The New Money Laundering Law in Brazil: Understanding Criminal Compliance Programs

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Abstract This chapter proposes an ambitious structure and will briefly introduce my observations on both sides of the New Money Laundering Law in Brazil, with theoretical references as well as an analysis of its practical consequences. Firstly, inspired by Klaus Tiedemann's point of view, some comments about the "culture of corporate criminal liability" (*Kultur der Unternehmensstrafbarkeit*) (Tiedemann, Zur Kultur der Unternehmensstrafbarkeit. In: Quelos N (eds) Droit penal et diversités culturelles – Festschrift für José Hurtado Pozo, Schulthess, Basel, pp 495ff., 2012a) will set the stage. It will be followed by an analysis of the international demand for an efficient alignment—in the field of organizational culture—alignment here being understood as international pressure for cooperation in criminal matters [A good example could be the case of Chile and the autonomous corporate criminal liability (*Ley 20.393/2009*), published in the same period that Chile achieved membership of the Organisation for Economic Cooperation and Development (OECD).]. Then, conclusions will be drawn by presenting the relationship between this organizational culture and the so-called "culture of corporate compliance", and how it influenced the Brazilian model of preventing economic crimes. These important topics outline an analysis of the Brazilian anti-money laundering system—in a descriptive way—from the legislative evolution over the New Money Laundering Law in Brazil to the recent jurisprudence of the Brazilian Supreme Court in the so-called Mensalão's Case, AP 470, which concerns a scandal involving members of the parliament during Lula da Silva's Government. Last but not least, the most important problems will be highlighted, including the moral dilemmas that belong to the "incestuous" relationship between corruption and money laundering (Kyriakos-Saad et al., Revue Internationale de Droit Pénal (AIDP) 83:161ff., 2012). Instead of a conclusion in a proper sense, you may then find some sceptical concerns about the future of corporate criminal compliance in Brazil.

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1 The Culture of Corporate Criminal Liability (Klaus Tiedemann)

Klaus Tiedemann analyses the culture of corporate liability as a reception of international regulatory standards: This reception establishes the normative function of integration (*Integrationsfunktion*) into criminal law and allows for arrangements and combinations with other public and private norms.[1] With regard to this, the *droit administratif penal* or *droit administratif repressif* appears as a trend not only in Europe but also in Latin America. Critically, and here with a footnote on Joachim Vogel, Tiedemann mentions the "legal transplantations" that lead us to question the way criminal law intends to adopt social transformations.[2] Furthermore, the way it causes social transformations is affected by these penal norms, as they may intervene in the economic development. For example, they can cause mechanisms that only protect the individuals and the community against the economic power of corporations. In the same manner, they are supposed to be capable to prevent corruption scandals.

We could easily describe this international context referring to the transformations induced by the economic society and inspired by an increasingly high-tech specialization, to the proliferation of risks inherent to large corporate transactions and to the enormous circulation of capital at a global level.[3] After the 1990s, the deregulation of the market imperfections leaded to a scenario of uncertainty: It is far from an ideal fair play setting in order to (1) attract stakeholders or (2) to provide shareholders with strategic information. Thereby, this setting (3) insufficiently protects their investments and thus (4) affects the corporate reputation.

So, in this case, the classical reasoning of criminal law is continuously substituted by new expectations based on corporate economic behaviour. In a simplified modus, economic criminal law has taken on this new *agenda*, giving up the previous strict legality and individualization of punishment model and replacing it with a model of corporate criminal liability which appeals to the compliance culture. This constitutes an unprecedented legal challenge which requires being re-thought, at least.

The *US sentencing guidelines*' influence[4] on the corporate compliance and on the drafting of values, objectives and incentives with the ultimate aim to comply with new standards of risk management, good governance and ethics in business has been affirmed elsewhere.[5] The problem outlined above becomes even more complex if we think of new behaviour standards being adopted, which are oriented

[1] Vogel (2007), pp. 407ff.; Eicker (2010), pp. 168ff.; about the "*Divisionalisierung des Rechts*" in criminal compliance matters, Kuhlen (2013), p. 13; an overview on different types of sanctions, Engelhardt (2012), pp. 563ff.

[2] Tiedemann (2012a), p. 497.

[3] Tiedemann (2012a), pp. 500ff.

