

The Role of Intermediaries in International Corporate Bribery

De rol van tussenpersonen bij internationale omkoping

Proefschrift ter verkrijging van de graad van doctor aan de
Erasmus Universiteit Rotterdam op gezag van
de rector magnificus
Prof. dr. A.L. Bredenoord
en volgens besluit van het College voor Promoties

De openbare verdediging zal plaatsvinden op
vrijdag 5 november 2021 om 10:30 uur

door

Maria Pia Sacco
geboren te San Giovanni Rotondo, Italië

Promotiecommissie

Promotoren: Prof. dr. S. Oded
Dr. P. Vanin

Overige leden: Prof. dr. E. Kantorowicz-Reznichenko
Prof. dr. W.G. Ringe
Prof. mr. P.A.M. Verrest

This thesis was written as part of the European
Doctorate in Law and Economics programme



An international collaboration between the
Universities of Bologna, Hamburg and
Rotterdam.

As part of this programme, the thesis has been
submitted to the Universities of Hamburg and
Rotterdam to obtain a doctoral degree.



ALMA MATER STUDIORUM
UNIVERSITÀ DI BOLOGNA



Universität Hamburg



Acknowledgments

It is my pleasure to thank those who made this research possible. First of all, I owe my deepest gratitude to my supervisors, Prof. Sharon Oded and Prof. Paolo Vanin, who have supported me throughout this journey. Your expertise and insightful feedback pushed me to sharpen my thinking and to go the extra mile. Even if things have been challenging at times, you have always encouraged me to do my best, to go above and beyond my limits and to believe in myself and my project. Thank you for your patience in walking me through the hurdles of multi-disciplinary studies, for being rigorous sounding boards and inspiring mentors.

I would also like to extend my sincere gratitude to Prof. Michael G. Faure and Prof. Luigi A. Franzoni for their guidance in setting up this research project and Prof. Elena Kantorowicz-Reznichenko for her insightful suggestions. I am grateful to Lisa Verniti and Marianne Breijer-de Man, for their kind and patient guidance all along the way. Further acknowledgements are due to the University of Bologna for sponsoring my research, to the Universities of Hamburg and Rotterdam for the opportunities to engage with international scholars and colleagues who helped me in developing my research ideas.

I would like to recognise the assistance of the International Bar Association and, in particular, Mark Ellis, Tim Hughes and Donna Canty. It is a real privilege to be part of such a prominent, purpose-driven and nurturing organisation! I would like to extend this gratitude to Beatriz Martinez, Anurag Bana, George Artley, Kieran Pender and Anna McNee, for being excellent professionals, sincere friends and generous colleagues. I cannot begin to thank Sara Carnegie, whose trust, unwavering support and thoughtful leadership has been instrumental. Thanks to Elise Groulx-Diggs and Stéphane Brabant for their friendship and inspiring example.

I thank my friends, Rocio, Alice, Shilpi, Mounira, Maria Teresa, Narciso, Stefano, Verena, Domenico, Francesca and Maria Rosaria for their encouragement. Lastly, I would like to thank my parents, Anna and Michele for the unconditional and loving support I could always rely on. Warm thanks to my brothers, my sister, Antonio, Tina and Cosimo for being there for me. Most of all, I would like to thank Francesco. Your loving and constant support, sacrifice and firm belief in my abilities made all the difference. Thank you for being my greatest supporter, my soulmate and life partner. I love you and this book is dedicated to you. All errors remain mine.

Table of Contents

- 1. Introduction**
- 2. Cross-Border Corporate Bribery and Third-Party Agents: A Comparative Analysis**
- 3. Law and Economics of Anti-Bribery Laws: Optimal Liability Regimes for Employees and Third-Party Agents**
- 4. The Certification of Intermediaries against Foreign Bribery: A Law and Economics Perspective**
- 5. Conclusions**

Detailed Table of Contents

1. Introduction	1
1.1. Background	1
1.1.1. Third-party intermediaries as a channel for legal services	3
1.1.2. Third-party intermediaries as a channel for illegal services	4
1.1.3. Third-party intermediaries between legal and illegal services	5
1.2. Scope of the study	6
1.3. Research Questions	8
1.3.1. Assuming the goal of social welfare maximization, should corporations be held vicariously liable for crimes committed by the intermediaries?	10
1.3.2. Is there a difference in effectiveness between ABC program addressing employees and those addressing intermediaries? And if so - may this difference justify, from a welfare maximization point of view, a variation between the structure of the corporate liability regime applicable to employee misconduct and the one applicable to misconduct of third parties?	10
1.3.3. What is the role that certifications of ABC programs adopted by third parties may play in improving the efficiency of ABC enforcement policies?	11
1.4. Thesis Structure and Methodology	12
2. Cross-Border Corporate Bribery and Third-Party Agents: A Comparative Analysis.....	15
2.1. Introduction.....	15
2.2. Identification of the Main Regimes to be Compared	16
2.3. Criteria of the Comparative Analysis	19
2.4. Criteria of the Comparative Analysis for Third-Party Agents	27
2.5. The Foreign Corrupt Practices Act	28
2.5.1. Introduction.....	28
2.5.2. The Elements of the Criminal Conduct.....	31
2.5.2.1. The Offender	31
2.5.2.2. The Recipient	32
2.5.2.3. Criminal Conduct and <i>Mens Rea</i>	33

2.5.3.	The Jurisdictional Scope	35
2.5.4.	The Liability Model	36
2.5.5.	The Impact of Corporate Compliance Programs on the Liability Regimes	38
2.5.6.	Third-Party Agents.....	42
2.6.	The OECD Anti-Bribery Convention	46
2.6.2.	The Elements of the Criminal Conduct.....	49
2.6.2.1.	The Offender	49
2.6.2.2.	The Recipient	49
2.6.2.3.	Criminal Conduct and <i>Mens Rea</i>	50
2.6.3.	The Jurisdictional Scope	51
2.6.4.	The Liability Model	52
2.6.5.	The Impact of Corporate Compliance Programs on the Liability Regimes	53
2.6.6.	Third-Party Agents.....	55
2.7.	The Italian Legislation against Transnational Corporate Bribery.....	58
2.7.1.	Introduction.....	58
2.7.2.	The Elements of the Criminal Conduct.....	59
2.7.2.1.	The Offender	59
2.7.2.2.	The Recipient	59
2.7.2.3.	Criminal Conduct and <i>Mens Rea</i>	60
2.7.3.	The Jurisdictional Scope	60
2.7.4.	The Liability Model	61
2.7.5.	The Impact of Corporate Compliance Programs on the Liability Regimes	63
2.7.6.	Third-Party Agents.....	68
2.8.	The United Nations Convention Against Corruption	72
2.8.1.	Introduction.....	72
2.8.2.	The Elements of the Criminal Conduct.....	74
2.8.2.1.	The Offender	74
2.8.2.2.	The Recipient	74
2.8.2.3.	Criminal Conduct and <i>Mens Rea</i>	75
2.8.3.	The Jurisdictional Scope	76
2.8.4.	The Liability Model	76
2.8.5.	The Impact of Corporate Compliance Programs on the Liability Regimes	77

2.8.6.	Third-Party Agents.....	77
2.9.	The UK Bribery Act.....	80
2.9.1.	Introduction.....	80
2.9.2.	The Elements of the Criminal Conduct.....	82
2.9.2.1.	The Offender	82
2.9.2.2.	The Recipient	82
2.9.2.3.	Criminal Conduct and <i>Mens Rea</i>	83
2.9.3.	The Jurisdictional Scope	84
2.9.4.	The Liability Model	85
2.9.5.	The Impact of Corporate Compliance Programs on the Liability Regimes	87
2.9.6.	Third-Party Agents.....	91
2.10.	International Chamber of Commerce Standards for Third- Party Agents in International Corrupt Practices.....	98
2.11.	Conclusions	100
3.	Law and Economics of Anti-Bribery Laws: Optimal Liability Regimes for Employees and Third-Party Agents.....	103
3.1.	Introduction.....	103
3.2.	Optimal Liability Regimes Against Corporate Crime	105
3.3.	Economic Analysis of Liability Regimes.....	109
3.3.1.	Vicarious Strict Liability and Its Limitations	109
3.3.2.	Regimes Encouraging Self-Enforcement Activities.....	110
3.4.	Third-Party Intermediaries.....	119
3.4.1.	Internalization of the Social Harm of Crime: The Risk of Strategic Delegation.....	120
3.4.2.	Corporate Self-Enforcement Activities: Differences Between Employees and Independent Contractors.....	124
3.5.	Efficient Deterrence of Intermediaries' Offences: An Economic Model.....	130
3.6.	Optimal deterrence with effort in crime prevention	135
3.6.1.	Optimal investment in crime prevention for employees 135	
3.6.2.	Optimal Standard of Prevention for Intermediaries....	142
3.7.	Optimal Sanction for Investment in Crime Prevention.....	145
3.7.1.	Liability Mitigation for Employees	145
3.7.2.	Liability Mitigation for Intermediaries	147
3.8.	Conclusions	151

4. The Certification of Intermediaries against Foreign Bribery: A Law and Economics Perspective.....	157
4.1. Introduction.....	157
4.2. ABC certification: typologies.....	158
4.3. ABC Certification: the signalling function.....	163
4.4. Semi-separating equilibrium with imperfect certification mechanisms	169
4.4.1. Efficient incentives for certification companies	172
4.5. Efficient incentives for certification companies: liability measures	184
4.6. The impact of ABC certification on efficient sanctioning mechanisms of corporate bribery.....	192
4.7. Conclusions	196
5. Conclusions.....	201
5.1. Assuming the goal of social welfare maximization, should corporations be held vicariously liable for crimes committed by the intermediaries?	202
5.2. Is there a difference in effectiveness between ABC program addressing employees and those addressing intermediaries? And if so - may this difference justify, from a welfare maximization point of view, a variation between the structure of the corporate liability regime applicable to employee misconduct and the one applicable to misconduct of third parties?	203
5.3. What is the role that certifications of ABC programs adopted by third parties may play in improving the efficiency of ABC enforcement policies?.....	205
5.4. Contribution, limitations and future research.....	207
BIBLIOGRAPHY	213
SUMMARY.....	229
SAMENVATTING	233

List of Abbreviations

AACI	American Anti-corruption Institute
ABC	Anti-bribery Compliance
ANAB	American National Accreditation Board
CEOs	Chief Executive Officers
COO	Chief Operations Officer
CPA	Certified Public Accountant
CRA s	Credit Rating Agencies
DOJ	U.S. Department of Justice
DPAs	Deferred Prosecution Agreements
e.g.	Exempli gratia (for example)
FCPA	Foreign Corrupt Practices Act
FDIs	Foreign Direct Investments
GDP	Gross Domestic Product
IAF	International Accreditation Forum
IAS	International Accreditation Service
I.C.C.	International Chamber of Commerce
i.e.	Id est (that is)
ISO	International Organisation for Standardisation
MLAs	Multilateral Recognition Arrangements
NPA s	Non-Prosecution Agreements
OECD	Organization for Economic Co-Operation and Development
OECD WGB	OECD Working Group on Bribery
PCAOB	Public Company Accounting Oversight Board
SEC	Securities and Exchange Commission
SFO	Serious Fraud Office
SOX	Sarbanes-Oxley Act
U.K.	United Kingdom
UKBA	U.K. Bribery Act
UNCAC	United Nations Convention against Corruption
UNODC	United Nations Office on Drugs and Crime
U.S.	United States of America

Tables, Figures and Appendixes

Appendix 1. Mathematical Appendix.....	153
Appendix 2. Pooling Equilibria.....	198
Table 1. Corporate Criminal Liability for Foreign Bribery: Comparison.....	94
Table 2. Corporate Criminal Liability for Foreign Bribery Paid by Intermediaries: Comparison	97
Table 3. The Economic Objectives of Corporate Criminal Liability: A Comparison of Corporate Criminal Liability Regimes.....	117
Table 4. Firms' Self-Enforcement Activities: Employees and Independent Contractors.....	132
Table 5. ABC Certification for Intermediaries: Separating Equilibrium	168
Figure 1. Flowchart: Risk-Based Anti-Bribery Compliance.....	144
Figure 2. Graph: Under-Investment in Crime Prevention.....	149

“Corruption is a global phenomenon that strikes hardest at the poor, hinders inclusive economic growth and robs essential services of badly needed funds. From cradle to grave, millions are touched by corruption’s shadow.” (Ban Ki-Moon, Secretary General Message, Global Anti-Corruption Day, 9th December 2014)

1. Introduction

1.1. Background

In the last forty years corruption has come at the forefront of academic and policy research, in particular with regard to its impact on economic growth and development.¹ Despite some divergent positions regarding short-term effects, in the long run, it is negatively correlated to gross domestic product (GDP) per capita and to human development, while it is positively correlated to income inequality.² This negative impact of corruption on growth and development takes place through several transmission channels, such as the allocation of talent, the cost of production, the efficiency of public expenditure and the strength of democratic institutions.³

Starting from the early 1990s, with the emergence of a globalised market economy, research has focused on an additional transmission channel, which is represented by the allocation of foreign direct investment (FDIs).⁴ Empirical findings show that firms are discouraged from investing abroad if the host country is highly corrupt.⁵ In fact corrupt payments act as a local tax imposed on companies entering a foreign market. Moreover this burden

¹ G. T. Abed and S. Gupta, ‘Governance, Corruption & Economic Performance’, International Monetary Fund, 2002.

² Transparency International, *The Impact of Corruption on Growth and Inequality*, 2014, p. 11.

³ *Id.*, p. 9.

⁴ S.-T. WEI, ‘How Taxing is Corruption on International Investors?’ (2000) 82(1) *The Review of Statistics and Economics* 1, 11.

⁵ J. HINES, ‘Forbidden Payment: Foreign Bribery and American Business After 1977’ (1995) *NBER Working Paper* n. 5266; D. DELLA PORTA and A. VANNUCCI, *Corrupt Exchanges: Actors, Resources and Mechanisms of Political Corruption*, Routledge, 1999.

grows along with the distance, in terms of level of corruption, between the host country and the exporting state.⁶

Corruption, defined as “the abuse of entrusted power for private gain”⁷ has a very broad scope, which includes bribery, trading in influence, abuse of functions, and various acts of corruption in the private sector.⁸ This study focuses on bribery, defined as “the offering, promising, giving, accepting or soliciting of an advantage as an inducement for an action which is illegal, unethical or a breach of trust”⁹.

In particular, I will look at bribes paid to foreign public officials by intermediaries. When looking at the data on the enforcement of this cross-border corporate crime, a relevant trend stands out. In three out of four cases, corrupt transactions took place through third-party intermediaries.¹⁰ In this context an intermediary can be defined as a person “who is put in contact with or in between two or more trading parties”¹¹. The significant involvement of middlemen in international corruption can be subject to distinct interpretations.¹² On the one hand, they can be seen as a conduit for the exclusive implementation of legitimate activities. On the other hand, it is possible to deem them as a shield for companies entering a foreign market through illegal means. Finally they can be perceived as an instrument for the implementation of a combination of legal and illegal services. Understanding

⁶ J. CAMPOS, D. LIEN and S. PRADHAN, ‘The Impact of Corruption on Investment: Predictability Matters’ (1999) 27(6) *World Development* 1059,1067; L. ZURAWICKI and M. HABIB, ‘Corruption and Foreign Direct Investment: What Have We Learned?’ (2010) 9(7) *International Business & Economic Research Journal* 1, 9.

⁷ Transparency International, ‘What is corruption?’, <<https://www.transparency.org/en/what-is-corruption>>, accessed 28.07.2021.

⁸ See UNCAC, n. 37 infra.

⁹ Transparency International UK, What is bribery?, <<https://www.antibriberyguidance.org/guidance/5-what-bribery/guidance>>, accessed 28.07.2021.

¹⁰ OECD, Foreign Bribery Report: An Analysis of the Crime of Bribery of Foreign Public Officials, 2014 <<https://www.oecd-ilibrary.org/docserver/9789264226616-en.pdf?expires=1610194632&id=id&accname=guest&checksum=EF7489616931E60D3B112B9C0FB2FE01>> accessed 09.01.2021.

