

**THE CONTRIBUTION OF *COMPLIANCE* PRACTICES TO THE
SOCIAL ROLE OF THE COMPANY.**

**A CONTRIBUIÇÃO DAS PRÁTICAS DE *COMPLIANCE* À FUNÇÃO
SOCIAL DA EMPRESA.**

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ABSTRACT

The target of this article is to research the origin of the company as promoter of social role and its relations with compliance and the intense economic globalization, its influence and contribution to the fortification of the social role of the company in Brazil. The research was developed via bibliography and interpretation of legal articles and reaching a historical perspective. This allowed the conclusion that compliance practices duly utilized by the companies to monitor the fulfillment of legislation, the edition of internal policies and codes of ethics and conduct are attitudes of social responsibility of the company, allowing its employees and the community in general to live in a world worth living and more respectful, among other positive factors.

KEYWORDS: Social Role of the Company; Compliance Practices; Economic Globalization; Regulator State. Self-regulation; Corruption; Code of Conduct; Ethics.

RESUMO

O presente artigo tem por objetivo pesquisar as origens da empresa como promotora da função social e suas relações com o compliance e a intensa globalização econômica, sua influência e contribuição ao fortalecimento da função social da empresa no Brasil. A pesquisa foi desenvolvida através de consulta bibliográfica e interpretação de textos jurídicos, buscando também uma perspectiva histórica, o que permitiu concluir que as práticas de *compliance* utilizadas efetivamente pelas empresas para monitorar o cumprimento da legislação, instituir políticas internas e códigos de ética e conduta são atitudes de responsabilidade social da empresa que permitem aos seus colaboradores e à população em geral viver em um mundo mais digno e mais respeitoso, entre outros fatores positivos.

PALAVRAS-CHAVE: Função Social da Empresa; Práticas de *Compliance*; Globalização Econômica; Estado Regulador; Autorregulação; Corrupção; Código de Conduta; Ética.

INTRODUCTION

Since the enactment of the Constitution of 1988 there is a strong change in the concepts of companies and their attitude towards their social role beyond the State responsibility and many times replacing the State. The social role of the company results from the inability of the State to provide the needs of the population, which was evidenced by the end of the Social and Welfare State. There is a strong change in the national and international corporate world due to economic globalization process, which puts pressure on the companies to have a complementing attitude to pursuing profit, aiming a corporate social image. Our Constitution included avant-garde concepts about the company social role in a time where there are worldwide

corporations with revenues higher than GDP (Gross Domestic Product) of many countries. In this line of globalization the acceptance of countries and corporations for the select club of great players of world economy requires from companies a strong performance in their social role, as well as effective compliance practices to assure the good behavior of their senior officers and employees. Compliance offers new techniques and tools to minimize the risks originated by their actions (risk management system). In the past, companies only evaluated the risk on the perspective of economic loss. Nowadays it is even closer to eventual legal and social responsibility of their officers and the company itself, either by abuse of economic power practiced by officers, incidences of internal fraud with damage to third parties or by social responsibility.

1. SOCIAL ROLE OF THE COMPANY

The preamble to the Constitution provides as fundamentals the principle of the Democratic State of Law destined to pursue and assure the exercise of social and individual rights, as well as supreme values that are liberty, safety, welfare, development, equality and justice to reach social harmony. There is a legitimate and democratic protection to the benefit of citizens exercised by the State of Law to guarantee the fundamental rights of the people and a concern with the person, individual or collective, from the perspective of the Democratic State of Law, with the purpose to assure social and individual rights. These are fundamentals for the dignified existence of people. The dignity of the human being is a supreme value granted to each person. The right to life and to the economic order shall assure to everyone the dignified existence.¹ Then, the responsibility of the State to protect “human dignity” shall reflect also in the economic aspects of the economic order and in the analysis of the social role practiced by the company.

¹ SILVA, José Afonso da. **Curso de Direito Constitucional Positivo**. 15th ed. São Paulo: Malheiros, 1998, p. 108-109.