[4] Tiedemann (2012a), p. 501.

[5] Sieber (2008), pp. 458, 476ff.

by the prescription to "comply or disclose"—or if we think of new ways of attributing liability, that require a more elaborated organizational culture to comply with duties of loyalty, sincerity and overall due diligence.

In such a manner and to such a degree, the efficacy of market regulation and the role of criminal norms are now gambled with. Is it possible to regulate markets by putting into practice criminal norms? What kind of regulatory impact do they have? Are the increased transactional costs associated with such complex criminal procedures worth their price?

In truth, as mentioned already before, it offers some evidence of an ambiguous function when corporate liability is discussed in the context of criminal law—on the one hand, corporate criminal liability serving to protect individuals and the community against the economic power of corporations, and, on the other hand, corporate criminal liability creating a market with distinct features (*Identität*) enforced by international regulatory standards. Both aspects lead us to a wide discussion between guaranteeing security in commercial relations versus the restriction of free action in the market. The paradox consists in the fact that restricting economic freedom of some economic agents could actually amplify commercial security in such a way that a restriction of one's freedom could generate the amplification of freedom for other economic agents.[6]

2 The Brazilian Anti-Money Laundering System

In order to understand money laundering—an emerging form of crime—and to evaluate both the legal issues and the possible impacts of the new law in Brazil, it is essential to elaborate first on the background on which this new regulatory standard evolved. The Brazilian anti-money laundering system went very clearly through the so called "three generations" of money laundering laws. This refers to the "connecting offences" (*Verknüpfungstat*) and to how each of the legislatives measures brought Brazilian law to a regulatory standard that meets the dynamic demands of a globalized economy.

Just at the beginning, in the "first generation", the protected interests were focused on the combat on drug trafficking, making reference (Decree 154/1991) to the "UN-Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances", the Vienna Convention of 1998.[7]

Later, entering the "second generation", Brazil enlarged the catalogue—the *numerous clausus*—of connecting offences (besides drugs traffic, terrorism and its financing, arms trafficking, extortion made by sequestration, offences against the

[6] Saad-Diniz (2013b), pp. 151ff.; Saad-Diniz (2013a), pp. 9f.

[7] It is also remarkable that, in the same year, 1998, Brazil adopted the corporate criminal liability (Law n. 9.613/1998), but strictly limited to environmental crimes (and it still remains the only legal variety of corporate criminal liability in Brazil).

national and international public administration, against the national financial system, and committed by organized crime—art. 1º, Law 9.613/98) and created its Financial Intelligence Unit (FIU), the COAF (Council for Controlling the Economic Activities—art. 14) by Law 9.613/98. Since 1999, efforts on international alignment of the Brazilian anti-money laundering system lead to the adoption of special branches of "mutual cooperation", such as proposed by the Basel Committee, the "Egmont Group", and also the policy-making body GAFI (*Group d'Action Financière*).[8]

Beyond the simple re-acquisition of stolen values, the purpose was not only to recognize the origin and layers of activity, but also to recognize how and in which social context money laundering was integrated, and how it interacts with the formal market.[9] These structural modifications came not without lots of conceptual and procedural problems: For example, what does terrorism and its financing mean to the Brazilian reality? These issues suffer from a lack of regulation, not mentioning that organized crime is still an issue to debate in general. By the way, the FIU created in 1998 now comes back on the table, as it lacks both institutional implementation and it failed to introduce a sufficient monitoring system.

Looking for much more wiggle-room for modification and trying to catch up with the international alignment in terms of cooperation, the New Money Laundering Law in Brazil was enacted in 2012 (Law n. 12.683/2012) and includes two most relevant modifications: on the one hand, the *numerous clausus* of connecting offences was abolished, and, on the other hand, the new law stimulated the substantiation of compliance duties as well as improved the operation of the FIU. With this new law, an improvement in the prevention of economic crimes was naturally expected. The last GAFI-Report 2012 on Brazil is of course laudatory, pointing out as deficiency only the lack of a specific regulation about terrorism and its financing.