¹¹ OECD, Typologies on the Role of Intermediaries in International Business Transactions, October 2009, p. 5 <<https://www.oecd.org/daf/anti-bribery/43879503.pdf>> accessed 09.01.2021.

¹² Ibid.

their role is fundamental in order to optimally regulate international corruption.

1.1.1. Third-party intermediaries as a channel for legal services

The employment of third-party intermediaries in international business transactions can yield important positive effects, with regard to the total level of trade. This result hinges upon the reduction of the transaction costs associated with entering a foreign market.

In the first instance intermediaries can reduce the material cost of the investment, such as the costs of travel and personal expenses. Additionally, they can reduce the costs of searching for trade partners, by acting as local representatives.¹³ The use of middlemen can also overcome cultural barriers and provide foreign investors with the information regarding the legislative and institutional framework of the host country. For example they can offer information about trading opportunities¹⁴, as well as local marketing strategies¹⁵. This service is particularly relevant for levelling the playing field between local and foreign investors.¹⁶

If intermediaries are exclusively seen as instruments necessary to reduce transaction costs, their impact on total welfare is positive, since they facilitate international flows of goods and services.¹⁷ Moreover they can act as a buffer against the demands for undue bribes.¹⁸ In this scenario, efficiency

¹³ A. GREIF, 'Contract Enforceability and Economic Institutions in Early Trade: The Maghribi Traders' Coalition' (1993) 83(3) *American Economic Review* 525, 548.

¹⁴ J.E. RAUCH and J. WATSON, 'Network Intermediaries in International Trade' (2004) 13(1) *Journal of Economics & Management Strategy* 69, 93.

¹⁵ M. PENG and A. YORK, 'Behind Intermediary Performance in Export Trade: Transactions, Agents, and Resources' (2001) 32 *Journal of International Business Studies* 327, 346.

¹⁶ J. CAMPOS et al., *supra* n. 6.

¹⁷ J. AHN, A.K. KHANDELWAL and S.-J. WEI, 'The Role of Intermediaries in Facilitating Trade' 2010 NBER Working Paper, <https://www.nber.org/system/files/working_papers/w15706/w15706.pdf>, accessed 03.03.2021.

¹⁸ J. BRAY, 'The use of intermediaries and other "alternatives" to bribery' in J. LAMBSDORFF et al. (eds), *The New Institutional Economics of Corruption*, Routledge 2004.

considerations require to encourage the use of middlemen in order to facilitate growth and development.

1.1.2. Third-party intermediaries as a channel for illegal services

The adoption of intermediaries in international business transactions can also be seen as a strategic choice of corporations to access a foreign market, through illegal means.¹⁹ Foreign companies investing in a corrupt country are put at a competitive disadvantage compared to the local competitors with regard to the ‘rules’ concerning the payment of bribes to public officials. This information asymmetry is particularly difficult to overcome without the use of an agent since corruption is meant to be secret. The use of third-party intermediaries can reduce this gap and can facilitate the participation of foreign firms in corrupt deals.

Moreover, corrupt transactions are not enforceable in court and, consequently, they may be subject to hold-up problems. Third-party intermediaries can build a reputation of trustworthiness and ensure the implementation of illegitimate arrangements.²⁰ For example they can select partners that are known to deliver their promises and they can prevent opportunism, due to their repeated interaction with corrupt public servants.²¹

Corporate entities can also use third-party intermediaries in order to detach themselves from the corrupt intent. In this way they can reduce the costs associated with the criminal sanctions and use the agency relationship as a form of insurance.²² This hypothesis is relevant when vicarious liability of corporations is not extended beyond the employment relationship.²³ Finally the involvement of third-party intermediaries in corrupt transactions can also reduce the moral costs associated with the criminal conduct. Experimental

¹⁹ OECD, *supra* n. 11.

²⁰ D. DELLA PORTA and A. VANNUCCI, *supra* n. 5.

²¹ J. LAMBSDORFF, *The New Institutional Economics of Corruption and Reform: Theory, Policy and Evidence*, Cambridge University Press 2007.

²² G. BAYAR, ‘The Role of Intermediaries in Corruption’ (2005) 122 *Public Choice* 277, 298.

²³ See Chapter III *infra*.

studies have shown that the delegation of illegal acts reduces the psychological costs of these actions. In the context of bribery, this means that bribers would feel less responsible, if the illicit payments are channelled through intermediaries.²⁴

The strategic use of intermediaries in order to facilitate corrupt transactions is also supported by anecdotal evidence. In a recent survey, conducted at a firm level, an overwhelming majority of business directors stated that companies used middlemen to avoid their direct involvement, either regularly or occasionally.²⁵

Under this framework the use of middlemen in international business transactions, increases the overall level of corruption and has a negative impact on total welfare.²⁶ For this reason, in some countries the use of intermediaries in public contracts has been entirely prohibited.²⁷

1.1.3. Third-party intermediaries between legal and illegal services

The previous sections have looked at the involvement of third-party intermediaries in international business transactions from two opposite perspectives. However, when looking at the most relevant cases, the definition of a third hypothesis seems to be more appropriate.²⁸ In fact middlemen are often employed in order to provide a combination of legal and illegal services.²⁹

²⁴ M. DRUGOV, J. HAMMAN and D. Serra, 'Intermediaries in Corruption: An Experiment' (2014) 17 *Experimental Economics* 78, 99.

²⁵ The survey was conducted on 50 US and 50 European companies. K. HASKER and C. OKTEN, 'Intermediaries and Corruption' (2008) 67(1) *Journal of Economic Behavior and Organization* 103, 115.

²⁶ G. BAYAR, *supra* n. 22.

²⁷ R. BEDI, 'India's Bizarre Arms Procurement Policy' (2000) 42 *Economic and Political Weekly* 3716.

²⁸ J. LAMBSDORFF, 'Corrupt Intermediaries in International Business Transactions: Between Make, Buy and Reform' (2011) 35(3) *European Journal of Law and Economics* 1, 18.

²⁹ *Ibid.*

Moreover, even when the illegal activities take place, corporations do not always play an active role in it. In some circumstances an intermediary initiates a corrupt transaction, without the consent of the company involved. In more severe situations, they threaten to disclose the illegal payment to judicial authorities, in order to ensure the payment of the corrupt service.³⁰

Consequently the adoption of intermediaries in international business transactions, does not bring to a clear-cut result on the overall level of corruption and, therefore, on total welfare. In particular the effect can depend on the distribution of the type of activities carried out. Additionally the provision of illegal services may be ancillary to the delivery of legal ones. In particular the former can act as leverage for the engagement in collective negotiations with public servants benefiting the latter ones.

In conclusion, the welfare implications deriving from the use of intermediaries are mixed. In general, if the costs of investing in a foreign country are high and there is a sufficiently high number of honest types, the impact is positive.³¹ This result shows that the two extreme solutions of exempting from liability deriving from corruption or prohibiting the use of intermediaries are not appropriate responses. This study will, therefore, focus on the definition of the optimal level of deterrence of corrupt practices carried out by middlemen.

1.2. Scope of the study

The growing attention of policymakers to international bribery led to the proliferation of legislative measures dealing with this phenomenon. The first attempt can be dated back to 1977 when, in the aftermath of the Watergate scandal, the US Congress enacted the Foreign Corrupt Practices Act (FCPA)³². Following this legislative intervention, several national and international measures have been adopted on a global scale. Despite the fact

³⁰ Ibid.

³¹ Ibid.

³² Foreign Corrupt Practices Act, 1977 (15 USC par. 78 dd-1, et seq.) [hereinafter FCPA]

that bribery is a bilateral crime, these legislations are mainly concerned with the regulation of corporate entities supplying the corrupt payment (i.e. the ‘supply side’).³³

This work analyses, from a legal and economic perspective, the liability rules imposed on corporations and, in particular, the ones applied when the criminal conduct occurs through third-party intermediaries. With regard to the national legislations, this study focuses on the FCPA, the UK Bribery Act (UKBA)³⁴ and the Italian Legislative Decree n. 231/2001 dealing with corporate liability for international bribery³⁵. In relation to the international instruments, the analysis focuses on the 1997 Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, of the Organization for Economic Co-Operation and Development (OECD Convention)³⁶ and on the 2003 United Nations Convention Against Corruption (UNCAC)³⁷.

These measures hold corporate entities liable for the criminal conduct put in place by third-party intermediaries, broadly defined. In fact their scope goes beyond middlemen and reaches a variety of subjects, including consulting firms, distributors, resellers, subcontractors, franchisees, joint venture partners and subsidiaries.³⁸ The application of a criminal sanction to corporate entities for the conduct of third-party intermediaries represents an exception to the ‘*respondeat superior*’ doctrine. On the basis of this principle, legal entities are vicariously liable for the criminal behaviour put in place by agents that are in a master-servant relationship with them.³⁹

³³ With the exclusion of the UK Bribery Act, see *infra* n. 34 and the United Nations Convention against Corruption, see *infra* n. 37.

³⁴ Bribery Act, 2010 (c.23) [hereinafter UKBA].

³⁵ Italian Legislative Decree n. 231/2001.

³⁶ OECD, Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, adopted by the negotiating conference on 21.11.1997 [hereinafter OECD Convention].

³⁷ United Nations Convention against Corruption, 2004 [hereinafter UNCAC].

³⁸ OECD, *supra* n. 11.

³⁹ J. ARLEN and W.B. MCLEOD, Beyond master-servant: A critique of vicarious liability’ in M.S. MADDEN, (ed.), *Exploring Tort Law*, p. 111, Cambridge University Press 2005.

One of the main distinctive features of the master-servant relationship is the existence, within the corporation, of a right to physically control its agents.⁴⁰ Absent this right, agents are classified as independent contractors and the application of vicarious liability is generally excluded. However, this rule is subject to some exceptions, which are differently defined, on the basis of the imputation rules in place.

In case of strict liability offenses, legal entities are liable for the crimes of their independent contractors, despite the delegation of their corporate activities.⁴¹ For offenses that require a mental state, the liability of the delegating company is excluded, unless the *mens rea* is proven. This condition is fulfilled, for example, in cases in which the corporation is aware that middlemen will complete the contract, through illegal means.⁴² Additionally the illegitimate intention is proven circumstantially, whenever the criminal conduct appears to be the result of a wilful refusal of the corporation to inquire the activities of its agents. The application of a vicarious liability regime on corporate entities for the violation of the provisions dealing with international corporate bribery hinges upon this ‘wilful blindness’ doctrine. Corporations are generally liable for their agents, whenever they are found to have “deliberately fail to make reasonable inquiries”.⁴³

1.3. Research Questions

Despite the importance of the role played by third-party intermediaries in international corrupt business transactions, the law and economics literature has addressed this topic only recently.⁴⁴ In particular, scholars have focused on two specific aspects. On the one hand, a special attention has been given

⁴⁰ A. SYKES, ‘The Economics of Vicarious Liability’ (1984) 93 *Yale Law Journal* 1231, 1280.

⁴¹ *United States v. Parfait Powder*, 163 F.2d 1008 (7th Cir.) 1947.

⁴² A. SYKES, *supra* n. 40.

⁴³ OECD *supra* n. 11, p. 13.

⁴⁴ A. BANERJEE, H. REMA and M. SENDHIL, ‘Corruption’ in R. GIBBONS and J. ROBERTS, (eds.) *The Handbook of Organizational Economics*, Princeton University Press 2012, pp. 1109-1147.

to the assessment of the impact of third-party intermediaries on the overall level of corruption. On the other hand, possible solutions for the regulation of middlemen have been studied.⁴⁵

Little attention has been paid to measure how the presence of third-party intermediaries in international business transactions affects the efficiency of the liability regimes imposed on corporate entities.⁴⁶ However the enforcement of legislative measures, insufficiently addressing this issue, may have harmful consequences on the overall level of corruption.⁴⁷ This study aims to fill this gap in the literature by addressing the three following questions:

- (i) Assuming the goal of social welfare maximization, should corporations be held vicariously liable for crimes committed by the intermediaries?
- (ii) Is there a difference in effectiveness between anti-bribery compliance (ABC) program addressing employees and those addressing intermediaries? And if so - may this difference justify, from a welfare maximization point of view, a variation between the structure of the corporate liability regime applicable to employee misconduct and the one applicable to misconduct of third parties?
- (iii) What is the role that certifications of ABC programs adopted by third parties may play in improving the efficiency of ABC enforcement policies?

⁴⁵ J. LAMBSDORFF, *supra* n. 28.

⁴⁶ *Ibid.*

⁴⁷ O. FJELDSTAD, 'Fighting Fiscal Corruption: Lessons from the Tanzania Revenue Authority' (2003) 23 *Public Administration and Development* 165, 175.

1.3.1. Assuming the goal of social welfare maximization, should corporations be held vicariously liable for crimes committed by the intermediaries?

Corporate crime has been deemed to be the result of an agency problem between legal entities and their employees.⁴⁸ For these reasons, when looking at its deterrence through criminal sanctions, independent contractors have not been sufficiently analysed by the economic literature.⁴⁹ This research question aims to explore the economic rationale for extending the application of a vicarious criminal liability beyond the realm of the employment relationship.

This analysis has been conducted in the context of corporate civil law violations. In particular, Arlen and McLeod have analysed the drawbacks of limiting the application of vicarious civil liability to a master-servant relationship.⁵⁰ Given the common features of criminal and civil liability when applied to corporations⁵¹, their analysis will be extended to the hypothesis of organizational misconduct.

1.3.2. Is there a difference in effectiveness between ABC program addressing employees and those addressing intermediaries? And if so - may this difference justify, from a welfare maximization point of view, a variation between the structure of the corporate liability regime applicable to employee misconduct and the one applicable to misconduct of third parties?

The imputation of a criminal conduct on corporate entities is justified by the ability of firms to achieve, in a more efficient manner than the State, the two

⁴⁸ J. ARLEN, 'Corporate criminal liability: Theory and evidence' in A. HAREL and K.N. HYLTON (eds.), *Research Handbook on the Economics of Criminal Law*, Edward Elgar Publishing, Cheltenham 2012.

⁴⁹ Ibid.

⁵⁰ J. ARLEN and W.B. MCLEOD, *supra* n. 39.

⁵¹ W. MULLIN, 'Corporate crime' in N. GAROUPA (ed.) *Criminal Law and Economics*, Edward Elgar 2009, p. 237.

following objectives: (i) on the one hand the prevention of the criminal conduct; and (ii) on the other hand, its detection and enforcement.⁵² These two objectives are subject to a trade-off and an optimal liability standard needs to balance them on the basis of a cost-benefit analysis. In particular, the efficiency of this regime hinges upon the assumption that the marginal costs of firms to achieve the objectives of corporate crime (i.e. prevention and detection) are lower than the marginal costs faced by the State.

However, the legislative framework addressing international corporate bribery⁵³, extends the vicarious liability beyond the employment relationship. In this context companies are, not only, required to pay for the corrupt conduct of their intermediaries but they are also expected to invest in corporate prevention and policing, through ABC programs.

In this study, I will look at the potential economic effects associated with the implementation of ABC programs addressing third-party intermediaries. In the first instance, the analysis will focus on the impact of this different relationship on the optimal standard of investments in ABC programs. In addition, it will look at the impact on the optimal sanction and liability mitigation for companies whose third parties have paid bribes to foreign public officials.⁵⁴ Even though ABC programs are made of *ex-ante* and *ex-post* measures, the analysis will only focus on the first category of activities for the purpose of simplicity.

1.3.3. What is the role that certifications of ABC programs adopted by third parties may play in improving the efficiency of ABC enforcement policies?

This study will, then, look at the role of third-party certifications, in the overall enforcement of foreign bribery paid by intermediaries. In particular, third-party certification will be regarded as a signalling tool that

⁵² J. ARLEN, *supra* n. 48.

⁵³ As analysed in Chapter II *infra*.

⁵⁴ See Chapter III *infra*.

intermediaries with adequate ABC programs could use to distinguish themselves from those with an inadequate investment in compliance. Considering their screening function, they can be regarded as an additional instrument companies can adopt, when investing in the *ex-ante* activities of their ABC programs.

The role of certifying companies will be analysed from an economic and legal perspective, in order to identify the conditions necessary for an efficient certification process. In carrying out this analysis, the regulatory measures adopted by the US to regulate auditors will be considered. The study will look at the possible implications of the adoption of these measures in the context of certification of ABC programs. Finally, this study will look at the way in which the choice to interact with certified intermediaries could have an impact on corporate criminal sanctions. The risks of moral hazard and the conditions necessary to limit them will be discussed.

