o. When discussing the *Cadastro Nacional de Empresas Punidas - CNEP* (a national registry of Legal Person considered guilty), the law also requires the compensation of the damages as one of the elements necessary for the cancelation of the register of penalties or register of leniency agreements - article 22, § 5o.

Taking that into consideration, the Brazilian Framework has the provisional administrative measures that ensure: a - the compensation for damages; b - the application of a fine and also c - the debarment.

3.1.1 Decree 8420/2015

In 18 March 2015, President Dilma Rousseff signed a normative act of the Clean Company Act - Federal Decree 8420/2015. It brings to a Brazilian framework some detailed procedures for the investigation of legal person in the cases of the Clean Company Act. The main titles are about the disciplinary procedure for liability, the administrative penalties, leniency agreements and compliance.

The chapter of penalties - from articles 15 to 27 - brings the rules of how to calculate the fines that the companies will support, and also some procedures about the publication of the final decision - in order to make the wrongdoing companies known for illicit acting. The chapter also explains how the agencies will act in order to fulfill the penalties and compensation for damage - both with administrative and judicial procedures.

The general model for fines will be calculated based on gross annual earnings of the legal person (after taxes). There are some causes that add percentages to the fine and causes that reduce percentages. As causes that add percentage - article 17 - there are: a) the continuity of the misconduct; b) the tolerance or knowledge of the board of the legal person of the misconduct; c) the interruption of public service or public procurements; d) the index of profit and solvency of the legal person; e) the reoccurrence; and f) the total amount of the public procurement. It is relevant to note that the element *d* is not related to the fraud or wrongdoing itself, but the simple fact that the legal person has a good financial health is sufficient to make an increase in the percentage of the fine. Also in the increase of the element *f*, there is no need for the legal person to actually obtain the public procurement - there will be increase even if the legal person tries to practice the fraud to obtain the public procurement. The maximum percentages of this article will

end up in 20% of the gross annual earnings after taxes. The causes that are more relevant to the percentage are the reoccurrence and the size of the procurements - elements *e* and *f* - 5% each,

As causes that reduce the percentage of the fine - article 18 - there are: a) the non consummation or the failure to complete the fraud; b) the proof of the compensation for damage; c) the collaboration with the investigations; d) the unsolicited disclosure before the beginning of the administrative procedure; and e) the existence of a compliance program. The elements from *b* to *d* are related to the actions of the legal person after the fraud itself. So they really work as incentives if the fraud took place. The element *a* - as the way it is described - can be related to the legal person or not, for example, there can be a case of no consumption related to externalities. And the element *e* has the important role to show the legal person that if they take measures before any knowledge of misconduct, they will have a lower fine. It may be relevant to note that the collaboration of the legal person, *c*, can function as a cause of reduction even if there is no leniency agreement. So the legal person has an incentive to collaborate even before the negotiations of the leniency agreement - reduction of maximum 1.5 on the percentage calculation of the fine. The unsolicited disclosure, *d*, reduces the percentage in 2 points and the existence of a compliance program, *e*, reduces in 4 points. The maximum amount of reduction will be in 10 points in the percentage of calculation.

The smaller percentage fixed for the fine will be 10% of the gross annual gain and the higher value, 20% — Article 20, paragraph 1, and article 19. The decree also brings some other ways of calculating the fine - in the case of impossibility of the above - article 22. Also, the provisions of reduction of fine in cases of leniency agreement - article 23.

It’s relevant to note that the unsolicited disclosure - article 18 letter d - reduces the penalty fine in 2 points — or 20% of total reduction of the fine. But the existence of a compliance program reduces it in 40% of total reduction - 4 points of reduction. So there is some incentive for collaboration and disclosure, but not as big as for the existence of compliance in the legal person.

3.2 US Foreign Corrupt Practices Act - FCPA

The Foreign Corrupt Practices Act (FCPA) is a United States federal law with the main goal to *deter improper inducements to foreign officials in connection with business activities* (Deming, 2005, p.5). To do so the act has two main mechanisms: the anti-bribery provisions and the accounting provisions. The first ones are proscriptive and the second, prescriptive.

3.2.1 Anti-Bribery Provisions

The anti-bribery provisions basically consider unlawful:

a. the offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value to

b. any foreign official

c. for purposes of:

c.1. influencing any act or decision of such foreign official in his official capacity,

c.2. inducing such foreign official to do or omit to do any act in violation of the lawful duty of such official, or

c.3. securing any improper advantage; or

c.4. inducing such foreign official to use his influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality,

d. in order to assist such issuer in obtaining or retaining business for or with, or directing business to, any person;

The FCPA also considers under the element *b - the following*:

b.1. any foreign political party or official thereof or any candidate for foreign political office, for the purposes involving such party, official or candidate

b.2. any person, while knowing that all or a portion of such money or thing of value will be offered, given, or promised, directly or indirectly, to any foreign official, to any foreign political party or official thereof, or to any candidate for foreign political office, for purposes involving a foreign official.