However, this report cannot shield some internal contradictions. Just to illustrate, according to this new law, money-laundering related to stealing and robbing are as punishable as related to trafficking in drugs or in the context of organized crime. With the repealing of the old catalogue, the application of the anti-money laundering law was extended to some controversial offences of an administrative level like tax evasion. What would happen to an accusation of money laundering if an administrative procedure does not reach a relevant conclusion in a criminal sense? If we follow this path, we accept an autonomous offence, but also accept a mismatch and a point of failure.

The other modifications mentioned above are centred in the position of a compliance officer. Art. 10, III and IV of the new law recommend the adoption of policies to prevent money-laundering, and art. 11, II and III ascribe responsibility of the head and compliance officers, without determining its limits. Here, also lawyers become vulnerable (Res. COAF n. 24/2013).

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[8] Silveira and Saad-Diniz (2013), pp. 157ff.

[9] Tiedemann (2012b), p. 261.

The new law, however, does not give clear criteria (risk consciousness, normative circumstances and material support to the offence)[10] for its application, and it remains very unclear who is in an oversight position. In that sense, it is possible to comprehend Brazil's alignment simply as a "legal transplantation". Besides the repealing of the catalogue of connecting and the modifications relating to the Brazilian FIU, this new law—which is based on international standards—builds the Brazilian anti-money laundering on trust-based prevention policies, on procedural incentives to recuperate the values, and on recent administrative and normative changes. Those changes concern how financial institutions are to manage programs against corporate crimes—i.e. they regulate corporate compliance, especially by means of FIU, COAF, CVM, BACEN (trying to specify and substantiate the obligation to inform suspicious operations).

In its administrative norms, Brazil experienced a "regulatory activism", trying to enforce the persecution of suspicious actions. Just an example, until the administrative bank norm Circular 3151/2004, there were 43 distinct proscriptions of suspected operations. In 2009, the Circular 3461/2009, were 106 such provisions, more than the double. In 2013 we have two brand new norms regulating the duty to communicate suspicious operations (3.654 and 3.654/2013), and almost 20 new ones are expected to fulfil the demands of Basel III—measures implementing preventive policies and imposing obligations to inform about irregular situations.[11]

What are the consequences following from this analysis? Besides the legality and proportionality issues, we recognize "regulatory activism" which intends to implement the standards outlined by Basel III, but we also have to recognize consequences to the Brazilian constitutional model of social-economic development (protection the social economic order, art. 170, CF).[12]

It is also possible to verify the notion of regulatory activism not only in administrative matters. According to the *Conselho Nacional de Justiça*, the Brazilian Justice System handled altogether 25,799 cases on corruption and money laundering, 1,763 of them just in the year 2012.

According to the AP 470—the so called Mensalão's case (the scandal of Lula da Silva's government),—and I won't polemicize here about the 8,405 pages that the decision contains—, the judgement attributed criminal relevance in financial transactions made by banks, in order to guarantee that some members of the parliament voted supporting the Government agenda. It was decided that these transactions constituted sophisticated financial engineering by manipulating suspicious information and by establishing connections with off-shore institutions. The results of their actions lead to several social harms; moreover, the case manifested high levels of moral hazard. The populists calls on condemnations can be heard in doubtful decisions on "multiple violation of obligations" or "general infractions of duties", or, as we can see on page 1187, in generic affirmations: "compliance reports

[10] In a similar way, Abanto Vásquez (2008), pp. 03ff.; Abanto Vásquez (2010), pp. 3ff.

[11] Silveira and Saad-Diniz (2012), pp. 308f.

[12] Sarcedo (2012), p. 218.

containing various irregularities", or even on page 1196 and 1198: "the reports about internal control and compliance were concealed".

In other words, the condemnations were justified in a very simple form and with uncompleted arguments, so that an omission on complying with an administrative obligation was sufficient to set the stage for a criminal approach. At page 3009 we find: "the financial institution systematically and negligently has not complied with the norms that regulate this subject, with omission in its duty to communicate the facts or not properly identifying the beneficiaries or the one who draws out". In other words: A simple omission on complying with obligations sets the stage for criminal condemnation, in terms of the administrative duty of art. 12, Law 9.613/98. And here it has to be emphasized that the administrative obligations founded not only a repressive sense; it was also the case of absolutions, as the issues discussed duties that must not be claimed during the facts (for example at page 5,455).