1.4. Thesis Structure and Methodology

This research is based on a positive and normative analysis. Chapter II draws an overview of the legislative regimes dealing with cross-border corporate bribery and of the guidelines defining the implementation of effective ABC programs. This analysis is positive and focuses on third-party intermediaries. The comparative analysis looks at both national and international treaties, since international corporate bribery is addressed through a combination of horizontal and vertical legal instruments.

Chapter III looks at the main contribution of the economic literature dealing with corporate crime. After defining the main objectives of public enforcement of this offense, the liability rules better suited for achieving these scopes are identified. Finally, it takes a normative approach, with the aim to address the first research question (i.e. assuming the goal of social welfare maximization, should corporations be held vicariously liable for crimes committed by the intermediaries?). In particular, the economic rationale to

extend the application of vicarious liability beyond the employment relationship, is discussed.

Chapter III also focuses on the pros and cons associated with ABC programs, addressing intermediaries. In particular, it looks at the costs and benefits associated with the prevention and detection of the criminal conduct committed by middlemen. On the basis of this distinction, it addresses the second research question (i.e. is there a difference in effectiveness between ABC program addressing employees and those addressing intermediaries? And if so - may this difference justify, from a welfare maximization point of view, a variation between the structure of the corporate liability regime applicable to employee misconduct and the one applicable to misconduct of third parties?). The analysis has a normative objective to assess the efficiency of the existing legislation and to define policy recommendations, for achieving welfare-enhancing solutions.

Chapter IV finally looks at the certification of ABC programs, in order to address the third research question (i.e. What is the role of the certification of ABC programs adopted by third parties?). This chapter looks at the certification of ABC programs adopted by intermediaries as a signalling tool to enable companies to identify intermediaries with adequate ABC programs in place. From this point of view, they complement the *ex-ante* measures of ABC programs implemented by corporations. The analysis hinges upon the economic theory of signalling and looks at the conditions necessary for ABC certification to be effective. In addition, it has the normative objective to clarify the desirable regulatory framework for a recognition of ABC certification as a possible element for obtaining a liability mitigation by companies that interact with certified third parties.

“Without strong watchdog institutions, impunity becomes the very foundation upon which systems of corruption are built. And if impunity is not demolished, all efforts to bring an end to corruption are in vain.” (Rigoberta Menchú, Nobel Prize laureate)

2. Cross-Border Corporate Bribery and Third-Party Agents: A Comparative Analysis

2.1. Introduction

Notwithstanding the fact that corruption is not a recent phenomenon⁵⁵, the last forty years have been characterised by a growing proliferation of initiatives against it, justified by a gradual understanding of its scope and by the seriousness of its impact.⁵⁶ Moreover, given the growing awareness of the potentially global effects of a criminal conduct occurring in one place, these measures have taken an international approach.⁵⁷

Despite the widespread expansion of anti-corruption instruments of different nature, this study exclusively focuses on the criminal law channel. In particular, as specified in the Introduction, it focuses on the role played by third party agents in the incidence of a corrupt transaction and on the assessment of the effectiveness of the enforcement measures dealing with them.

⁵⁵ See *supra* Introduction, section 1.1.

⁵⁶ D. VLASSIS, ‘The United Nations Convention against Corruption: A Way of Life’ in N. PASSAS and D. VLASSIS (eds.), *The United Nations Convention against Corruption as a Way of Life*, Selected papers and contributions from the International Conference on ‘The United Nations Convention against Corruption as a way of life’, Courmayeur, 15-17 December 2006 Milan, ISPAC, p. 17. N. PASSAS, ‘Introduction’ in N. PASSAS and D. VLASSIS (eds.), *The United Nations Convention against Corruption as a Way of Life*, p. 9: ‘Corruption is neither a new phenomenon nor confined to particular countries, geographic regions, political systems or cultures. New is an international determination to act effectively against this scourge, which undermines political stability, sabotages development, distorts competition, violates the rule of law, maintains structures of inequality and poverty, and adds to other sources of insecurity, unfairness and injustice. In the last two decades, the world has witnessed many initiatives against corruption and its negative effects on governments, businesses and society at large.’

⁵⁷ N. PASSAS, *ibid.*

In this chapter I carry out a comparative analysis of the liability regimes dealing with cross-border corporate bribery and I focus on the criteria defined by the national and international legislators to ascribe the criminal conduct of individual agents to fictitious entities. In particular this chapter is organized as follows. In Section 2.2 I introduce the legislative measures subject to the comparative analysis; in Section 2.3 the criteria of the comparative analysis are listed, while section 2.4 examines these criteria in the context of third-party agents. Sections 2.5, 2.6, 2.7, 2.8, 2.9 carry out the comparative analysis on the basis of the above-mentioned standards for the FCPA, the OECD Convention, the Italian Legislative Decree n. 231/2001, the UNCAC and the UKBA. The results of this comparison are also represented in *Tables 1* and *2* of this Chapter. Finally Section 2.10, looks at the standards of ABC programs for third-party agents introduced by the International Chamber of Commerce (ICC).

2.2. Identification of the Main Regimes to be Compared

Before listing the regimes object of the comparative analysis, a peculiar aspect of the criminal law approach, dealing with cross-border corporate bribery, needs to be considered. In particular, the measures addressing this offense have a hybrid⁵⁸ nature because they are characterised by a combination of horizontal and vertical instruments.⁵⁹ The former are represented by Treaty obligations between States (also defined as “suppression conventions”⁶⁰) that, unlike other international criminal law instruments⁶¹, do not have a direct application. The latter are measures of the

⁵⁸ See D. AMANN, ‘Harmonic Convergence? Constitutional Criminal Procedure in an International Context’ (2000) 75(3) *Indiana Law Journal*, 809.

⁵⁹ In order to overcome the limits of national criminal laws in the deterrence of global crime, a system of transnational criminal law has been developed. This system is based on a combination of vertical and horizontal elements. N. BOISTER, *An Introduction to Transnational Criminal Law*, Oxford University Press 2012, p. 7.

⁶⁰ There are over 200 of these conventions and they all deal with crimes, such as narcotraffic, smuggling, fraud and terrorism which, when carried out cross-border, cannot be tackled simply by national legislation. See M.C. BASSIOUNI, *International Criminal Law, Multilateral and Bilateral Enforcement Mechanisms*, vol. 2, Martinus Nijhoff Publishers 2008.

⁶¹ The core international law crimes are regulated by Articles 5-8 of the Rome Statute. They are genocide, war crimes, crimes against humanity and aggression. See Rome Statute of the International Criminal Law Court, 17 July 1998, 2187 UNTS 90, in force on 1 July 2002.

ratifying countries⁶² that vertically implement those standards, through national criminal laws.⁶³

Consistently with the general framework of the anti-bribery agenda defined above, the comparative analysis drawn in this chapter, looks at a combination of national and international measures. Among the legislative acts present in the first category, the study looks at the OECD Convention⁶⁴ and at the UNCAC⁶⁵. With regard to the national instruments, the examination focuses on the FCPA⁶⁶, the Italian Legislative Decree n. 231/2001, dealing with transnational corporate bribery and the 2010 UKBA⁶⁷. These legal acts will be analysed in chronological order, starting from the oldest one (the FCPA) and ending with the most recent one (the UKBA). This choice is based on the consideration that the above-mentioned provisions have influenced each other, with the FCPA leading the legislative movement regarding foreign corporate bribery.

Apart from the distinction between horizontal and vertical instruments, the measures listed above can be classified on the basis of their scope and go from a very broad (e.g. the UNCAC; the UKBA) to a narrow one (e.g. the OECD Convention; the FCPA).⁶⁸ This difference is based on the breadth of the concept of corruption and on the consequent diversity of the instruments adopted to curb it.⁶⁹ As already specified in the Introduction, this study

⁶² These treaties create a system of horizontal and vertical obligations. The horizontal obligations are between the ratifying countries, particularly with regard to the obligations of mutual legal assistance; the vertical obligations are on the ratifying countries with regard to the enforcement of the treaty obligations. See N. BOISTER, *supra* n. 59, p. 13.

⁶³ M. PIETH, L. LOW and P. J. CULLEN (eds.), *The OECD Convention on Bribery: A Commentary*, Cambridge University Press 2007, p. 14 and L.S. BORLINI and M. ARNONE, *Corruption: Economic Analysis and International Law*, Edward Elgar 2014, p. 218.

⁶⁴ OECD Convention, *supra* n. 36.

⁶⁵ UNCAC, *supra* n. 37.

⁶⁶ FCPA, *supra* n. 32.

⁶⁷ UKBA, *supra* n. 34.

⁶⁸ International Bar Association, Report of the Task Force on Extra-Territorial Jurisdiction, 2009, p. 225 <https://www.ibanet.org/Article/NewDetail.aspx?ArticleUid=597d4fcc-2589-499f-9d9b-0e392d045cd1> 09.04.2021.

⁶⁹ In fact, these acts include a 'policy-based' definition, which defines corruption as '*the abuse of entrusted power for private gain*', Transparency International, What is corruption?

focuses on the supply side of bribery, taking place internationally.⁷⁰ Finally, in the selection process an additional principle of relevance has been taken into account. In fact, the selected national legislations are among the ones with the highest level of enforcement, respectively in the Common Law and Continental Law system.⁷¹

The analysis of these horizontal and vertical instruments will help answer the three research questions presented in the Introduction. In particular, the positive analysis capturing the state of the art aims to complement the normative analysis developed in Chapter III and Chapter IV. In this way, it will be possible to verify whether the anti-bribery provisions adopted in the countries under analysis are efficient, from a law and economics perspective. Namely:

- a) For the first research question (i.e. assuming the goal of social welfare maximization, should corporations be held vicariously liable for crimes committed by their intermediaries?): the legal analysis will look at whether the horizontal and vertical legal instruments have expanded the scope of corporate vicarious liability beyond the master-servant relationship.
- b) For the second research question (i.e. is there a difference in effectiveness between ABC program addressing employees and those addressing intermediaries? And if so - may this difference justify, from a welfare maximization point of view, a variation between the structure of the corporate liability regime applicable to employee

<<https://www.transparency.org/en/what-is-corruption>> accessed 23.01.2021 or as ‘*the abuse of public office for private gains*’, World Bank, *Helping Countries Combat Corruption: The Role of the World Bank*, 1997. For a complete analysis of the definitions of corruption, see L.S. BORLINI and M. ARNONE, *supra* n. 57, p. 314 et ss. S.R. ACKERMAN, *Anti-Corruption Policy: Can International Actors Play a Constructive Role?* Carolina Academic Press 2013, p. 5.

⁷⁰ See *supra* section 1.2.

⁷¹ This refers to the period between the entry into force of the OECD Convention (15 February 1999) and 1 June 2014. See OECD, *supra* n. 10. See S. MANACORDA, F. CENTONZE and G. FORTI (eds.), *Preventing Corporate Corruption: The Anti-Bribery Compliance Model*, Springer 2014, pp. 397-416.

misconduct and the one applicable to misconduct of third parties?): the legal analysis will look at the ABC compliance requirements for third parties, in order to verify whether they differ from those provided for employees and will additionally focus on the structure of the liability regimes applicable.

- c) For the third research question (i.e. what is the role that certifications of ABC programs adopted by third parties may play in improving the efficiency of ABC enforcement policies?): the legal analysis will look at the role attributed to ABC certification mechanisms and at the standards and regulations they are subject to.

2.3. Criteria of the Comparative Analysis

In order to ensure a systematic comparison of the selected regimes against transnational bribery, I define the criteria to serve as the basis for the analysis. Criminal law is a parochial discipline⁷² and the identification of common criteria is a difficult task. Moreover, the hybrid nature of the legislation dealing with cross-border corporate bribery, has led to a trade-off between the demand to have a coordinated action against corruption, on the one hand, and the necessity to respect national sovereignty, on the other one.⁷³

This equilibrium has been reached, in a particularly effective way, by the OECD Convention. In fact, while setting some clear minimum standards⁷⁴, it allows signatory States to implement its provisions with a certain level of freedom, on the basis of the principle of functional equivalence.⁷⁵ According to this standard, Member States are not expected “to utilise its precise terms in defining the offence under their domestic laws. A Party may use various

⁷² L.E. CHIESA, 'Introduction, in Comparative Criminal Law' in M. DUBBER and T. HÖRNLE (eds.), *Oxford Handbook of Criminal Law*, Oxford University Press, 2014, p. 1.

⁷³ L.S. BORLINI and M. ARNONE, *supra* n. 63, p. 311.

⁷⁴ Despite this flexibility, the countries implementing the Convention must adopt minimum standards in order to ensure a certain level of harmonisation. These standards have been clarified under Annex I of the Convention, Good Practice Guidance on Implementing Specific Articles of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.

⁷⁵ OECD, *No Longer Business as Usual: Fighting Bribery and Corruption*, 2000, p. 52.

approaches to fulfil its obligations, provided that conviction of a person for the offence does not require proof of elements beyond those which would be required to be proved if the offence were defined as in this [Convention]”.⁷⁶

Accordingly, the criteria of the comparative analysis of this chapter, hinge upon the standards defined at the OECD level. Specifically the analysis is based on the following features: the elements of the offense (objective and subjective); the liability rule and the sanctions imposed; the incentives provided in order to encourage the involvement of the private sector in the prevention and detection of corporate bribery; the jurisdictional scope.

The elements of the criminal offence can be divided in objective and subjective ones, respectively defined as ‘*actus reus*’ and ‘*mens rea*’.⁷⁷ The *actus reus* is constituted by the elements that make up the conduct to be put in place in order for the criminal offence to happen. In the context of bribery, it is made up of the qualification of the offender (the briber), the qualification of the co-offender (the recipient of the bribe, defined as bribee) and the qualification of the acts carried out by both. This represents the first element of the comparative analysis and this study exclusively focuses on the definition of the conduct of the offender (i.e. supply-side).⁷⁸

The *mens rea* refers to the mental state of the offender and it needs to be satisfied “with respect to all the factors or elements making up the offence”.⁷⁹ In order to define this criterion, it is necessary to distinguish between civil law and common law jurisdictions.⁸⁰ The common law requirement of the *mens rea* is satisfied when the behaviour is put in place with intention or knowledge, recklessness or negligence.⁸¹ In Civil law countries an additional distinction is made between intention, on the one hand, and negligence and

⁷⁶ M. PIETH et al., *supra* n. 63, p. 54.

⁷⁷ *Id.*, p. 157.

⁷⁸ L.S. BORLINI and M. ARNONE, *supra* n. 63, p. 327.

⁷⁹ M. PIETH et al., *supra* n. 63, p. 159.

⁸⁰ *Id.*, p. 157.

⁸¹ *Ibid.*

knowledge, on the other one. In fact only the first one entails a certain degree of volition and satisfies the *mens rea* requirement in these jurisdictions.⁸²

Moreover the intention is made up of two elements: the knowledge of the existence of specific elements of crime and a certain volition of committing a crime.⁸³ When dealing with transnational corporate bribery, the *mens rea* requirement needs to be satisfied with regard to corporate entities.⁸⁴ However, criminal law traditionally focuses on personal guilt⁸⁵ and the attribution of a criminal conduct to a fictitious entity has been the object of a controversial debate (on the basis of the dogma that fictitious entities cannot satisfy the mental requirement, i.e. “*societas delinquere non potest*”).⁸⁶

In order to overcome this limitation, three imputation models through which the mental element of the corrupt conduct could be attributed to corporations have been identified.⁸⁷ The models are the following⁸⁸:

⁸² Ibid.

⁸³ Id., p. 159. ‘To act knowingly, the offender must have been aware that he was committing bribery himself or through another person, as the case may be; he must at least have reckoned with it. To act willingly, the offender must have resolved to commit the crime, or have reckoned with the occurrence of corruption under his management.’ G. GORDON, *The Criminal Law of Scotland*, 3rd ed., The Scottish Universities Law Institute, 2001. L.S. BORLINI and M. ARNONE, *supra* n. 63, p. 342.