The free initiative is also one of the fundamentals of the Constitution, such as incentive to the protection of capitalism based on the market liberalism, one of the fundamentals of the Magna Carta for the construction of an open society, fair and solidary, but also admitting the State intervention to promote the competition and the high standard of service offered to the market. ²

Since the end of 20th century the State is dissociating itself from its monopolist and protectionist vision that culminated with the Social State, and does not want anymore the function of intervention in the economy. The State tends to delegate the activities provided for in the Carta Magna to other private legal entities, in exchange of their economic interests. There is a change in the attitude of the State to drive to private initiative the obligation of basic needs of the population. It is also clear for everyone that the State, as provider and guarantor of the provisions of the Constitution, in spite of all its efforts, has no technical and financial organizational conditions to grant and assure to all citizens the human dignity as principle and does not enable the exercise of social rights foreseen in Article 6 of the Constitution.

Business activity is being developed in several centuries, mainly as of the Industrial Revolution in England. The company integrated the lives of the people. To obtain work and revenues for subsistence the population migrated from the rural zone to the cities. It also originated the dependence of industrialized products in large scale due to the acceleration of consumption of goods produced in the industries. This is the beginning of massive industrialized products, changing the consumption habits of the population and intensifying the social differences. The company benefitted from this situation and led the consumers to change their simple habits to a complex life and full of superficialities.

At the end of the Cold War the States realized the leak in the public budget arising from the Social and Welfare State and began to transfer to the private initiative these rights that were earlier guaranteed by the State. As a consequence occurred

² CRETELLA JUNIOR, José. **Elementos de Direito Constitucional**. 4th ed. São Paulo: Revista dos Tribunais, 2001, p. 248.

initial processes of State privatization, Social Security reform and change in the discipline of competition.³

2. COMMITMENT TO ETHICS AND TRANSPARENCY

The company has a prime economic purpose. Nevertheless, the absolute power to dispose the property of production goods was mitigated by the company obligation to fulfill the social role of the property. This limitation is a social obligation of the company to put itself in equilibrium with the interests of several groups that interact with the company, contributing to the continuing development of the people, communities and of its reciprocal relations aiming the construction of fairer society and economic development.

The social responsibility of the companies has been a much discussed topic in the business sector. Many companies are utilizing several social programs aiming the materialization of their role before the community where they are inserted. The social responsibility must be focused in its economic, social and legal aspects due to the extreme relevance of the company as a fundamental center of market economy, as social cell and mainly as legal entity for rights and obligations as it has relations with all levels. The company that has social responsibility undertakes the constitutional commitment with the realization of values of social justice and human dignity and harmonizes the capacity of private initiative capital holders to obtain profits and contribute to the public and community interests.

3. LEGAL GROUNDS OF SOCIAL RESPONSABILITY

During the latest years the concern with social and environmental effects of the activities of the company and the moral and ethics values brought many discussions

³ COELHO, Fábio Ulhoa. **Curso de Direito Comercial**. Vol. 1. 6th ed. São Paulo: Saraiva, 2002, p. 6.

about the business environment and the enrichment of the socially responsible management.

Patrícia Almeida Ashley⁴ understands that social responsibility is: [...] the compromise that an organization must have before the society, evidenced by way of acts and attitudes that positively affect, broadly or to a specific community, acting proactively and coherently its specific role in the society and its accountability with it. The organization, in this sense, undertakes the obligations or moral character, beyond what is provided by law, even though they are not directly linked to its activities, but that may contribute for the sustainable development of the commonwealth. In an expanded view, social responsibility is any and all action that may contribute for the improvement of life quality of the society.

Eduardo Tomasevicius⁵ comments that “When a company⁵ contributes to the increase of social welfare, internally or externally, it is considered a corporate company. The social responsibility of the companies is ordinarily divided in two types: internal social responsibility, consisting of the concern with labor conditions, job quality, remuneration, hygiene and health of its employees; and external social responsibility consisting of the company concern with the community where it is placed, its customers, service providers and public entities.”