In sum, the anti-bribery provisions of the FCPA *prohibit any promise, offer, or payment of anything of value if the offeror "knows" that any portion will be offered, given, or promised to a foreign official, foreign political party, or candidate for the purpose of influencing a governmental decision* (Deming, 2005, p.7).

In order to implement the OECD Convention, the FCPA was expanded in 1998 to include the nationality principle:

> For the nationality principle to apply, there is no requirement that there be any territorial connection to the United States. Jurisdiction is based solely on the status of an individual as a U.S. national or whether an entity was established under the laws of the United States or has its principal place of business in the United States. (Deming, 2005, p. 7-8)

The FCPA's anti-bribery provisions apply *broadly to three categories of persons and entities: (1) "issuers" and their officers, directors, employees, agents, and shareholders; (2) "domestic concerns" and their officers, directors, employees, agents, and shareholders; and (3) certain persons and entities, other than issuers and domestic concerns, acting while in the territory of the United States* (DOJ and SEC Guide, 2012, p.10).

An issuer under the FCPA is a company that has *a class of securities registered under Section 12 of the Exchange Act or is required to file periodic and other reports with SEC under Section 15(d) of the Exchange Act* (DOJ and SEC Guide, 2012, p. 11). It means that a company does not need to be a U.S. company to be considered an issuer. It only needs to have a class of securities listed on a national securities exchange in the U.S. Additionally, it needs to have a class of securities quoted in the over-the-counter market in the United States and required to file periodic reports with SEC. Also the officers, directors, employees, agents or stockholders acting on behalf of an issuer - even the foreign nationals, and any co-conspirators, can be prosecuted under the anti-bribery provisions (DOJ and SEC Guide, 2012, p.11).

A domestic concern, in accordance with the 15 U.S.C. § 78dd-2(h)(1), is any individual who is a citizen, national, or resident of the United States; and any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship which has its principal place of business in the United States. Furthermore, a domestic concern also applies to those who are organized under the laws of a state of the United States or a territory, possession, or commonwealth of the United States. Also, officers, directors, employees, agents, or stockholders acting on behalf of a domestic concern, including foreign nationals or companies, are also covered by the domestic concern definition (§ 78dd-2(a)).

Since 1998, the FCPA also applies to foreign persons and foreign non-issuer entities that, either directly or through an agent, engage in any act in furtherance of a corrupt payment (or an offer, promise, or authorization to pay) while in the territory of the United States. Also, officers, directors, employees, agents, or stockholders acting on behalf of such persons or entities may be subject to the FCPA's anti-bribery prohibitions (15 U.S.C. § 78dd-3(a)).

Taking into consideration these definitions, the prohibitions apply *to U.S. nationals, U.S. businesses, publicly held companies, many foreign companies, and, in certain circumstances, almost anyone* (Deming, 2005, p.5).

Although the FCPA has some different requirements and specifications on the elements, one can conclude that, basically there are the same core elements for corruption present in OECD

Convention and Brazilian new framework - someone offering or paying something to a foreign official in order to secure an illegal advantage related to business.

Brazilian Clean Company Act has a broader spectrum of actions, because it’s not tied specifically to foreign officials or foreign business, but includes national business and Brazilian officials. Nevertheless, for the questions addressed previously - whether the Brazilian framework can make corruption less likely to happen and how can the government use the framework to make the bribes non profitable? - The comparison with FCPA penalties is sufficient, especially given the same type of misconduct is described - bribes to obtain or retain business.

3.2.2 The Accounting and Record-Keeping Provisions

The necessity of the accounting and record-keeping provisions became clear since the Watergate scandal and they also related to deter the action of bribery but addressing the issue in a different way. Their main idea is to force legal persons - and some of their director and employees - to maintain accurate records of transactions, disposition of assets, and a system of internal accounting control (Deming, 2005, p.21). In case of no completion of these obligations, severe penalties shall take place. Doing so, there were supposed to be registers of any money or asset used in bribes or fraud.

The provisions address domestic and foreign operations of publicly held companies and create *an affirmative duty for issuers and officers, directors, employees and agents or stockholders acting on behalf of the issuer* (Deming p. 5 and p.22). The publicly held companies can be U.S. nationals or foreign entities that *are required under the Exchange Act to register pursuant to §*

12 or to file reports pursuant to § 15(d).4 8 Issuers can also include foreign entities with American Depository Receipts ("ADRs") listed on a national exchange (Deming 2006, p. 473). There are some limitations; they are not applicable to subsidiaries if the shareholder of the US holder is equal or lower than 50 percent. Therefore, they affect worldwide operations of all issuers subjected to the FCPA provisions and also *domestic practicers unrelated to the making of improper inducements in foreign settings* (Deming, 2005, p.21). The scope of the record-keeping provisions, then, is narrower than the anti-bribery provisions, as it involves only issuers of securities (Deming, 2006, p. 472).