⁸⁴ L.S. BORLINI and M. ARNONE, *supra* n. 63, p. 350. OECD, *Behind the Corporate Veil: Using Corporate Entities for Illicit Purposes*, Paris, 2001. Financial Action Task Force, *The Misuse of Corporate Vehicles, Including Trust and Company Service Providers*, 2001, available at <<https://www.fatf-gafi.org/documents/documents/themisuseofcorporatevehiclesincludingtrustandcompanyserviceproviders.html>>, last accessed 27.03.2021.

3 October.

⁸⁵ M. PIETH and R. IVORY, *Corporate Criminal Liability: Emergence, Convergence and Risk*, Springer, 2011, p. 4.

⁸⁶ ‘The first group includes the anthropomorphic models, which measure organizational blameworthiness by using the standards traditionally applied to individual culpability. The second group includes the organizational models, which determine culpability based on the characteristics of the corporation, on its policies, and its practices.’ C. DE MAGLIE, ‘Models of Corporate Criminal Liability in Comparative Law’ (2005) 4 (3) *Washington University Global Studies Law Review* 548.

⁸⁷ M. PIETH et al., *supra* n. 63, p. 5. D.J. PLAINE, ‘The OECD Guidelines for Multinational Enterprises’ (1977) 11(2) *International Lawyer* 1977, 339-341.

⁸⁸ Notice that these models have been adopted in the legislations analysed below, as highlighted in the summarizing tables (Table 1 and Table 2 *infra*).

- a. The vicarious liability model: this model traditionally ascribes the criminal conduct to a legal entity, when committed by its employees in the interest of the company and while exercising their functions (i.e. master-servant relationship). It was applied for the first time in the aftermath of the industrial revolution in Anglo-American jurisdictions in order to deal with civil wrongs and was subsequently extended to crimes.⁸⁹

- b. The identification theory model: this theory was introduced in the UK in the 1940s and it is based on an anthropomorphic representation of the firm.⁹⁰ In fact it distinguishes among individuals acting as the hands (i.e. simple employees) of the corporations and individuals acting as their brain (i.e. subjects holding managerial positions). According to this theory the corporation is criminally liable if the conduct has been put in place by individuals that are its 'directing mind'.⁹¹ This approach has been considered to be too limited, particularly in cases in which the corporate entity is a multinational and the decisional power is delegated throughout a complex organization.⁹²

- c. The objective theory model (or 'holistic model'): this model introduces a broad concept of criminal liability of legal entities and holds them accountable for crimes, independently from the indictment of an individual and on the basis of the corporate culture and organization. According to this theory the culpability of the legal entity could be excluded if it proves to have adopted 'adequate' preventive measures.

⁸⁹ M. PIETH and R. IVORY, *supra* n. 85, p. 626.

⁹⁰ C. DE MAGLIE, *supra* n. 86, p. 556.

⁹¹ *Tesco Supermarket Ltd v. Natrass* [1971] UKHL 1, [1972] AC 153.

⁹² For this reason, the UK legislative system has been considered inadequate and the OECD Working Group required the adoption of a different model. See OECD, UK: Phase 2bis - Report on the Application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 1997 Recommendation on Combating Bribery in International Business Transactions <<http://www.oecd.org/daf/anti-bribery/anti-briberyconvention/41515077.pdf>> accessed 22.01.2021.

The **liability models** discussed above, together with the sanctions in case of infringement, represent the second criterion of comparison. The third element of comparison is represented by the **jurisdictional scope**. For the purpose of this analysis it shall be interpreted as the “state’s authority to criminalize a given conduct”⁹³. This authority rests in a state ‘sovereignty’⁹⁴ which can be exercised within or outside the national territory. The territorial principle is the basis for the recognition of the jurisdiction over crimes in almost all States. This principle provides for the jurisdiction of a State, whenever a material element of a criminal conduct (or its effects) takes place in its territory.⁹⁵

The application of this principle for the deterrence of transnational crime is rather insufficient, particularly considering the globalization of the economy and the internationalization of criminal activities.⁹⁶ In this context the extraterritorial application of the law has been regarded a necessary tool for the prosecution of international bribery. All the anti-bribery measures analysed in this study apply, along with the principle of territoriality, the principle of active nationality.⁹⁷ According to the latter, states can have jurisdictional powers for crimes committed by their nationals (i.e. ‘active nationality’ principle) “wherever they may be”⁹⁸.

The principle of territoriality and the principle of active nationality are implemented in an extensive manner⁹⁹ because they do not only pursue national interests but they also favour a cooperative environment for the

⁹³ See R. O’KEEFE, ‘Universal Jurisdiction – Clarifying the Basic Concept’ (2004) 2(3) *Journal of International Criminal Justice* 733 and L.S. BORLINI and M. ARNONE, *supra* n. 63, p. 350.

⁹⁴ *France v. Turkey* 1928, PCIJ Report Series A, No. 1, the so-called ‘Lotus case’ in which it was specified that there is no international rule that imposes a precise jurisdictional criterion.

⁹⁵ S. BASSIOUNI, *supra* n. 60, p. 161.

⁹⁶ U. BECK, *Was ist Globalisierung?* Frankfurt 1998. ‘Crime is now established on an international scale’, *Somchai Liangsiriprasert v. US Government*, 1991, 1 AC, pp. 225 ff., at p. 241.

⁹⁷ OECD Convention, *supra* n. 36, Article 4(2).

⁹⁸ M. PIETH et al., *supra* n. 63, p. 269.

⁹⁹ *Id.*, p. 272.

protection of foreign and global interests.¹⁰⁰ Moreover the OECD Convention and the UNCAC explicitly refer to the possibility to be the legal basis for the application of the extradition¹⁰¹ and, at the same time, require the application of the principle “aut dedere, aut iudicare”¹⁰². According to this principle if a country refuses to extradite its own national who has committed a crime abroad, shall direct this person to its own domestic institutions.¹⁰³

The fourth criterion is represented by **ABC programs adopted** by corporate entities and by the legislative **incentives** provided to encourage their adoption. ABC programs can be defined as ‘self-imposed rules’ established by corporate entities in order to comply with anti-bribery legislations and, in general, in order to prevent and deter the occurrence of this crime within their organization.¹⁰⁴ The adoption of ABC programs has been promoted by the private sector¹⁰⁵ since the beginning of the anticorruption movement.

One of the first and most relevant examples is represented by the Rules on Combating Corruption (ICC Rules), issued in by the International Chamber of Commerce (ICC) in 1976.¹⁰⁶ The ICC is a private organization for the business sector and encouraged the adoption by its members of ABC programs as self-regulatory instruments.¹⁰⁷ Similarly, in 2009, the OECD adopted the 2009 Recommendation for Further Combating Bribery of Foreign Public Officials in International Business Transactions (the 2009 Anti-Bribery Recommendation) in which a Good practice guidance on internal

¹⁰⁰ Id., p. 150.

¹⁰¹ UNCAC, supra n. 37, Article 44 and OECD Convention, supra n. 36, Article 10.

¹⁰² OECD Guidelines, p. 280. ‘*A second source is far more recent: since many countries are opposed to extraditing their nationals, they have the international obligation to prosecute crimes of those nationals who seek refuge in their country (“aut dedere aut iudicare”)*’.

¹⁰³ It is important to remember that extradition does not apply to legal entities. See International Bar Association, supra n. 68, p. 234.

¹⁰⁴ International Chamber of Commerce, ICC Rules on Combating Corruption, 2011, p. 3 <<https://cdn.iccwbo.org/content/uploads/sites/3/2011/10/ICC-Rules-on-Combating-Corruption-2011.pdf>> accessed 22.01.2021.

¹⁰⁵ M. MANTOVANI, ‘The private sector in the fight against corruption’ in S. MANACORDA, F. CENTONZE and G. FORTI (eds.), supra n. 71.

¹⁰⁶ International Chamber of Commerce, supra n. 104.

¹⁰⁷ J. TRICOT, ‘Corporate anti-bribery self-regulation and the international legal framework’ in S. MANACORDA, F. CENTONZE and G. FORTI (eds.), supra n. 71, p. 261.

controls, ethics, and compliance (OECD Good Practice Guidance) has been published.¹⁰⁸ Moreover in 2013 the OECD, together with the World Bank and the United Nations Office on Drugs and Crime (UNODC), issued an Anti-Corruption Ethics and Compliance Handbook for Business (Anti-Corruption Handbook for Business).¹⁰⁹

ABC programs were initially promoted on a voluntary basis and they were considered to be part of corporate social responsibility strategies.¹¹⁰ The interest of the private sector in the adoption, on a voluntary basis, of compliance measures aimed at deterring international bribery was justified by the circumstance that corruption harms business because it “distorts competition and efficiency in markets”.¹¹¹ However the involvement of the private sector in the anti-bribery agenda has moved from being a simple voluntary instrument to be part of a ‘public-private partnership’ in which corporations are encouraged by the public sector to prevent the criminal conduct.¹¹² This strategy is based on the idea that corporate entities are more efficient than other institutions in the prosecution of corporate crime, because they can more closely monitor their employees.¹¹³

The adoption ABC programs is encouraged by national and international regulators in different ways, according to the specificity of their legal systems. In particular, depending on the imputation model, the adoption of compliance programs may affect the level of the sanction imposed on a convicted firm¹¹⁴ or it may affect the identification of the culpability of a

¹⁰⁸ OECD, Recommendation for Further Combating Bribery of Foreign Public Officials in International Business Transactions, 09.12.2009 <<https://www.oecd.org/investment/anti-bribery/anti-briberyconvention/oecdantibriberyrecommendation2009.htm>> accessed 03.01.2021.

¹⁰⁹ OECD, UNODC and WORLD BANK, *Anti-Corruption Ethics and Compliance Handbook for Business*, 2013 <<http://www.oecd.org/corruption/Anti-CorruptionEthicsComplianceHandbook.pdf>> accessed 22.01.2021.

¹¹⁰ J. TRICOT, *supra* n. 107, p. 258.

¹¹¹ OECD, *supra* n. 75.

¹¹² J. TRICOT, *supra* n. 107, p. 263 and F. CENTONZE, ‘Public-private partnership and agency problems: The use of incentives in strategies to combat corruption’ in S. MANACORDA, F. CENTONZE and G. FORTI (eds.), *supra* n. 71, p. 43.

¹¹³ J. ARLEN, *supra* n. 48, p. 144.

¹¹⁴ For example, in the case of the FCPA. See *infra* section 2.5.5.

firm.¹¹⁵ Finally the adoption of compliance programs may also have an impact, from a procedural point of view, by favouring the signature of guilty plea agreements or pre-trial agreements.¹¹⁶

Despite these differences all countries require that, in order to obtain these advantages, compliance programs shall be effective. Each legislation defines general criteria in order to assess the effectiveness of these programs, but an important role has been played by the private sector and by meta-regulators through the production of guidelines and best practices. For instance, in 2016, the International Organization for Standardization (ISO), published the ISO 37001, a standard for anti-bribery management systems.¹¹⁷ This standard aims to provide an authoritative global framework to support the implementation of adequate anti-bribery management systems.¹¹⁸ Even though the adoption of a single standard seems to be desirable for the simplification of the procedures that legal entities have to comply with, concerns regarding the desirability of developing “[...]an effective standard in a field where objective metrics are hard to define” were raised.¹¹⁹ The comparative analysis looks, for each jurisdiction, at the incentives provided for the adoption of ABC programs and at the requirements for considering those programs effective, in each jurisdiction.¹²⁰

¹¹⁵ For example, in the case of the UKBA. See *infra* section 2.9.5.

¹¹⁶ A. NIETO MARTIN and M. MUNOZ DE MORALES, ‘Compliance programs and criminal law responses: A comparative analysis’ in S. MANACORDA, F. CENTONZE and G. FORTI (eds.), *supra* n. 71, p. 344.

¹¹⁷ International Organization for Standardization, ISO 37001:2016, Anti-bribery management systems – Requirements with guidance for use <<https://www.iso.org/standard/65034.html>> accessed 06.09.2020.

¹¹⁸ *Ibid.* Notice that, as explicitly mentioned in the introduction, this standard reflects the existing international good practices on anti-bribery management systems. R. MESSICK, ISO 37001 and the Federal Sentencing Guidelines Compared, 13.09.2017, The Global Anticorruption Blog <<https://globalanticorruptionblog.com/2017/09/13/iso-37001-and-the-federal-sentencing-guidelines-compared>> accessed 06.09.2020.

¹¹⁹ F. HEIMANN, C.J. DUMAS and S. SHAH, Verification of Anti-Corruption Compliance Programs, Transparency International USA, 2014, p. 34 <https://www.transparency.nl/wp-content/uploads/2016/12/TI-USA_2014_verificationreportfinal.pdf> accessed 18.07.2020.

¹²⁰ J. SANDAGE, ‘The universal approach of the United Nations Convention against Corruption’ in S. MANACORDA, F. CENTONZE and G. FORTI (eds.), *supra* n. 71, p. 37. Moreover, in doing so, they also refer to the general framework provided by international standards and best practices. See also OECD, *supra* n. 109.

2.4. Criteria of the Comparative Analysis for Third-Party Agents

In three out of four cases dealing with cross-border corporate bribery the corrupt conduct encompassed the use of third-party agents or, more generally, of business partners.¹²¹ Given the importance of their participation, the comparative analysis of the measures aiming at the prevention of international corruption, will focus on those subjects.

However third-party agents act outside the realm of the employment relationship and, this circumstance, has important consequences for the following two aspects:

- (i) Mens rea: the mental state of the organization can be based on the principle of “direct knowledge” or on the basis of “wilful disregard”. The first standard requires the existence of a level of control and is more appropriate for a situation in which the criminal conduct has been carried out by employees. On the contrary, the standard of “wilful disregard” can be interpreted as a reckless behaviour in which organisations have failed to prevent bribery. As we will see in my analysis, this appears more flexible and better suited to address instances in which the link between the corporation and the criminal agent is weaker.
- (ii) Compliance and ethics standards: corporations are required to invest in ABC measures, on the basis of the risk of corruption, identified through their due diligence activities. This investment is necessary even when companies delegate some activities to intermediaries and independent contractors. Moreover, the interaction with independent contractors can be regarded, per se, as an additional source of risk. If companies fail to extend their due diligence to third parties, the adequacy of ABC programs can be questioned, if the risks associated with third parties are not sufficiently addressed. This may, not only,

¹²¹ See supra Introduction.

have an impact on the *mens rea* (to identify the “wilful behaviour”) but also on the total sanction (e.g. applicability of more lenient sanctions).

In the next sections, for each legislative measure object of the analysis, the following questions are addressed:

- (i) Is the criminal conduct of third-party agents imputed to corporate entities?
- (ii) What is the *mens rea* requirement when the criminal conduct is carried out outside the employment contract?
- (iii) What are the conditions for the implementation of ABC programs in case of third-party violations?

2.5. The Foreign Corrupt Practices Act

2.5.1. Introduction

The FCPA was enacted by the Congress of the United States of America in 1977 in the aftermath of the Watergate scandal when, over 200 corporations, admitted having made questionable payments when investing abroad.¹²² The FCPA amended the Securities and Exchange Act of 1934 (Exchange Act) and it is composed of two different types of provisions: the books and records and internal control provisions¹²³ and the anti-bribery provisions¹²⁴. The former require that “issuers” prohibit off-the-books accounting¹²⁵ and require to devise and maintain an adequate system of internal accounting controls¹²⁶. Even though these provisions were enacted as part of the FCPA, they do not apply exclusively to bribery and, consequently, they are out of the scope of this analysis. The anti-bribery provisions prohibit US-based companies,

¹²² Foreign Corrupt Practices Act and Domestic Foreign Investment Disclosure: Hearing on S. 305 Before the Senate Commission on Banking, Housing, and Urban Affairs, 95th Cong., 1st Session 116-18 (1977). The introduction of a specific legislation criminalizing corporations for bribes paid abroad was necessary to broaden the scope of the principle of territoriality and clarify the applicability of the principle of active nationality, as discussed in Section 2.5.3 below.

¹²³ Exchange Act, section 13(b)(2)(A). FCPA, supra n. 32, section 78m(b)(2)(A).

¹²⁴ Exchange Act, section 30A. FCPA, supra n. 32, section 78dd-1.

¹²⁵ Exchange Act, section 13(b)(2)(A). FCPA, supra n. 32, section 78m(b)(2)(A).