It is very important the understanding of Banco Nacional de Desenvolvimento Econômico e Social (BNDES)⁶ on this matter, an agency linked to the Ministry of Development, Industry and Foreign Trade, considered a national provider of financings to companies, for whom the concept of corporate social responsibility is associated [...] to the recognition that the decisions and results of companies activities reach a broader universe of social agents than the one consisted of partners and shareholders. The corporate social responsibility or corporate citizenship, as it is also called, emphasizes the impact of companies activities to the agents with whom they interact (*stakeholders*): employees, service providers customers, consumers, contractors investors,

⁴ ASHLEY, Patrícia Almeida. **Ética e responsabilidade social nos negócios**. São Paulo: Saraiva, 2002, p. 7. 39

⁵ TOMASCEVICIUS FILHO, Eduardo. **Revista dos Tribunais: A Função social da empresa**. São Paulo, nr. 92, p. 40, Apr 2003.

⁶ BANCO NACIONAL DE DESENVOLVIMENTO ECONÔMICO E SOCIAL – BNDES. **Relato Setorial nº 1- AS/GESET**, 2000, p. 3.

competitors, governments and communities. This concept expresses commitments that go beyond the ones already compulsory to the companies, such as the fulfillment of labor obligations, tax and social, environmental legislation, utilization of soil and others. It expresses the adoption and propagation of values, conducts and proceedings that induce and stimulate the continuing improvement of business processes, to also result in the preservation and progress of life quality of the companies in an ethic, social and environmental point of view.

Still discussing social responsibility, Fabiane Bessa⁷ comments about the importance of the principle of good faith in acting in any and all phases of the business in conformity with the law, the social role of the company and the principles of private law. The limitations to the free initiative are in the legal system and vary in accordance with the extension of the public interest involved. Social responsibility is in place when the strategic options of the company are targeted to produce or render services to bring better social and environmental performance or adopting economic practices that promote the sound and loyal competition.

Although in no situation the legal system literally adopts the expression social responsibility of the company, a legal concept can be built based on the following fundamentals:

A) Constitution of 1988: art. 1, III – the dignity of the human being ; IV – the labor social values and in free initiative; art. 5, XXIII – the property will comply with its social role; art. 170, “caput”: The economic order, grounded in the valorization of human labor has as purpose to assure all a dignified existence, as dictated by the social justice; II – private property (production property); III – social role of the property; free competition and IV – environment protection; art. 186 – The social role is fulfilled when the rural property observes simultaneously the following requirements: I – adequate and rational use; II – adequate use of available natural resources and preservation of environment; III – fulfillment of all legislation regulating the labor relations; and IV – exploitation that favors the welfare of the property owners and employees.

⁷ BESSA, Fabiane. **Responsabilidade social das empresas práticas sociais e regulação jurídica**. Rio de Janeiro: Lumen Juris, 2006.

B) Infra-constitutional Legislation: I) Law 6.404/76 (Law of the Corporations): art. 116, sole paragraph: “The controlling shareholder shall use the power for the purpose of leading the company to its target and fulfill its social role, and is responsible before the remaining shareholders of the company, its employees, and the community which rights and interests shall confidently respect and fulfill.”; art. 154, caput – The administrator shall exercise the attributions provided in the law and the by-laws of the company to reach its purpose and interests, as long as are satisfied the requirements of public interest and the social role of the company. II) Civil Code: art. 104 – validity of the legal transaction; art. 187 – it is also considered unlawful act if the holder of a right, upon its exercise, clearly exceeds the limits imposed by the social and economic purpose, by good faith; art. 421 – the freedom to contract will be exercised in the rational and limits of the social role of the contract; art. 927 – civil liability; art. 966 – it is considered the business man who professionally exercises economic activity organized for the production and circulation of goods and services.

The Counsel of Federal Justice, during the I Journey of Civil Right edited the enunciation 53 determining that it has to be taken into account the principle of the social role when interpreting the laws related to the company, notwithstanding its absence of express reference in the law.