The record-keeping provisions § 78m(b)(2)(A) states that the issuers should:

> *(A) make and keep books, records, and accounts, which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the issuer; and*

And about the system of internal controls - § 78m(b)(2)(B), the issuers are required to: *devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances that (i) transactions are executed in accordance with management's general or specific authorization; (ii) transactions are recorded as necessary (I) to permit preparation of financial statements in conformity with generally accepted accounting principles or any other criteria applicable to such statements, and (II) to maintain accountability for assets; (iii) access to assets is permitted only in accordance with management's general or specific authorization; and (iv) the recorded accountability for assets is compared with the existing assets at reasonable intervals and appropriate action is taken with respect to any differences.*

The records should be in accordance to accepted accounting standards and *prevent off-the-book transactions such as kickbacks and bribes* (Deming, 2005, p. 22). They should have *reasonable assurances and reasonable detail* in such level of *detail and degree of assurance as would satisfy prudent officials in the conduct of their own affairs* (§ 78m(b)(7)).

As Deming points out (2005, p.42): *proving a violation of the accounting and record-keeping provisions is more straightforward and more likely to succeed than proving a violation of the anti-bribery provisions.* So it seems to be a very clever mechanism because the wrongdoer can be liable even if the bribe is not proven, but only by the fact of using confusing and imprecise accounting registers in order to disguise the bribes and the fraud. And as the provisions apply to all payments, even relatively low amounts of money not properly recorded can generate severe consequences (2005, p.22) - criminal and civil liability, as discussed in the following chapter.

It is very important to notice that the accounting and record-keeping provisions and the anti-bribery provisions complement each other (Deming, 2006, p.468). The record-keeping provisions were implemented to prevent the practices that came to light in the era of the Watergate scandal - the very accounting and record-keeping practices that made it possible to cover bribes in the legal person's books (Deming, 2006, p.468-469). Also for a civil violation of the book-keeping provisions, no proof of intent is required - the rule is strict liability:

> *Whether the issuer had knowledge of a defect in the system of controls or improperly recorded transactions or other financial activity is irrelevant in the civil enforcement*

context with respect to the accounting and record-keeping provisions. (Deming, 2005, p. 27)

But for the anti-bribery provisions, proof of intent is required even for a civil violation - rule of culpability. This differentiation signals to the companies the importance of compliance with the rules about the books and records, and also delivers to the SEC the mechanisms to enforce the fight against bribes in a more severe way.

3.2.3. The Enforcement and Penalties

The enforcement of FCPA is divided between Department of Justice (DOJ) and Security Exchange Commission (SEC). The first one is responsible for the investigation and prosecution of criminal charges against natural or legal person (Deming, 2005, p. 41). And the SEC has a civil enforcement authority *limited to issuers as well as their officers, directors, employees, and agents and stockholders acting on their behalf.* The DOJ also has all the other cases of civil enforcement of the FCPA, including *taking civil enforcement action against domestic concerns as well as anyone other than an issuer who may undertake action in furtherance of an improper inducement, or who may cause action to be undertaken by an agent, within the territory of the United States* (Deming, 2005, p. 41).

The penalties are heavy: for the anti-bribery provisions - for criminal violations, an entity can be assessed a fine up to $2 million per violation. A natural person can face up to 5 years of imprison or $100,000 in fine, or both, per violation (§ 78dd-2 (g)). For the accounting and record-keeping

provisions, for criminal violations, an individual can face up to 20 years of prison or a fine of $5 million, or both, per violation — § 78ff (a). And entities, for the last case, can be fine up to $25 million.

And fines also can be greater under the alternative sentencing provisions - 18 USC § 3571 (d):

> (d) Alternative fine based on gain or loss. If any person derives pecuniary gain from the offense, or if the offense results in pecuniary loss to a person other than the defendant, the defendant may be fined not more than the greater of twice the gross gain or twice the gross loss, unless imposition of a fine under this subsection would unduly complicate or prolong the sentencing process.

It is relevant to understand that this fine is not the damage restitution itself, and in accordance to 18 USC § 3572 (b), this fine should not impair the ability of the defendant to make restitution, in case of the existence of obligation to make restitution to a victim other than the United States.

Some clarifications of the relevance of good sentencing and the principals and aims of the activity can be found in the Chapter Eight (Sentencing Guidelines for the United States Courts. 18 USCS Appendix) - Sentencing of Organizations. According to the document, the sanction will provide just punishment and incentives for organizations to maintain internal mechanisms for preventing, detecting and reporting criminal conduct. And the principles that should be considered are to remedy any harm; and, if crime, divest the organization of the assets. The final

range of the conduct must also consider the seriousness of the offense and the culpability of the organization - and the seriousness is linked to the large of the pecuniary gain or loss.