¹²⁶ Exchange Act, section 13(b)(2)(B). FCPA, supra n. 32, section 78m(b)(2)(B).

individuals and foreign companies to pay bribes to foreign public officials when doing business abroad.

The measures introduced with the FCPA had from the beginning, among other things, the objective of establishing fair competition between legal entities investing in international markets.¹²⁷ At the time in which the FCPA was drafted it was highlighted that most of the cases of international bribery concerned payments made by American companies in order to “gain an edge over other U.S. manufacturers”¹²⁸. For this reason a unilateral intervention against international bribery was considered not to have an important impact on the competitiveness of American companies, at least in the short-run.¹²⁹ The adoption of international and multilateral measures against bribery was considered to be desirable in the long-run in order to provide cooperative law enforcement arrangements and the OECD was considered to be an appropriate forum for this cooperation.¹³⁰ In fact “only a corruption-free system makes it possible for all participants to compete on a level playing field”.¹³¹

The FCPA represents the first and most important¹³² legal instrument against transnational bribery both in terms of number of cases enforced and in terms of the magnitude of the fines imposed. In fact, if looking at the data on the enforcement of the OECD Convention, among the 39 countries compared, the United States has the highest level of enforcement with sanctions on individuals and legal entities related to 128 separate foreign bribery

¹²⁷ L.S. BORLINI and M. ARNONE, *supra* n. 63, p. 216.

¹²⁸ US House of Representatives, Unlawful Corporate Payments Act of 1977, 28.09.1977, p. 2.

¹²⁹ FCPA History, p. 949 citing Senator Proxmire’s considerations in front of the US Congress, Foreign and Corporate Bribes: Hearing Before the S. Comm. On Banking, Hous., and Urban Affairs, 94th Cong. 46 (1976).

Omnibus Trade and Competitiveness Act of 1988, section 5003(d). The amended statute included the following directive: ‘*It is the sense of the Congress that the President should pursue the negotiation of an international agreement, among the members of the Organization of Economic Cooperation and Development, to govern persons from those countries concerning acts prohibited with respect to issuers and domestic concerns by the amendments made by this section.*’

¹³¹ International Chamber of Commerce, *supra* n. 104, p. 3.

¹³² D. ZARIN, *Doing Business Under the Foreign Corrupt Practices Act (Second Edition)*, 2013, Practising Law Institute.

schemes.¹³³ With regard to the level of the sanctions, the highest fine is represented by the one imposed on Goldman Sachs Group Inc. (\$2.9 billion) to resolve charges regarding a Malaysian sovereign wealth fund.¹³⁴

It is interesting to notice that nine out of the ten highest fines have been imposed on non-American multinational companies.¹³⁵ This trend started in 2006, when an action was taken against a non-US issuer for the first time.¹³⁶ Since then the prosecution of non-US issuers or individuals became more common and some of these actions were based on a broad assertion of jurisdiction.¹³⁷ This aggressive enforcement of the FCPA against non-US offenders led to some criticisms on the international legal right of the US to regulate outside its borders.¹³⁸

These concerns became even more relevant considering that, in the recent years, most of the cases regarding the violation of the FCPA entered into deferred prosecution agreements (DPAs) and non-prosecution agreements (NPAs).¹³⁹ These pre-trial contractual arrangements are concluded between the offenders and the US Department of Justice (DOJ) or the Securities and Exchange Commission (SEC)¹⁴⁰ and have raised concerns on their effectiveness and legitimacy, given the lack of transparency.¹⁴¹ In order to

¹³³ This data refers to the enforcement period from the entry into force of the Convention until 2014 and refers to the absolute number of investigations. See OECD, *supra* n. 10.

¹³⁴ H. CASSIN, Wall Street Bank Earns Top Spot on FCPA Blog Top Ten List, 26.10.2020, The FCPA Blog Post, <<https://fcpa.blog.com/2020/10/26/wall-street-bank-earns-top-spot-on-fcpa-blog-top-ten-list>> accessed 08.01.2021.

¹³⁵ *Ibid.*

¹³⁶ This action regards the case of Statoil, ASA, Exchange Act Release No. 54599, 13.10.2006 <<https://www.sec.gov/litigation/admin/2006/34-54599.pdf>> accessed 22.01.2021.

¹³⁷ A.D. WESTBROOK, 'Enthusiastic Enforcement, Informal Legislation: The Unruly Expansion of the Foreign Corrupt Practices Act' (2011) 45(2) *Georgia Law Review* 550.

¹³⁸ Restatement (Third) on Foreign Relations Law, section 401 (1986).

¹³⁹ See *infra* section 2.5.5.

¹⁴⁰ The Securities and Exchange Commission has started to enter into these agreements for the first time in 2011 with the settlement involving Tenaris S.A. See Sec. & Exch. Comm'n: Tenaris Ltd. Deferred Prosecution Agreement (May 2011) <<http://www.sec.gov/news/press/2011/2011-112-dpa.pdf>> accessed 22.01.2021.

¹⁴¹ These concerns were raised in particular by the OECD Working Group on Bribery. See OECD, United States: Phase 3 - Report on Implementing the OECD Anti-Bribery Convention in the United States, October 2010 <<http://www.oecd.org/unitedstates/UnitedStatesphase3reportEN.pdf>> accessed 22.01.2021 and

overcome these criticisms the US has started to publish more information on the conditions that led to these pre-trial agreements, “including the reasons for choosing to use them”¹⁴².

Finally, the FCPA addresses the criminal behaviour of third parties.¹⁴³ For instance, in the investigation regarding Goldman Sachs Group Inc, the SEC said that “former senior employees of Goldman Sachs used a third-party intermediary to bribe high-ranking government officials in Malaysia and the Emirate of Abu Dhabi.”¹⁴⁴

2.5.2. The Elements of the Criminal Conduct

2.5.2.1. The Offender

In identifying the possible offenders, the FCPA, initially restricted its application to the case of US issuers¹⁴⁵ or domestic concerns other than issuers¹⁴⁶. The first term (i.e. “issuers”) includes companies whose securities are “listed on a national securities exchange in the United States, or any company with a class of securities quoted in the over-the-counter market and required to file periodic reports with SEC”.¹⁴⁷ The second category of subjects (i.e. “domestic concerns other than issuers”) represents “any individual who is a citizen, national, or resident of the United States, or any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship that is organized under the laws of the United States or its states, territories, possessions, or commonwealths or that has its principal place of business in the United

OECD, United States: Follow-Up to Phase 3 - Report & Recommendations, December 2012 <<http://www.oecd.org/daf/anti-bribery/UnitedStatesphase3writtenfollowupreportEN.pdf>> accessed 22.01.2021.

¹⁴² OECD, United States: Follow-Up to Phase 3, p. 3.

¹⁴³ See *infra* section 2.5.6.

¹⁴⁴ H. CASSIN, Goldman Sachs Reaches \$3.3 Billion Resolution of Malaysia FCPA Violations, 22.10.2020, The FCPA Blog Post, <<https://fcpablog.com/2020/10/22/goldman-sachs-reaches-3-3-billion-resolution-of-malaysia-fcpa-violations>> accessed 08.01.2021.

¹⁴⁵ FCPA, *supra* n. 32, as amended in 1998, section 78dd-1.

¹⁴⁶ FCPA, *supra* n. 32, section 78dd-2.

¹⁴⁷ US Department of Justice, FCPA: A Resource Guide to the US Foreign Corrupt Practices Act, p. 11.

States”¹⁴⁸

In 1998¹⁴⁹ these provisions were amended in order to include any “persons other than issuers or domestic concerns”¹⁵⁰. This amendment was introduced in order to comply with the OECD Convention and it allowed for the criminalization of the behaviour of “any person” (whether an individual or a foreign non-US issuer) committing a crime of transnational bribery, under the condition that the crime was committed while on the US territory¹⁵¹.

2.5.2.2. The Recipient

The FCPA prohibits the payment of bribes to foreign officials defined as follows: “any department, agency, or instrumentality thereof, or of a public international organization, or any person acting in an official capacity for or on behalf of any such government or department, agency, or instrumentality, or for or on behalf of any such public international organization”.¹⁵² From the analysis of this provision it is possible to pinpoint two different methods through which the recipients of the bribes are identified. On the one hand an institutional approach, which refers to the official capacity in which the person operates and, on the other hand, a functional approach privileging the occupation put in place.

The FCPA mentions also the payment of bribes to the employees of an “instrumentality”¹⁵³ of a foreign government which includes state-owned or state-controlled entities. This provision takes into account the circumstance that, especially in some business areas (e.g. aerospace and defence manufacturing, banking and finance, healthcare and life sciences, energy and

¹⁴⁸ Ibid.

¹⁴⁹ The amendments were introduced with the International Anti-Bribery and Fair Competition Act of 1998, pub. L. n. 105-366, signed on 10.11.1998.

¹⁵⁰ FCPA, supra n. 32, section 78dd-3

¹⁵¹ This definition allows for the extension of the scope of the FCPA also to foreign subsidiaries. See *United States v. Syncor Taiwan, Inc.* No. 02-CR-1244-ALL (CD Cal.).

¹⁵² Exchange Act, section 30A(f)(1)(A). FCPA, supra n. 32, section 78dd-1(f)(1) and sections 78dd-2(h)(2)(A), 78dd-3(f)(2)(A).

¹⁵³ The ‘instrumentality’ criterion is assessed on the basis of a fact-specific analysis of an entity’s ownership, control, status and function.

extractive industries, telecommunications) many governments operate through this form of entities.¹⁵⁴

Finally with regard to the bribes paid to officials of public international organizations it is important to highlight that the provision criminalizing this form of payments was introduced in 1998 in order to comply with the OECD Convention. Despite this origin the definition of public international organization, provided by the FCPA is narrower than the one provided by the OECD Convention because it exclusively refers to any organization included under the International Organizations Immunities Act¹⁵⁵, or any other organization that the President so designates.¹⁵⁶

The FCPA exclusively deals with forms of international bribery occurring between a private subject and a public official. The American Federal law does not explicitly prohibit commercial bribery (i.e. private-to-private corruption) and, in order to sanction this conduct, the DOJ has applied state laws in combination with wire fraud statutes and with the Travel Act.¹⁵⁷

2.5.2.3. Criminal Conduct and *Mens Rea*

The FCPA criminalises the act of “offering to pay, paying, promising to pay, or authorizing the payment of money or anything of value”¹⁵⁸. This conduct is prohibited even if the payment is not finalized. With regard to the object of the payment, the FCPA does not specify any quantitative requirement but it does include a legal requirement. In fact the payment, in order to be subject to a criminal sanction, shall be “improper”. This illegitimate nature of the

¹⁵⁴ US Department of Justice, FCPA: A Resource Guide to the US Foreign Corrupt Practices Act, supra n. 147, p. 20.

¹⁵⁵ FCPA, supra n. 32.

¹⁵⁶ Exchange Act, section 30A(F)(1)(B). FCPA, supra n. 32, section 78dd-1(f)(1)(B) and sections 78dd-2(h)(2)(B), 78dd-3(f)(2)(B).

¹⁵⁷ D.M. HOWARD, C.A. KRAUSE and W. GIBSON, Private Commercial Bribery: The Next Wave Of Anti-Corruption Enforcement?, Lexology, 14.04.2010 <<http://www.lexology.com/library/detail.aspx?g=9975ef8f-95c0-4a5a-8c45-27c4e800f338>> accessed 22.01.2021.

¹⁵⁸ US Department of Justice, FCPA: A Resource Guide to the US Foreign Corrupt Practices Act, supra n. 147, p. 10.

payments is excluded only under two circumstances: the payment is legitimate according to written laws of the foreign country¹⁵⁹ or the payment is done in order to perform a contractual obligation¹⁶⁰.

With regard to the subjective element of crime the FCPA specifies two requirements. The first condition is that the briber shall act “wilfully”.¹⁶¹ This requirement is considered to be satisfied when the agent acts with the knowledge to commit “a bad act under the general rules of law”¹⁶², despite the fact that he is not aware of the existence of the FCPA¹⁶³. The second condition is that the act shall be done with the intention to obtain an improper advantage and specifically “in order to obtain or retain business” (‘business purpose test’)¹⁶⁴.

The U.S. Court of Appeal has clarified this requirement in 2004 in the decision *United States v. Kay*¹⁶⁵. In the decision the Court extends the application of this principle beyond the simple hypothesis of the payments done in order to influence the acquisition or retention of government contracts and applies it to payments done, in order to obtain a variety of unfair business advantages (e.g. in order to obtain a favourable treatment with regards to custom duties or sale taxes)¹⁶⁶.

Given the existence of the business purpose test, the FCPA allows for a narrow exception in case of “facilitating or expediting payments”. These payments shall be done in furtherance of routinely governmental action,

¹⁵⁹ US Department of Justice, FCPA: A Resource Guide to the US Foreign Corrupt Practices Act, *supra* n. 147, ‘Local Law Defence’, p. 23.

¹⁶⁰ US Department of Justice, FCPA: A Resource Guide to the US Foreign Corrupt Practices Act, *supra* n. 147, ‘Bona Fide Expenditures’, p. 24.

¹⁶¹ See FCPA, *supra* n. 32, sections 78dd-2(g)(2)(A), 78dd-3(e)(2)(A), 78ff(c)(2)(A).

¹⁶² *United States v. Kay*, 513 F.3d 432-448 (5th Cir. 2007).

¹⁶³ *United States v. Kay*, 513 F.3d at 447-48.

¹⁶⁴ US Department of Justice, FCPA: A Resource Guide to the US Foreign Corrupt Practices Act, *supra* n. 147, p. 12.

¹⁶⁵ *United States v. Kay*, 513 F. 3d.

¹⁶⁶ *United States v. Kay*, 359 F.3d 738, 755-56 (5th Cir. 2004), at 756.

involving non-discretionary acts, and are not criminalized.¹⁶⁷ Despite this exception, American authorities have clarified that corporations shall avoid facilitating payments given that they may still violate the law of the country in which they take place. In addition, the SEC and the DOJ have clarified that facilitation payments may be criminalised under other countries' foreign bribery laws and, if not properly recorded, they may also violate the FCPA.¹⁶⁸

2.5.3. The Jurisdictional Scope

The jurisdiction of American authorities over the crime of international bribery is based on the principle of territoriality and on the principle of active nationality and these principles apply in an extensive way. The principle of territoriality applies to US issuers¹⁶⁹ and domestic concerns¹⁷⁰, even when the criminal conduct is carried out abroad as long as there is a nexus with the American territory. Such nexus is identified when “placing a telephone call or sending an e-mail, text message, or fax from, to, or through the United States” or “sending a wire transfer from or to a U.S. bank or otherwise using the U.S. banking system”¹⁷¹.

The principle of territoriality is also applied in order to claim jurisdiction over crimes committed by foreign entities¹⁷² abroad, as long as they engage in any act in furtherance of a corrupt payment while in the territory of the United

¹⁶⁷ US Department of Justice, FCPA: A Resource Guide to the US Foreign Corrupt Practices Act, supra n. 147, p. 25.

¹⁶⁸ Ibid.

¹⁶⁹ According to the FCPA, an issuer is ‘any company with a class of securities listed on a national securities exchange in the United States, or any company with a class of securities quoted in the over-the-counter market in the United States and required to file periodic reports with the SEC [...] Foreign companies with American Depository Receipts that are listed on a U.S. exchange are also issuers’. US Department of Justice, FCPA: A Resource Guide to the US Foreign Corrupt Practices Act, supra n. 147, p. 11.

¹⁷⁰ According to the FCPA, a domestic concern is ‘any individual who is a citizen, national, or resident of the United States, or any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship that is organized under the laws of the United States or its states, territories possessions, or commonwealths or that has its principal place of business in the United States’, FCPA, US Department of Justice, FCPA: A Resource Guide to the US Foreign Corrupt Practices Act, supra n. 147, p. 11.

¹⁷¹ US Department of Justice, FCPA: A Resource Guide to the US Foreign Corrupt Practices Act, supra n. 147, p. 11.

¹⁷² Subjects ‘other than issuers and domestic concerns’. FCPA, supra n. 32, section 78dd-3.