The purpose of profit of the company cannot be ignored in detriment to its social role, as this role cannot be social assistance or philanthropic. Therefore it has to be recognized that the social role never may occupy the company economic role nor usurp its surviving means, which is the profitability. In order to fulfill the social role it is not enough the company in operation, it is necessary the decision of the administrators concerning public interest without observing its corporate purpose, the profit.

As presented, it is clear that the social role cannot prevail the individual rights and interests, but reconciling the company interests with the society's⁸. In addition, the State is not exempted to promote welfare and social justice just because the companies are assuming a part of this important role.

⁸ MAGALHÃES, Rodrigo Almeida. **A função social da empresa.** Revista Magister de Direito Empresarial, Porto Alegre, Year 5, nr. 28, p. 5-12, 2009.

The company turned to be a social institution, as it provides a large part of goods and services in the society and pays to the State an important share of its income. It also has a high degree of development, importance and influence, being necessary to the mankind. The company is still responsible by the employment of a large share of the community where it is set up, being a source of subsistence, generation and circulation of income, goods and capital of the society.

It is not acceptable that the business only targets the profit and prosperity of the businessman. The performance of the company must always aim the social welfare and the environment, privileging the sustainable development, the special treatment in extracting mineral resources and ethic values of the society. Besides this, companies have to revert part of their resources to the public welfare, humanitarian, educational and philanthropic purposes.

The social role of the company shall include the origination of capital and job opportunities, education and labor strength diversity, incentive to scientific development by way of technology and improvement of life quality via educational actions, cultural, assistance and environment protection (CONSULEX, 2006, p. 29).

It is effortless to realize the important economic and social role that the company exercises in the community, being an impulse to the development of the nation and population, bearing the social responsibility role.

Nowadays, the company has a meaningful importance in world scenario, with immediate reflexes in the economy, concentrating the rendering of services, circulation of goods, generation of jobs and taxes. As the company is part of many partnerships, it has relevant power in the economic order of a country and consequently worldwide. Ana Frazão⁹ confirms telling that “The company is seen as an institution which importance transcends the economy sphere and covers more relevant social interests, such as the employee survival and welfare that render services to it and remaining citizens who share with it the same social space”.

⁹ LOPES, Ana Frazão de Azevedo. **Empresa e propriedade: função social e abuso de poder econômico**. São Paulo: Quartier Latin, 2006. p. 119.

Social role is an objective to be conquered in favor of the society. This way, when this purpose is accomplished, a useful means is achieved not only for individuals directly involved, but the collectivity. Due to the high company's ability to influence the society, it has to be observed not only as a richness source generator, but as a power. So, its social responsibility has to be demanded in the same proportion.

Eduardo Tomasevicius Filho says "The social role of the company constitutes a power-obligation of the businessman and company administrators to harmonize the company activities in connection with society interest, by obeying duties, positive and negative".¹⁰ Then, upon settlement of a company, the interests of the businessman has to reach beyond the gaining of profit, the company activities have to be in accordance with the purpose why the free initiative was granted, the chase for dignity and social justice."

4. COMPLIANCE

Compliance is a tool to manage company risks, such as legal or regulating sanctions, financial losses, reputational losses due to non fulfillment of the legislation, conduct codes, etc.

There are many benefits on the utilization of compliance tools, such as integrity of the organization, loyalty of employees, good reputation, good relations with stakeholders, contractor, customers, investors and regulating agencies.

Compliance incorporates principles of integrity, ethic and moral conduct. One has to consider that, when not observing law, acts that bring negative impact to the stakeholders could generate reputational risk and adverse publicity, placing in risk the preservation of any company.

Compliance is understood as an act in accordance with the law, regulations, protocols, standards and recommendations of a specific sector, codes of conduct and

¹⁰ TOMASCEVICIUS FILHO, Eduardo. **Revista dos Tribunais**: A Função social da empresa. São Paulo, nr. 92, p. 40, Apr 2003.

regulatory agencies. It is a state of conformity desired by law or regulation or due to a requirement. To comply means fulfill, execute, satisfy or do anything imposed, be in conformity, adopting and practicing internal and external regulations aiming the reduction of risks and losses mainly in business activity, but being also applied in the public sector.¹¹

Compliance mission is to assure, together with the other departments of the company, adequacy and fortification of internal controls, seeking to mitigate risks in accordance with the complexity of its business, as well as disseminate the control culture to assure the accomplishment of laws and existing regulations, besides acting in the orientation and awareness to prevent activities and conducts that may cause image risks to the company.