Also the listed causes of increase of the penalty are:

(i) the involvement in or tolerance of criminal activity;
(ii) the prior history of the organization;
(iii) the violation of an order; and
(iv) the obstruction of justice.

And there are causes that mitigate the penalty:

(i) the existence of an effective compliance and ethics program; and
(ii) self-reporting, cooperation, or acceptance of responsibility.

The use of probation is recommended in order to ensure that another sanction will be fully implemented or ensure the implementation of steps that will reduce the likelihood of future criminal conduct.

Another measure that take place in cases of anti-bribe provisions of FCPA is the already mentioned use by the SEC of disgorgement. The disgorgement is an equitable remedy used to deprive wrongdoers of their ill-gotten gains and deter violations of federal securities law (Bohn, M. A. and Kalb, Sasha, 2010). It is a way that SEC can use to recover the approximate amount

earned from the alleged illicit activities, including reasonable interest, as part of administrative or cease and desist proceedings, meaning a way of preventing unjust enrichment.

In order to calculate, it’s necessary to identify the illegal profits – the SEC tries to identify *reasonable approximation of the profits which are causally connected to the violation* (Bohn, M. A. and Kalb, Sasha, 2010). The defense can try to show that the illicit profit was different than that. There are some criticisms about the difficulties of establishing a measure of predictability, including the alleged lack of detail accompanying SEC disgorgement orders (Bohn, M. A. and Kalb, Sasha, 2010).

Taking into consideration the anti-bribery penalties to legal person, there are fines - that can be calculated at levels like twice the gross gain or loss, and also the necessity of compensation for the damage.

4. Conclusion

Taking into consideration the comparison of the Brazilian framework, the OECD Convention and the FCPA, the Brazilian framework is mostly in accordance with the international convention and, in that concern, broad enough to make reasonable the idea of making frauds and bribes not profitable. The range of procedures that can take place, both administrative and judicial is well built and with adequate measures — fines and damage compensation. The Decree 8420/2015 - published in 19, March of 2015, adds to the framework a very complete way of calculating the fines in administrative procedures. It is a useful provision because the more the legal person and others can understand how stiff the penalties would be in cases of bribes and fraud, the more reliable the framework would become in its main goal.

Although there is no provision to make the legal person criminally responsible for misconducts, there are civil fines that can be settled - a provision also in accordance with the OECD Convention, but different from the FCPA provisions - that recognize the possibility of criminal liability with fines.

Taking out of the discussion the particularities and specificities of each country, the FCPA has one relevant provisions that is not found in the Brazilian framework - the record and book-keeping provisions.

The book-keeping FCPA provisions appear to be very relevant to the US framework. As the penalties are stiffer than in the case of the anti-bribery provisions — item 3.2.3 of this paper - it

is likely to happen that the entities and its directors, officers, or specialists such as lawyers, accountants, auditors etc. - will try to forge registries to hide bribes and illegal expenses. The idea is that they would prefer to make a voluntary disclosure of the situation — and adopt the necessary procedures — like leniency agreements.

The OECD Convention also addresses the issue of accounting. According to Article 8, the Party shall take measures regarding maintenance of books and records, financial statement disclosures, and accounting and auditing standards. The existence of off-the-books accounts, the making of off-the-books or inadequately identified transactions, and the use of false documents, for the purpose of bribing foreign public officials or of hiding such bribery also shall be prohibit. The item 2 of the article also states that the countries should provide effective, proportionate and dissuasive civil, administrative or criminal penalties for the companies, in order to prevent the described actions.

The Brazilian framework encourages the companies to make voluntary disclosure of illicit activities — it is an item to minimize the percentage of the fine — but it represents only a reduction of 2 points of the total of 20 points - or, potentially, in a case of the maximum fine, a reduction of 10%. In the US framework, the fine in the case of record-keeping is up to $25 million per violation, and in an anti-bribery case, up to $2 million per violation. It is a larger incentive to keep track of all the registers, especially because the book-keeping provisions are a case of strict liability for a civil violation. In the case of discovering bribery, it is better to disclose the activity to the authorities.

Thus, the Brazilian Clean Company Act and its decree greatly improved the Brazilian framework in fighting bribery - especially foreign official bribery. The new legislation is in accordance to international standards, and until now, has some transparent methodology of fine calculation - although new and not yet utilized. In what it concerns to legal person, it is a law of strict liability. However, the US framework has proven to have an efficient provision for record-keeping, with really harsh penalties, that simplify the investigation and function as a stimulus to the entities to not perform wrongdoings or, at least, spontaneously disclose them.

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