States.¹⁷³ Finally, in 1998 an amendment to the FCPA introduced the principle of active nationality in order to, among other things, comply with the OECD Convention.¹⁷⁴ According to this principle, US issuers and domestic concerns paying bribes to foreign officials abroad can be subject to US authorities even without the existence of a territorial nexus.¹⁷⁵

2.5.4. The Liability Model

The FCPA provides for criminal and civil sanctions in case of violations that were put in place by legal entities or by natural persons. Legal entities are sanctioned under the FCPA for the conduct carried out by agents acting “in an official capacity” and in their interest or on their behalf (i.e. vicarious strict liability).¹⁷⁶ In order to identify corporate agents a particular value is given to the role covered within the public entity rather than to the official appointment.¹⁷⁷ Finally the liability of legal entities does not exclude the sanction of the natural person for the same criminal conduct and, when these liabilities coexist, the sanctions imposed shall “provide just punishment, adequate deterrence, and incentives for organizations to maintain internal mechanisms for preventing, detecting, and reporting criminal conduct”¹⁷⁸.

¹⁷³ See FCPA, supra n. 32, section 78dd-3. Id. P. 12. Moreover, the weak link of the bank transfer of the e-mail transfer was confirmed also in the case of a foreign company: see *See US v. JGC Corp.*, No. 11-cr-260, Information 20(e), 22 (S.D. Tex. 06.04.2011) and *United States v. Magyar Telekom, Plc.*, No. 1:11CR00597, Information 2, 24, 26(c), 47 (E.D. Va. 29.12.2011). The DOJ asserted territorial jurisdiction over one of the defendants, a UK citizen and managing director of a non-issuer located in the UK, based on allegations that he had mailed a package containing an allegedly corrupt purchase agreement from the UK to the US. See *United States v. Patel*, No. 1:09-cr-00335, Trial Tr. 5:11–14, 7:17–8:2 (D.D.C. 06.06.2011). In fact, a district court judge, by rejecting a DOJ’s decision (*United States v. Patel*, No. 1:09-cr-00335, Trial Tr. 5:11–14, 7:17–8:2, D.D.C. 06.06.2011), reasoned that, for territorial jurisdiction to be applied, the corrupt act must take place ‘while in the territory of the United States’. Id. at 11:7–9, 29:12–13.

¹⁷⁴ S. Rep. No. 105-277 at 2 ‘[T]he OECD Convention calls on parties to assert nationality jurisdiction when consistent with national legal and constitutional principles. Accordingly, the Act amends the FCPA to provide for jurisdiction over the acts of US businesses and nationals in furtherance of unlawful payments that take place wholly outside the United States. This exercise of jurisdiction over US businesses and nationals for unlawful conduct abroad is consistent with US legal and constitutional principles and is essential to protect US interests abroad.’

¹⁷⁵ See FCPA, supra n. 32, section 78dd-1(g).

¹⁷⁶ FCPA, supra n. 32, sections 78dd-1(f)(1), 78dd-2(h)(2)(A), 78dd-3(f)(2).

¹⁷⁷ M. PIETH, supra n. 63.

¹⁷⁸ US Sentencing Commission, 2018 Guidelines Manual Annotated, Chapter 8, Preamble <<https://www.uscc.gov/guidelines/2018-guidelines-manual-annotated>> accessed 10.03.2021.

The violation of the anti-bribery provisions can lead to both criminal and civil liability, according to the enforcement authority and the circumstances of crime. The criminal liability is imposed by the DOJ in case of violation of the bribery provisions and leads to a fine up to \$2 million¹⁷⁹ for business entities and to a fine up to \$250,000 and imprisonment up to five years¹⁸⁰ for individuals. The same authority can impose civil sanctions for the violation of the anti-bribery provisions carried out by domestic concerns and foreign nationals for violations while in the United States.¹⁸¹ The SEC pursues, instead, civil actions in case of violations of anti-bribery and accounting provisions carried out by issuers¹⁸² and can set fines up to \$16,000 per violation on business entities as well as on individuals¹⁸³.

Finally, in addition to civil and criminal sanctions, the violation of the FCPA may lead to collateral consequences for companies and individuals. In particular these consequences include the suspension or debarment from contracting with the federal government¹⁸⁴, the suspension or revocation of certain export privileges¹⁸⁵ and the cross-debarment from multilateral development banks¹⁸⁶.

¹⁷⁹ FCPA, *supra* n. 32, sections 78dd-2(g)(1)(A), 78dd-3(e)(1)(A), 78ff(c)(1)(A).

¹⁸⁰ FCPA, *supra* n. 32, sections 78dd-2(g)(2)(A), 78dd-3(e)(2)(A), 78ff(c)(2)(A); 18 USC section 3571(b)(3), (e).

¹⁸¹ US Department of Justice, FCPA: A Resource Guide to the US Foreign Corrupt Practices Act, *supra* n. 147, p. 69.

¹⁸² *Ibid.*

¹⁸³ *Ibid.*

¹⁸⁴ This measure is regulated by the federal guidelines governing procurement and it is not intended to sanction the corrupt company or individual but rather to protect the government's interests. Consequently, the decision is not made by the DOJ prosecutors but is made by independent debarment authorities. See 48 CFR, sections 9.406-2, 9.407-2.

¹⁸⁵ US Department of Justice, FCPA: A Resource Guide to the US Foreign Corrupt Practices Act, *supra* n. 147, p. 71.

¹⁸⁶ This action of cross-debarment is based on an agreement among the African Development Bank Group, the Asian Development Bank, the European Bank for Reconstruction and Development, the Inter-American Development Bank Group and the World Bank Group. See Agreement for Mutual Enforcement of Debarment Decisions (09.04.2010) <<https://www.adb.org/documents/agreement-mutual-enforcement-debarment-decisions>> accessed 22.01.2021.

2.5.5. The Impact of Corporate Compliance Programs on the Liability Regimes

By adopting the imputation model of vicarious strict liability, the US legislator has chosen to have a strict policy towards legal entities paying bribes abroad.¹⁸⁷ The impact of this choice is partially limited by the incentives given by public authorities to legal entities that have attempted to avoid this criminal conduct through the implementation compliance programs.

Those programs are “established by corporate management to prevent and detect misconduct and to ensure that corporate activities are conducted in accordance with applicable criminal and civil laws, regulations and rules”.¹⁸⁸ They have an impact on the decision of the prosecutors to indict a company or to choose alternative measures, on the assessment of the sanction (if any) to be imposed on this company and on the *ex-post* compliance obligations following any corporate criminal resolution¹⁸⁹. The first hypothesis is disciplined by Federal Prosecuting Guidelines in which there is a specific section dealing with the prosecution of corporate crime.¹⁹⁰ In this section, the Guidelines specify that “in all cases involving corporate wrongdoing, prosecutors should consider” several factors in order to balance the costs and benefits of prosecuting a corporate entity. In deciding whether to indict a corporation or to decline a prosecution the DOJ can decide to adopt civil and regulatory alternatives. In particular non-prosecution agreements, deferred prosecution agreements and plea-bargaining agreements can be adopted according to the circumstances.

¹⁸⁷ In fact, the imputation model of vicarious strict liability is considered to be the strictest way through which legal entities can be held accountable for their wrongdoing. M. PIETH et al., *supra* n. 63, p. 179.

¹⁸⁸ US Department of Justice, Justice Manual, 9-28.800 Corporate Compliance Programs, <<https://www.justice.gov/jm/jm-9-28000-principles-federal-prosecution-business-organizations#9-28.800>>, accessed 10.03.2021.

¹⁸⁹ US Department of Justice Criminal Division, Evaluation of Corporate Compliance Programs, Updated June 2020 <<https://www.justice.gov/criminal-fraud/page/file/937501/download>> accessed 16.01.2021.

¹⁹⁰ US Department of Justice, Justice Manual, 9-28.000, Principles of Federal Prosecution of Business Organizations, *supra* n. 188.

Plea agreements are negotiated for “the most serious, readily provable offense charged”¹⁹¹ and require the offender to plead guilty. When it is not possible to readily prove the offence charged but other appropriate circumstances subsist the Guidelines suggest the adoption of non-prosecution agreements (NPAs) and deferred prosecution agreements (DPAs).¹⁹² Under these two agreements the DOJ respectively refrains from bringing charges against the company (NPAs) or postpones (DPAs) this moment if the corporation agrees to respect certain requirements through which it would be able to show its commitment to a good corporate conduct and culture. One of the most important conditions of these agreements is represented by the adoption of effective compliance programs.¹⁹³

Moreover the US Sentencing Guidelines specify that for each offence the fine is calculated according to several aspects, such as the seriousness of the offense, the organisation’s role in the offense, any prior civil or criminal misconduct, the implementation of effective compliance and ethics programs.¹⁹⁴ Starting from a base fine, these elements are taken into account in order to increase¹⁹⁵ or decrease¹⁹⁶ this sanction, on the basis of a culpability score. One of the most important elements taken into account when assessing

¹⁹¹ US Department of Justice, Justice Manual, 9-28.1300 Plea Agreements with Corporations, (b), supra n. 188.

¹⁹² US Department of Justice, Justice Manual, 9-28.100 Collateral Consequences, supra n. 188.

¹⁹³ US Department of Justice, FCPA: A Resource Guide to the US Foreign Corrupt Practices Act, supra n. 147, p. 40.

¹⁹⁴ The US Sentencing Guidelines are promulgated by the US Sentencing Commission pursuant to section 994(a) of Title 28, USC. This is an independent agency in the judicial branch composed of seven voting and two non-voting *ex officio* members. Its principal purpose is to define sentencing policies and practices for the federal criminal justice system. US Sentencing Commission, supra n. 178, section 8C2.8. Determining the Fine Within the Range (Policy Statement).

¹⁹⁵ In particular, the sanction can be increased up to four times the amount of the base fine on the basis of the following elements: ‘(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’. See US Sentencing Commission, 2018 Guidelines Manual Annotated, supra n. 178, section 8, Introductory Commentary.

¹⁹⁶ The reduction can be to 5% and is based on the two following elements: ‘(i) the existence of an effective compliance and ethics program; and (ii) self-reporting, cooperation, or acceptance of responsibility’, US Sentencing Commission, 2018 Guidelines, Manual Annotated, supra n. 178, section 8, Introductory Commentary, 2018.

the reduction of the sanction, is “the existence of an effective compliance program”, disciplined under section of chapter §8B2.1.¹⁹⁷

It should be noticed that, in both cases above analysed, the simple existence of compliance programs is not a sufficient element to either exclude the liability¹⁹⁸ of a corporate entity or to mitigate the imposed sanction. In fact in order to avoid the risks of possible abuses of the law by legal entities¹⁹⁹, these programs are required to be effective in deterring international bribery. For this reason, different guideline documents clarifying the specific elements of effective ABC programs have been published. In particular, the second edition of the FCPA Guidelines published by the DOJ and the SEC have identified the following requirements:²⁰⁰

- commitment from senior management and a clearly articulated policy against corruption;
- code of conduct and compliance policies and procedures;
- oversight, autonomy, and resources;
- risk assessment;
- training and continuing advice;
- incentives and disciplinary measures;
- third-party due diligence and payments;
- confidential reporting and internal investigation;
- continuous improvement: periodic testing and review
- mergers and acquisitions: pre-acquisition due diligence and post-acquisition integration
- investigation, analysis, and remediation of misconduct.

This document needs to be read in combination with the Sentencing Guidelines²⁰¹, the document on the Evaluation of Corporate Compliance

¹⁹⁷ US Sentencing Commission, 2018 Guidelines Manual Annotated, supra n. 178, section 8B2.1. Effective Compliance and Ethics Program.

¹⁹⁸ US Department of Justice, Justice Manual, 9-28.800, supra n. 188.

¹⁹⁹ W. LAUFER, ‘Corporate Liability, Risk Shifting, and the Paradox of Compliance’ (1999) 52(5) *Vanderbilt Law Review* 1405 and K. KRAWIEC, ‘Cosmetic Compliance and the Failure of Negotiated Governance’ (2003) 81 (2) *Washington University Law Quarterly* 491.

²⁰⁰ US Department of Justice, FCPA: A Resource Guide to the US Foreign Corrupt Practices Act, supra n. 147, pp. 58-67.

²⁰¹ US Sentencing Commission, 2018 Guidelines Annotated, supra n. 178, section 8B2.1, Effective Compliance and Ethics Programs.

Programs (updated in June 2020)²⁰² and with other international public and private instruments²⁰³. In addition, the verification of the effective implementation of these elements is done internally by the companies themselves and externally by independent reviewers.²⁰⁴ Moreover this form of verification is risk-based and consequently cannot be done with a one-size-fits-all approach but should take into account, for each legal entity involved, the following elements: industry-sector risk, country-risk, corporate history and other risks.²⁰⁵

In 2010 the US Chamber of Commerce proposed a series of amendments meant to improve the FCPA. In particular it was suggested to introduce a “compliance defence”, which would exclude the culpability of legal entities in case they implemented effective ABC programs.²⁰⁶ This suggestion has not been implemented and it has been harshly criticized on the basis of the consideration that it would be incompatible with the requirements of the FCPA that refer to “actual knowledge” and “wilful behaviour”.²⁰⁷ Moreover, a compliance defence has not been introduced because has been thought to cause the elimination of criminal liability for international bribery offenses by “permitting a “fig leaf” compliance program to insulate companies from knowing and intentional wrong-doing”.²⁰⁸

²⁰² US Department of Justice Criminal Division, Evaluation of Corporate Compliance Programs, Updated June 2020

<<https://www.justice.gov/criminal-fraud/page/file/937501/download>> accessed 16.01.2021.

²⁰³ US Department of Justice, FCPA: A Resource Guide to the US Foreign Corrupt Practices Act, *supra* n. 147, p. 67 <<https://www.justice.gov/criminal-fraud/file/1292051/download>> accessed 16.01.2021.

²⁰⁴ F. HEIMANN et al., *supra* n. 119, p. 14.

²⁰⁵ *Id.*, p. 15.

²⁰⁶ US Chamber of Commerce, Restoring Balance: Proposed Amendments to the Foreign Corrupt Practices Act, 26.10.2010 <<https://www.uschamber.com/restoring-balance-proposed-amendments-foreign-corrupt-practices-act>> accessed 24.01.2021.

²⁰⁷ D.W. KENNEDY and D. DANIELSEN, Busting Bribery: Sustaining the Global Momentum of the Foreign Corrupt Practices Act, September 2011, Open Society Foundations, p. 30 <<https://www.opensocietyfoundations.org/publications/busting-bribery-sustaining-global-momentum-foreign-corrupt-practices-act>> accessed 23.01.2021.

²⁰⁸ *Id.*, p. 31.

2.5.6. Third-Party Agents

The FCPA, since its enactment in 1977, has addressed the issue of the criminal conduct put in place by third parties. In fact the act has provided for the criminalization of the action of bribing, even when carried out “indirectly” whether by issuers²⁰⁹ or by persons other than issuers or domestic concerns.²¹⁰ However the typologies of third parties addressed have not been explicitly specified. Consequently the term has been subject to a broad interpretation, extending it “to anybody that a company deals with who could make a payment to a government official on behalf of the company”. This definition includes agents, distributors, joint-venture partners, consultants, attorneys, auditors, tax consultants, sub-contractors and vendors.²¹¹

The first draft of the FCPA defined the subjective element of the criminal conduct as the condition of “[...] knowing or having reason to know”.²¹² Such definition of the *mens rea* was considered excessively vague and, for this reason, in 1988 was amended with the enactment of the Omnibus Trade Act.²¹³ With this Act the regulator substituted the requirement of “having a reason to know” with “knowing”, by clarifying that this state of mind occurs if:²¹⁴

“(A)

- (i) such person is aware that such person is engaging in such conduct, that such circumstance exists, or that such result is substantially certain to occur; or

²⁰⁹ FCPA, supra n. 32, Section 78dd-1.

²¹⁰ This specification refers to the circumstance in which the FCPA also prohibits corrupt payments made through third parties or intermediaries. FCPA, supra n. 32, section 78dd-1(a); FCPA, supra n. 32, sections 78dd-2(a), 78dd-3(a).

²¹¹ D. ISAAK, ‘FCPA Compliance: Navigating The Minefield Of Intermediaries’ (2008) 17 *Currents International Trade Law Journal* 22.