Compliance gathers the means to assure that large organizations do observe law and do not cause damages to interested parties. The institution of compliance is the execution of a program that commits all employees of a company with the attitude to do the right thing every day. This corporate effort demands auditing, investigation, monitoring, incentive, organizational discipline and investment in internal communication. The increasing interest in compliance practices is due to the fact that it contributes to prevent lawsuits and protect reputation, reduce fines and penalties, financial frauds and internal corruption, and compliance incentives an ethic culture in the companies.

5. COMPLIANCE PRACTICES TO HELP COMPANY EFFECT IS SOCIAL

Compliance is a way to manage ethic behavior of the company administrative members and employees via rules as a form to reduce company risks. The company has many multidisciplinary aspects and its officers have to know a large variety of issues which turns the topic very complex.

¹¹ BREIER, Ricardo. **Autorregulação impacta direito penal empresarial**. Revista Consultor Jurídico, 28th September 2013. Available at: <http://www.conjur.com.br/2013-set-28/autorregulacao-produz-impactos-direito-penal-empresarial#author>). Access: 20th November 2014.

The management of behavior in business ethics is very recent in Brazil and is being developed due to the requirements of globalization, international trade and the need of the companies to show its social contribution to the society and a good image of its business. The social role and business ethics (compliance rules) demand from administrators a behavior not directed just to company profit. In a certain way, there is a humanization of the company. There is an increasing trend to enact legislation that seeks even more and more the effectiveness of business ethics behavior and implement it within the company.

The fact that the company generates jobs, pay taxes and improves the economy within the legal limits, are activities that ratify its reason to exist beyond its corporate and profit purpose.

Compliance helps the company to avoid lawsuits against it related to fraud or to be obliged to pay huge fines and penalties, assuring longevity of the company, the protection of collective interests, a work environment lined in ethics and also the satisfaction of the shareholders to realize the appreciation of their shares.

In adopting compliance practices, its effects go beyond the ethic behavior of its administrators and employees, since the society directly obtains the reflexes in internal policies developed by the company and the results of their effectiveness. As an example, in the means that the company administrators are not willing to bribe public officers, it is positive for the society in all aspects.

There is a positive gain of social effects, such as the ethic behavior in social relations of employees that adhered to compliance practices to which they were submitted, as well as the multiplication of this behavior by the people around them as an example to be followed. There is a lesser tolerance and complaisance to unlawful acts in general, because the collective conscience is increased in “doing the right thing” and negatively highlight the person not willing to do it properly. Company employees tend to act with less omission towards an irregular attitude of colleagues in the means that they are impelled and motivated to have an ethic behavior that goes beyond the company limits. It rises in the company a feeling that, within the company, the exposure of non ethic behavior of a employee blemishes the company name and the remaining employees that work in the company.

The reduction of corruption might reduce the prices of the products, as it stops commission payments to corruptors in their commercial business and can also be a facilitator in tax burden reduction, in the means that the State pays less for services and products (that usually would cost more due to the inclusion of bribes to public officers).

Other issue to consider in adopting compliance practices in the companies as a social role is the reporting channels for sexual and moral harassment within the company. In general the reporting channel inhibits the employees in having harassment acts and propitiates a better work environment in the company, increasing confidence, credibility and stability. If there are reports effected through the report channel, the reporting employee is treated with dignity and respect and the report is investigated to check the bad behavior of the reported employee with consequent penalties.

In the market globalization standpoint, the more Brazilian companies adopt these compliance practices, higher is the credibility of Brazil in the eyes of foreign investors, that will consider Brazil a more stable and confident place to invest, generating jobs, taxes and circulation of capital.