These few words on substance, the lack of specific information and the shallow data-analysis in this Judgement mean that compliance programs in the financial field—which are, at first sight, very positive—become an inefficient measure, and, what is worse, cannot be recommended in terms of legal certainty. Generically speaking, a situation where the regulation of market information aims at preventing economic crimes actually converts itself into a repressive measure,—an authentic inversion—verified in the praxis.

An imprecise combination of norms of administrative nature seems to deteriorate the preventive character of criminal compliance in Brazil. If this preventive character was already difficult to check empirically before, this decision makes it possible to recognize a "renaissance" of retributive theories.[13] As a consequence, I am quite sure that even any advantage these condemnations may have will not prove to be worthwhile to the Brazilian criminal system of Justice as a whole. This precedent, setting equivalent a violation of an administrative duty to a criminal liability, can stimulate a system of delegation of responsibilities inside the corporation, or even worse, it can stimulate the so-called "organized irresponsibility". That makes employees even more vulnerable.

Thus, observing the Brazilian case, the legal practice of criminal compliance in the Supreme Court brought consequences on two levels, macro and micro: on the macro level, it was transformed into a model of compliance "*ex post*", not interested in the prevention and instead focused on guaranteeing a criminal reaction after the scandal. The Supreme Court intended to also play a part in the governance structure by aligning the Brazilian system to the international standards. Finally, the organizational culture in Brazil seems to adopt an austere (severe) model of criminal regulation of the market.[14]

On the micro level, the function of information in the corporate field amplifies the criminal liability caused by a simple omission on due diligence. Consequently,

[13] For a critical reference, Pawlik (2012), pp. 82f.

[14] *Idem* note 6.

the transactional costs have increased and corporations have started to restructure the methods of organization and internal control.

3 Imposing Limits: Why Do We Need Criminal Compliance?

So, my presentation has just highlighted the legal issues, the evolution of the Brazilian anti-money laundering system including the evolution of the legislation on this matter, and some arguments on the possible application of criminal compliance programs. Observing the Brazilian case, it is perhaps too early to take part in the efforts of regulating anti-money laundering at any cost. Why do we need it? The fact is that in Brazil we are not yet able to fulfil a precondition, namely defining a sufficient standard of obligations to comply with.

Some limits, however, should be implemented for this “efficient control of information in the corporate field”. Are we prepared for such austerity in the behaviour of corporations; do we have a sufficient organizational culture? Rigid patterns to attribute liability would expand the role of criminal law[15] and could be a doubtful promise to solve the prevention of economic crimes.[16] More than that, the moral dilemma[17] involving economic development, bureaucratic corruption and ethics in the corporate field are still open questions.[18] Regulatory activism, condemnations at any cost, new standards of criminal regulations, all lead to the question of which “preferences” are to be followed? Who decides about what constitutes ethical behaviour? Who is going to control the controllers (*quis custodiet ipsos custodes*), and what kind of ethics are we looking for?

Instead of following this path, economic criminal law could work out in more details the juridical tools to protect the employees instead of perverting systems delegating liability to employees. It was my main interest to discuss here my own doubts. By which measure this new compliance standard could be appropriate to the Brazilian organizational culture,[19] stimulating economic growth? It is a pleasant idea to define the features, the identity of an international market more specifically, or, as Tiedemann said, “the integrative function of criminal law”. We must face courageously the moral dilemma—and the controversial issue—that exactly the

[15] Critical remarks in Silva Sánchez (1999), pp. 20f.

[16] Analyzing the Brazilian case, Silveira (2011), p. 423.

[17] The economic impact of moral dilemmas is nevertheless contingent, Schramm (2005), pp. 85ff.

[18] Leff (2009), pp. 307ff.; in a realistic way, Rose-Ackermann (1997), pp. 31ff. In further details, considering the ways in which the damaging consequences of corruption operate in the economy, and also keeping a distinction between “immoral” and “corrupt” transactions, Bardhan (1997), pp. 1320ff.; “corrupt income may also induce a misallocation of resources”, Lambsdorf (2005), p. 14; with an international perspective about the “anti-corruption culture” and the role of the criminal law, Abanto Vásquez (2004), pp. 278ff.

[19] Discussing the organization culture in a Latin-American context, Rodríguez (2012), pp. 126f.

same "incestuous" relationship between corruption and money laundering is behind the new international stage of the Brazilian economy.

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