²¹² Act of 19.12.1977, Pub. L. No. 95-213, section 30A(a)3, 91 Stat. 1494, 1495 (codified at 15 USC section 78dd-l(a)(3) (1982).

²¹³ Trade and Competitiveness Act, P.L. 100--418 Title V – Foreign Corrupt Practices Amendments <<https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2010/04/11/tradeact-100-418.pdf>> accessed 23.01.2021.

²¹⁴ FCPA, supra n. 32, section 78dd-3 – Prohibited foreign trade practices by persons other than issuers or domestic concerns.

(ii) such person has a firm belief that such circumstance exists or that such result is substantially certain to occur.

(B)

(i) When knowledge of the existence of a particular circumstance is required for an offense, such knowledge is established if a person is aware of a high probability of the existence of such circumstance, unless the person actually believes that such circumstance does not exist.”

In this definition, the requirement of knowledge is expanded in order to avoid a ‘head in the sand’ approach, where the management of the organization would attempt to escape the liability in cases of unwarranted obliviousness.²¹⁵ This concept applies to cases where a defendant “acted with reckless disregard” for a man of ordinary intelligence²¹⁶ and it is distinct from simple negligence or “mere foolishness”.²¹⁷

This concept was applied to a case in which bribes were paid by an intermediary, represented by a physical person, in the case *United States v. Bourke*.²¹⁸ In this case, this individual was found liable for conspiring to violate the FCPA, through a bribery scheme involving his corporation Dooney & Bourke and a consortium of investors. The responsibility of Bourke was considered sufficiently proven on the basis of the wilful blindness

²¹⁵ Trade and Competitiveness Act, *supra* n. 213.

²¹⁶ *United States v. Bright*, 517 F.2d 584 (2d Cir. 1975); H. Rept. No. 96-1396, 96th Cong., 1st Sess., 35 (1980). *United States v. Jacobs*, 475 F.2d 270, 277-88 (2d Cir. 1973). The inference cannot be overcome by the defendant’s ‘deliberate avoidance of knowledge’, *United States v. Manrique Aribizo*, 833 F.2d 244, 249 (10th Cir. 1987), his or her ‘willful blindness’, *United States v. Kaplan*, 832 F.2d 676, 682 (1st Cir. 1987), or his or her ‘conscious disregard’, *United States v. McAllister*, 747 F.2d 1273, 1275 (9th Cir. 1984), of the existence of the required circumstance or result. As such, it covers any instance where ‘any reasonable person would have realized’ the existence of the circumstances or result and the defendant has ‘consciously chose[n] not to ask about what he had ‘reason to believe’ he would discover’, *United States v. Picciandra*, 788 F.2d 39, 46 (1st Cir. 1986). Courts should, accordingly, apply the appropriate ‘mix’ of subjective and objective standards implied in such a carefully structured test.

²¹⁷ HR3 - Omnibus Trade and Competitiveness Act of 1987
<<https://www.congress.gov/bill/100th-congress/house-bill/3>> accessed 23.01.2021.

²¹⁸ *United States v. Bourke*, No. 09-4704-cr(L) (2d Cir. 14.12.2011).

requirement, given that the consortium was organized by an agent, whose reputation was questioned internationally.

Additional attention shall be paid to the imputation to a holding of a criminal conduct carried out by its subsidiaries. In fact, apart from the application of the wilful blindness principle, in the context of a corporate group, the following two rules apply²¹⁹:

- (i) direct liability: this requirement is satisfied if the parent company has actively participated in the criminal conduct. This participation can be proven, for example, with the involvement of senior managers or executives, whether through their direct authorization of corrupt payments²²⁰ or through their participation to cultural committees in which the payment of bribes was openly discussed.²²¹
- (ii) vicarious liability: this hypothesis applies when the conditions of the agency relationship are satisfied. According to the FCPA Guidance, “[t]he fundamental characteristic of agency is control”.²²² The existence of the control requirement is assessed on a factual basis, despite the presence of a formal power. Consequently, a parent company is liable for the criminal conduct of its subsidiary when it has “sufficient knowledge and control of its subsidiary’s action”.²²³

The imputation of the criminal conduct of third-party agents on corporate entities goes beyond the application of the control principle. In order to infer

²¹⁹ US Department of Justice, FCPA: A Resource Guide to the US Foreign Corrupt Practices Act, *supra* n. 147, p. 28.

²²⁰ *SEC v. Siemens Aktiengesellschaft*, No. 08- cv-2167 (DDC 12.12.2008), ECF No. 1 <<http://www.sec.gov/litigation/complaints/2008/comp20829.pdf>> accessed 23.01.2021.

²²¹ *United States v. TechnipFMC plc*, No. 19-cr-278 (EDNY 25.06.2019), ECF No. 5 <<https://www.justice.gov/criminal-fraud/file/1225056/download>> accessed 23.01.2021. *United States v. Technip Offshore USA, Inc.*, No. 19-cr-279 (EDNY 25.06.2019), ECF No. 5 <<https://www.justice.gov/criminal-fraud/file/1225066/download>> accessed 23.01.2021.

²²² US Department of Justice, FCPA: A Resource Guide to the US Foreign Corrupt Practices Act, *supra* n. 147.

²²³ *Id.*, p. 29.

the existence of a certain level of knowledge, the regulator has identified an additional condition, which is represented by a risk-based due diligence.²²⁴ The exercise of a third-party due diligence process is part of an optimal anti-corruption compliance and ethics program²²⁵ and aims to identify the possible sources of risk deriving from the adoption of agents. In particular such process takes place through the following three steps:

- a. In the first phase the analysis focuses on the identification of the 'external' sources of risk, associated with the choice of the agent. In particular the due diligence process looks at the “qualifications and associations of its third-party partners, including its business reputation, and relationship, if any, with foreign officials”.²²⁶ Moreover the analysis of the riskiness of the agent is assessed on the basis of the “business rationale for including the third party in the transaction”²²⁷. In order to limit the risk associated with the selection process of agents, the appointment procedures are required to be based on a written policy, with a series of internal approvals by chief executives.
- b. The second phase is characterised by the identification of the internal sources of risk associated with the interaction with third party agents. In particular the FCPA Guidance refers to the following two aspects: the payment and the timing terms of the business relationship. With regard to the first requirement, an excessive commission to third-party agents, or an unreasonably large discount to third-party distributors, are considered as possible indicators of a corrupt intent.
- c. The third phase is based on the assessment of the riskiness of the interaction with third party agents, on the basis of the preventive and

²²⁴ Id., p. 60.

²²⁵ US Department of Justice, FCPA: A Resource Guide to the US Foreign Corrupt Practices Act, *supra* n. 147, p. 60.

²²⁶ Ibid.

²²⁷ Ibid.

detective measures adopted by the corporation. Specifically, corporations may comply with the following standards: periodically updating third party due diligence; exercising audit rights; providing periodic training and requesting annual compliance certifications by its business partners. The adoption of these measures can substantially mitigate third-party risk.

The overall level of risk resulting from the due diligence process, leads to the identification of the necessary corporate preventive measures. The inadequate implementation of monitoring and preventive actions can be one of the conditions through which the *mens rea* can be inferred. In fact, from the execution of ABC programs, disregarding third-party red flags risks, the wilful blindness requirement can be satisfied.²²⁸ Moreover, the adequate implementation of ABC programs addressing intermediaries can lead to the benefits, discussed in section 2.5.5 above.

When looking at the way in which the FCPA deals with third-party agents involved in corrupt transactions, the following two conclusions can be drawn. On the one hand, the decision to extend the *mens rea* requirement to cases of wilful blindness, facilitate the imputation of the criminal conduct committed by third parties. On the other hand, this subjective requirement is satisfied anytime companies have not carried out an adequate due diligence process.

2.6. The OECD Anti-Bribery Convention

2.6.1. Introduction

The OECD Convention was adopted by the OECD in Paris, on December 18, 1997 and entered into force on February 15, 1999²²⁹. It represents the first international instrument adopted to tackle transnational bribery and it is the result of nine years of negotiations since the OECD adopted the first measures

²²⁸ W. TIMMENY, 'An Overview of the FCPA', (1982) 9(2) *Syracuse Journal of International Law and Commerce* 235, 237.

²²⁹ OECD Convention, *supra* n. 36.

against bribery in the early 1990s²³⁰. Currently 44²³¹ countries have ratified it and, since it is not a self-executing act, has to be implemented by the signatory parties through their national legislations.

In order to favour the adoption of the Convention by a greater number of countries, the OECD opted for the principle of functional equivalence.²³² This principle assesses the compliance of national legislations by looking at the overall effect of the application of the law rather than at the wording of the single legal provisions²³³. In this way the development of a global standard against transnational bribery was favoured, while respecting the peculiarity of each signatory State.

Despite this flexibility, a uniform application of the Convention is granted through a process of peer-review carried out by the OECD Working Group on Bribery in International Business Transactions (OECD WGB)²³⁴. The OECD WGB has the responsibility to monitor the implementation and enforcement of the OECD Convention and of the related instruments. Each year publishes a report on the state of the implementation of the Convention and its monitoring has been based on four different phases²³⁵. Since 2010 the

²³⁰ Revised Recommendation of the Council on Combating Bribery in International Business Transactions, the Agreed Common Elements of Criminal Legislation and Related Action, and the 1996 Recommendation of the Council on the Tax Deductibility of Bribes to Foreign Public Officials <http://www.oecd.org/daf/anti-bribery/ConvCombatBribery_ENG.pdf> accessed 21.01.2021.

²³¹ OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions Ratification Status as of May 2018 <<http://www.oecd.org/daf/anti-bribery/WGBRatificationStatus.pdf>> accessed 08.01.2021.

²³² The application of this method is stated in the Preamble and, more specifically, in M. PIETH et al., *supra* n. 63, p. 2.

²³³ M. PIETH et al., *supra* n. 63, p. 27.

²³⁴ OECD, OECD Working Group on Bribery in International Business Transactions <<http://www.oecd.org/corruption/anti-bribery/anti-briberyconvention/oecdworkinggrouponbriberyininternationalbusinesstransactions.htm>> accessed 08.01.2021.

²³⁵ The four phases of the monitoring process are as follows: phase 1: assessing the adequacy of a country's legislation to implement the Convention; phase 2: assessing the effective implementation of the legislation; phase 3: assessing the enforcement of the Convention and the 2009 Anti-Bribery Recommendation; and phase 4: focuses on enforcement and cross-cutting issues tailored to specific country needs, and unimplemented recommendations from phase 3.

OECD WGB also publishes the data on the enforcement level of the Convention by the signatory States and as of December 2020, 651 natural and 230 legal persons have been sanctioned under criminal proceedings in the period of time between 1999 and the end of 2019²³⁶. For this reason, even though the Convention is an international instrument, it had a fundamental role in shaping the national anti-bribery legislations worldwide.

The Convention is the only internationally binding instrument exclusively focused on the deterrence of the active side of bribery (i.e. the supply side). This approach is justified by the circumstance that the Convention has the clear objective of ensuring an efficient and fair competition among corporations investing in the international market.²³⁷ The fundamental role played by legal entities has been highlighted in 2009 with the adoption of the Recommendation for Further Combating Bribery of Foreign Public Officials in International Business Transactions²³⁸. With the adoption of this recommendation, the OECD calls on the private sector to play a leading role in the fight against transnational bribery and advocates for the adoption of the specific steps listed in the Good Practice Guidance on Internal Control, Ethics and Compliance²³⁹.

Country monitoring of the OECD Convention <<http://www.oecd.org/daf/anti-bribery/countrymonitoringoftheoecdanti-briberyconvention.htm>> accessed 08.01.2021.

²³⁶ OECD, 2019 Enforcement of the Anti-Bribery Convention, Investigations, Proceedings, and Sanctions <<http://www.oecd.org/daf/anti-bribery/OECD-Anti-Bribery-Convention-Enforcement-Data-2020.pdf>> accessed 09.01.2021.

²³⁷ J. TRICOT, 'Corporate anti-bribery self-regulation and the international legal framework' in S. MANACORDA, F. CENTONZE, , G. FORTI (eds.), *Preventing Corporate Corruption The Anti-Bribery Compliance Model*, Springer, 2014, pp. 251-277. 'It may seem odd, but from the perspective of someone who has experienced the last twenty years of regulation in corruption, I firmly believe that "an unfair competition" agenda has initiated the current struggle against the age old phenomenon of corruption'.

²³⁸ OECD, *supra* n. 108.

²³⁹ OECD, Good Practice Guidance on Internal Controls, Ethics and Compliance, Adopted 18 February 2010 <<http://www.oecd.org/daf/anti-bribery/anti-briberyconvention/44884389.pdf>> accessed 23.01.2021.

2.6.2. The Elements of the Criminal Conduct

2.6.2.1. The Offender

Given that the OECD Convention exclusively criminalizes the active side of bribery the definition of the offender refers to the agents paying bribes internationally (i.e. bribe givers).²⁴⁰ According to article 1 of the Convention these payments can be done by “any person”, with the following implications²⁴¹: (i) transnational bribery is not a special offence “capable of being committed only by a certain category of persons” (e.g. company’s directors)²⁴² and (ii) among the possible offenders, it is also possible to include legal entities²⁴³.

2.6.2.2. The Recipient

The OECD Convention exclusively targets bribes paid by private parties to foreign public officials²⁴⁴, excluding from its scope the criminalization of bribes directed to private parties. This form of bribery is defined as ‘commercial bribery’ and, even though it has an impact on international trade, it has been explicitly excluded from the scope of the OECD Convention.²⁴⁵

The Convention has chosen to adopt a definition of foreign public officials and officials of international organizations independently from the one provided by the signatory States.²⁴⁶ This choice is justified by the need to

²⁴⁰ J. LAMBSDORFF, *supra* n. 28.

²⁴¹ The circumstance that transnational bribery could have been committed by ‘any person’ was already specified under the appendix to the Revised Recommendation of 1997 defining the ‘Agreed Common Elements’.

²⁴² M. PIETH et al., *supra* n. 63, p. 55.

²⁴³ The liability of legal entities is defined in a separate provision by Article 2 of the OECD Convention, *supra* n. 36.

²⁴⁴ OECD, *supra* n. 36, Article 2.

²⁴⁵ The inclusion of the deterrence of private-to-private bribery was suggested by the International Chamber of Commerce on the basis of the circumstance that it affects free competition in international markets. See International Chamber of Commerce, Memorandum to the OECD Working Group on Bribery in International Business Transactions, Recommendations by the ICC on further provisions to be adopted to prevent and prohibit private-to-private corruption, 13.09.2006 <<https://iccwbo.org/publication/memorandum-to-the-oecd-working-group-on-bribery-in-international-business-transactions>> accessed 23.01.2021.

²⁴⁶ OECD, Commentaries on the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions Adopted by the Negotiating Conference on 21.11.1997, p.

avoid a limited application of anti-bribery measures in countries with a more restrictive definition of public officials, particularly in cases in which corruption is tolerated. The Convention defines “foreign public officials” as follows: “any person holding a legislative, administrative or judicial office of a foreign country, whether appointed or elected; any person exercising a public function for a foreign country, including for a public agency or public enterprise; and any official or agent of a public international organisation”.²⁴⁷

This definition can be divided in three separate categories:

- “any person holding a legislative, administrative or judicial office of a foreign country, whether appointed or elected”: refers to the legislation of the country in which the offence took place (‘institutional perspective’) and aims to favour legal certainty and clarity.²⁴⁸
- “any person exercising a public function for a foreign country, including for a public agency or public enterprise”: refers to those who exercise a public function for another country, independently from their official involvement in one of the three institutional branches (‘functional perspective’).²⁴⁹
- “any official or agent of a public international organisation”: refers to the institutional exercise of a public office for an international organization formed by States, governments and other international public administrations, despite the form and the competences.

2.6.2.3. Criminal Conduct and *Mens Rea*

The OECD Convention criminalizes the act “to offer, promise or give any undue pecuniary or other advantage”.²⁵⁰ It is important to notice that the

13 <https://www.oecd.org/daf/anti-bribery/ConvCombatBribery_ENG.pdf> accessed 23.01.2021.

²⁴⁷ OECD Convention, supra n. 32, Article 1, 4 (a).

²⁴⁸ M. PIETH et al., supra n. 63, p. 60.