The institution of compliance practices in the companies has many consequences which are socially beneficial. Nevertheless, the damages of a weak compliance program are larger and the level of consequences can lead to the termination of a company, either due to financial loss, such as the payment of penalties for bribing, fragile control systems or due to fraudulent transactions and the escape of investors as a result of lack of confidence in the company.

Compliance practices well instituted and effective include measures that increase the company value, such as the tangible value (value of shares, assets, production capacity, etc.) and intangible (the company brand, represented by the level of confidence generated in the market).

The company that appreciates compliance practices, among other positive results, has a reduction of passive labor suit, reduction of accidents (generated by lack and bad professional education and leading to high insurance policies), reduction of interest rates in financings, talent retention and a image of credibility and ethics in the market. Also important to mention are the amounts of money not used to pay bribes

that remain in the company and generate better results and enable better conditions for the employees.

It should be also considered the bad effects of an ineffective compliance program and less assertive (many times existing just in paper), that generates behavior vices in employees and damages to the society, and fortify the idea that impunity is the rule, individuality prevails collectivity, the culture of the company overlaps the market rules and internal policies, appreciating acquiescence to censurable issues caused by relations of friendship, fear to exposure or even repression.

It is worth highlighting that, to reach the purpose of a compliance program, it has to match the company, involving all its cells and hierarchies and disseminating a culture lined in ethics and respect to the good practices of governance.¹²

6. INSTITUTION OF A COMPLIANCE PROGRAM

The institution of a compliance program in the company should be very well planned in details. Its enforcement involves the senior officers and all employees of the company. The target of the program is the enforcement of proceedings, revision of conducts, drafting and publication of internal policies, trainings for awareness of applicable rules to the company sector and commitment of senior officers and employees with ethics and good behavior in company business, operational activities and relations with public officers and suppliers and contractors.

The internal policies should be clear, of easy understanding and access, with periodical updating and integration among members and company sectors.

The implementation of compliance practices implies to put in action a program that commits all employees with the attitude to “do the right thing every day”. This corporate effort requires control, auditing, investigation, monitoring, incentive, organizational discipline and investment in internal communication. The interest in this

¹² Gabriela Alves Guimarães – Lawyer - MBA in Business Administration at Ohio University and MBA in Business Management at Fundação Getúlio Vargas- FGV; Independant Investment Agent certified by CVM.

tool is due to the fact that compliance contributes to prevent lawsuits and protect reputation, improve relationship among employees, disseminate ethics and good behavior everywhere, increase respect among people, reduce fines and penalties, financial frauds and internal corruption, and stimulates an ethical culture in the company. The larger the company is, more formal must be the compliance program, with clear policies, in writing, about standards and proceedings to be followed. In general, the compliance programs have as basis the circulation of a print manual as well as periodic seminars and trainings.

CONCLUSION

Even though a company reaches its corporate purpose successfully and makes a lot of profit, if it is in detriment to its employees or in damage to the society or the environment, such a company is impracticable because it is not observing its social role. In this world economically globalized, where Brazil is included, companies should have a positive relationship with the society, accomplishing with its social role.

The compliance practices in favor of the social role of the company are in action when the company provides a compliance program aiming the change of ethical and moral behavior of its senior officers and employees by way of trainings, monitoring specific sectors legislation (labor, competition, bribery of public official, social security, tax, environmental and administrative in general), in addition to internal policies, code of conduct to be observed by everyone, which effects reflect directly in the society. This is the great challenge in Brazil, where the culture of the shorter way and bribe payments are still widely used.

The company that accomplishes its social role certainly will be more committed, happier, healthier and more productive employees. The good attitude of the company and correct behavior will lead it to a good social reputation.

At the competition standpoint, the compliance practices reach an important economic factor. In adopting an ethical posture, there will be more morality in public

bids, where the participants will be in an equal position or, at least, will not be not privileged by the company that had agreed any prior unlawful hidden advantage.

The monitoring of the ethical conduct of the company by way of effective compliance practices will show very positive reflexes, such as better selected and committed trade partners, since the companies, when contracting them, are also requiring that they have in place effective compliance programs.

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