²⁴⁹ M. PIETH et al., supra n. 63, p. 65. The second requirement shows a preference of the Convention for a substantial rather than formal application of the law. In this case, even a subject acting in his private qualities could have the qualification of a public agent.

²⁵⁰ OECD Convention, supra n. 36, Article 1(1).

Convention explicitly requires that the advantage must be undue.²⁵¹ From this qualification it is possible to infer that the criminal liability is excluded whenever the conduct occurs in compliance with the legislation of the country in which took place.²⁵² At the same time it is not possible to apply this exclusion, when the conduct is justified simply on the basis of the local traditions.²⁵³

With regard to the subjective element, the Convention specifies that the conduct shall be carried out intentionally.²⁵⁴ The intentionality of the criminal conduct refers to two different elements: i) the conduct put in place by the briber; ii) the objective to obtain or retain business. ‘Facilitating payments’ of small entities are excluded from the scope of the Convention, as long as they are made in order to induce lawful decisions where no discretion is implied.²⁵⁵ The deterrence of these payments through the instrument of transnational criminal law was, moreover, considered to be not “practical or effective”.²⁵⁶ Despite these considerations it is important to remember that, given the negative effects of facilitating payments on sustainable economic development, in 2009 the OECD called for a ban of those payments.²⁵⁷

2.6.3. The Jurisdictional Scope

The OECD Convention defines the criteria necessary to identify the jurisdiction over bribery of foreign public officials, under art. 4. In particular it allows for the application of the principles of territorial and active nationality. The territoriality principle is defined by art. 4 (1) and requires

²⁵¹ Ibid.

²⁵² M. PIETH et al., *supra* n. 63, p. 104.

²⁵³ Ibid.

²⁵⁴ OECD Convention, *supra* n. 36, Article 1 (1).

²⁵⁵ These payments are, therefore, assumed not to be made in order to ‘obtain or retain business’. M. PIETH et al., *supra* n. 63, p. 139. Moreover this exclusion does not prevent states from adopting a stricter form of liability.

²⁵⁶ Deterrence through national criminal legislation was considered more appropriate, and international involvement in the deterrence of this form of corruption was considered to be more appropriately reached through ‘governance’ programmes. See M. PIETH et al., *supra* n. 63, p. 24.

²⁵⁷ OECD, Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions Adopted by the Council on 26 November 2009 <<http://www.oecd.org/daf/anti-bribery/44176910.pdf>> accessed 21.02.2021.

each signatory States to criminalise bribery of foreign public officials when the conduct is committed “in whole or in part of its territory”²⁵⁸. This principle shall be interpreted in a broad way “so that an extensive physical connection to bribery is not required”²⁵⁹.

The second paragraph of article 4 disciplines the jurisdiction on the basis of the principle of active nationality and it provides that “each party which has jurisdiction to prosecute its nationals for offences committed abroad shall take measures as they may be necessary to establish its jurisdiction to do so in respect of the bribery of a foreign public official”²⁶⁰. The introduction of the principle of active nationality is compulsory²⁶¹ and, among other things, it has been introduced with the intent to promote solidarity in the deterrence of transnational bribery, “especially where the country in which the offence was committed does not have adequate resources available”²⁶².

2.6.4. The Liability Model

Article 1 of the OECD Convention requires that the conduct of international bribery shall be subject to criminal liability.²⁶³ Transnational bribery most of the time involves legal entities²⁶⁴ and, in this case, the Convention has specified that “each party shall take measures as may be necessary, in accordance with its legal principles, to establish the liability of legal persons for the bribery of a foreign public official”²⁶⁵. This approach, on the one hand, granted a greater flexibility to member states for the implementation of the

²⁵⁸ OECD Convention, supra n. 36, Article 4 (1).

²⁵⁹ M. PIETH et al., supra n. 63, p. 10.

²⁶⁰ OECD Convention, supra n. 36, Article 4 (2).

²⁶¹ Even though, initially it was not clear and it shall be implemented in respect of the principle of functional equivalence. In summary, it can be stated that a strict interpretation of Article 4(2), which takes into account the concept of ‘functional equivalence’, but insists on consistency within legal systems, would probably make the ‘nationality principle’ mandatory for all OECD states.

²⁶² M. PIETH et al., supra n. 63, p. 280.

²⁶³ OECD Convention, supra n. 36, Article 3 (1). With regard to the sanctions to be imposed, the Convention provides that the measures shall be ‘*effective, proportionate and dissuasive*’.

²⁶⁴ OECD, supra n. 10.

²⁶⁵ OECD Convention, supra n. 36, Article 2. This flexibility is due to the fact that, at the time of the adoption of the Convention, no universal theory of legal person’s liability existed.

Convention and, on the other hand, it has been criticised for being excessively concerned with national peculiarities at the expense of legal predictability.²⁶⁶

With the intent to establish a minimum standard the Convention specifies that the measures adopted shall be “effective, proportionate and dissuasive”.²⁶⁷ In order to assess whether national legislations meet these requirements the analysis needs to consider, not only, the sanctions officially imposed but also other elements that may affect these sanctions, such as the imputation model²⁶⁸ chosen to criminalise the corporate behaviour and the incentives provided for the adoption of compliance programs.²⁶⁹

2.6.5. The Impact of Corporate Compliance Programs on the Liability Regimes

The OECD Convention did not immediately tackle the issue of the role of corporate compliance programs in the deterrence of international corporate bribery. This aspect was only addressed indirectly when analysing the different imputation models of corporate criminal liability. In fact, when adopting the holistic approach²⁷⁰, an important role is played by corporate compliance programs through a due diligence defence. This defence was defined as an instrument to assess the guilt of corporate entities, on the one hand, and to reward their cooperation on the other one (i.e. ‘carrot and stick approach’).²⁷¹

²⁶⁶ M. PIETH et al., *supra* n. 63, p. 12.

²⁶⁷ OECD Convention, *supra* n. 36, Article 3.

²⁶⁸ See *supra* section 2.3.

²⁶⁹ M. PIETH et al., *supra* n. 63, p. 192. With regard to this aspect, the Guidelines have also specified that the most dissuasive model is the one of vicarious strict liability. The identification model has, instead, been considered inadequate, particularly in the case in which it recognises criminal liability exclusively when the conduct has been carried out by the most senior company representatives or by those concerned with business policy decisions. Finally, the Guidelines recognise the possible efficacy of the measures that recognise the responsibility of corporations due to a lack of organisation and corrupt corporate culture. This last form of liability has been considered to be sufficient and to highlight the importance of the role of compliance.

²⁷⁰ M. PIETH et al., *supra* n. 63, p. 191.

²⁷¹ *Id.*, p. 193.

Even though the OECD WGB recognized the possible positive impact deriving from the adoption of this carrot and stick²⁷² approach it also recognised that the assessment of the effectiveness of compliance programs may not be an easy task for judges and courts.²⁷³

Moreover with regard to the enforcement, the OECD recognises that the “investigation and prosecution of bribery of a foreign public official shall be subject to the applicable rules and principles of each party”.²⁷⁴ In the Official Commentary it is also recognised that, particularly in common law countries, the enforcement can take the form of plea-bargaining and the importance of assessing its impact on deterrence has been highlighted.²⁷⁵

Finally in 2009 the OECD released a Recommendation for Further Combating Bribery of Foreign Public Officials.²⁷⁶ This Recommendation calls on signatory States to encourage “companies to develop and adopt adequate internal controls, ethics and compliance programmes or measures for the purpose of preventing and detecting foreign bribery, taking into account the Good Practice Guidance on Internal Controls, Ethics, and Compliance”. The Recommendation does not explicitly define the types of incentives that Countries should give but it specifies the elements of best practices that companies should adopt.²⁷⁷ In particular, the following elements have been identified:

- strong support from senior management (‘tone at the top’)²⁷⁸;
- a clear corporate policy;
- internal controls;
- oversight of monitoring activities;

²⁷² Ibid.

²⁷³ Id., p. 192.

²⁷⁴ OECD Convention, supra n. 36, Article 5.

²⁷⁵ M. PIETH et al., supra n. 63, p. 309. In fact, on the one hand, this instrument is considered to be risky because it may weaken the deterrence of an individual case, while on the other hand, it is considered to have a possibly positive impact for the overall system.

²⁷⁶ OECD, supra n. 108.

²⁷⁷ Id. Annex II.

²⁷⁸ OECD, supra n. 108.

- third-party risk management, contractual provisions to inform business partners and seek reciprocal commitment with regard to ABC measures;
- financial and accounting procedures to avoid hiding of bribery and ensure fair and accurate books and accounts;
- periodic communication and training for all levels of the company;
- disciplinary procedures;
- internal and confidential reporting;
- periodic reviews of ABC measures.

2.6.6. Third-Party Agents

The OECD Convention, under article 1, specifies that corporate entities can be held liable for a criminal offense carried out “[...] whether directly or through intermediaries”.²⁷⁹ The OECD Commentary clarifies that the term intermediaries has a broad application and, in the intention of the regulator, it encompasses agents, consulting firms, subsidiaries and distributors.²⁸⁰ Consistently with this objective, most of the signatories of the OECD Anti-Bribery Convention have extended the application of corporate criminal liability measures beyond the scope of employment. In particular, when bribes are paid, firms are held accountable in 76% of the countries for unrelated intermediaries (e.g. consultants), and in 78% of the member states for related agents (e.g. subsidiaries).²⁸¹

In this context, the definition of the imputation rule is left to the choice of national legislators.²⁸² However, even though outside an employment contract, the intermediary must have acted in the interest and under the direction of the company.²⁸³ Consistently with the principle of functional

²⁷⁹ OECD Convention, supra n. 36, Article 1

²⁸⁰ Commentary on Article 1.

²⁸¹ OECD, supra n. 11.

²⁸² OECD Convention, supra n. 36, Article 2.

²⁸³ OECD, supra n. 108, section 6.

equivalence, what matters is the intention to benefit the corporation rather than the concrete accrual of this benefit in favour of the principal.

The extension of the liability to cases in which third-party agents are involved, has the objective to avoid the abusive adoption of intermediaries by corporations willing to escape the liability. This would lead to particularly harmful effects when considering that, for jurisdictional reasons, the conduct of many agents would be outside judicial scrutiny.²⁸⁴ Moreover the involvement of third-party agents encompasses an additional risk, which is represented by the fact that they are often employed for conducting a crucial phase of the business activity, such as the conclusion of the business deal.²⁸⁵

Furthermore, the extension of the liability is based on the basis of a wilful blindness requirement. The Convention identified several steps through which this standard can be satisfied.²⁸⁶ Specifically, when dealing with business partners²⁸⁷, apart from carrying out a due diligence process, a corporation shall be: “ii) informing business partners of the company’s commitment to abiding by laws on the prohibitions against foreign bribery, and of the company’s ethics and compliance programme or measures for preventing and detecting such bribery; and iii) seeking a reciprocal commitment from business partners”²⁸⁸.

With regard to the due diligence standard, the following aspects may represent important red flags: “the company acting as agent has neither its seat in the country in which it provides its service, nor does it carry out any other business in this country; the agent company demands payment of its commission before it has concluded the contract in question; the accounts or

²⁸⁴ M. PIETH et al., *supra* n. 63, p. 430.

²⁸⁵ J. LAMBSDORFF, *supra* n. 28.

²⁸⁶ This Good Practice Guidance was adopted by the OECD Council as an integral part of the OECD Recommendation at *supra* n. 108.

²⁸⁷ Agents and other intermediaries, consultants, representatives, distributors, contractors and suppliers, consortia and joint venture partners.

²⁸⁸ OECD, *supra* n. 108, Annex II, Article 6.

bills for services rendered fail to specify in any detail either the content of the negotiations done or when they were carried out [...]; the agent company emphasises that it alone can secure the conclusion of the contract, because only it knows the right people; the company structure and financial organisation of the agent company is lacking in transparency; it appears to have hardly any staff; the agents are not bound to any particular codes of conduct; the competence of the agents working in the field is suspect; there are personal connections between the agents and the decision-makers of the foreign state.”²⁸⁹ The existence of these red flags shows a greater level of risk in the business partnership and this aspect needs to be dealt with through compliance and ethics programs.

Finally the Convention does not take a unanimous position with regard to the case in which the criminal conduct has been put in place by a subsidiary in the context of a corporate group. In fact, the choice of the imputation rules on parent companies is left to national legislations. On a general basis the Convention identifies two main ways of holding corporate groups liable. On the one hand they can be held accountable on the basis of a broadly defined agency principle in which the *mens rea* is satisfied by the existence of a reckless behaviour. On the other hand, the parent company can be held directly liable for the corrupt conduct of its subsidiaries when they acted without independence.

In this context, despite the legal separation between the two entities, it is necessary to look at the existence of a hierarchical relationship. This relationship can be presumed when: “first, the parent controls the expenditure of the subsidiary or is at least under a legal obligation to do so; second, the exercise of such control reveals that this expenditure (or a portion of it) is indeed destined for the benefit of a foreign public official”.²⁹⁰

²⁸⁹ M. PIETH et al., supra n. 63, pp. 125-126.

²⁹⁰ M. PIETH et al., supra n. 63, p. 130.

2.7. The Italian Legislation against Transnational Corporate Bribery

2.7.1. Introduction

The deterrence of the supply side of international bribery has been disciplined in Italy for the first time in 2000²⁹¹, in order to comply with the ratified Convention on the protection of the financial interests of the European Community²⁹² and with the OECD Convention. The introduced legislation is made up of two different provisions: on the one hand, the elements of the offense are specified under article 322-bis of the Italian Penal Code²⁹³ and, on the other hand, the liability of corporate entities is defined in the Legislative Decree n. 231/2001.

This act represented an important milestone in the Italian legislative system since the introduction of a direct liability for corporate entities had been fiercely opposed, on the basis of dogmatic objections for decades.²⁹⁴ In order to overcome possible criticisms the liability regime introduced in 2001 has been defined administrative. The statute report defines this form of liability as a '*tertium genus*' because it represents a hybrid form in which elements of the administrative and criminal models are combined.²⁹⁵ The result is a mixed model with the higher level of guarantees of the criminal trial and the administrative nature of the liability²⁹⁶.

²⁹¹ 29.09.2000, Law n. 300/2000, as published in the Official Gazette n. 250 on 25.10.2000.

²⁹² Council Act of 26 July 1995 drawing up the Convention on the protection of the European Communities' financial interests [Official Journal C 316 of 27.11.1995], of its first Protocol to the Convention on the Protection of the European Communities' financial interests, Council Act of 27 September 1996 [Official Journal C 313 of 23.10.1996] and the Convention Council Act of 26 May 1997 drawing up the Convention made on the basis of Article K.3 (2)(c) of the Treaty on European Union, on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union [Official Journal C 195 of 25.06.1997].

²⁹³ In 2012, some of the provisions of Article 322-bis of the Italian Penal Code have been modified by the Law n. 190 2012 in order to comply with the UNCAC. These measures were mainly targeted at improving the deterrence of national corruption. Among other things, these provisions introduced the prohibition of private-to-private corruption under Article 2635 of the Italian Civil Code. The liability of legal entities is regulated under Legislative Decree n. 231/2001.

²⁹⁴ These objections were based, among other things, on the circumstance that the Italian Constitution, under Article 27, establishes that criminal responsibility is unique to individuals.

²⁹⁵ C. DE MAGLIE, 'Models of Corporate Criminal Liability in Comparative Law' (2005) 4 *Washington University Global Studies Law Review* 561.

²⁹⁶ Repubblica Italiana, Corte Suprema di Cassazione, Sezioni Unite Penali, ThyssenKrupp AST Spa, RGN 38343/2014, 24.04. 2014.

Despite the delay in the adoption of a regime criminalizing international bribery, Italy has been considered to be a ‘moderate enforcer’ and it has currently sanctioned sixteen individuals and seven legal persons.²⁹⁷

2.7.2. The Elements of the Criminal Conduct

2.7.2.1. The Offender

The Italian legislation defines the violation of transnational bribery under article 322-bis of the Penal Code, which extends several offences of domestic corruption²⁹⁸ to the case of bribery of foreign public officials. Despite the fact that the Italian legislative system has ratified UNCAC, the provisions dealing with transnational bribery exclusively focus on the supply side of international bribery.²⁹⁹ In compliance with the OECD Convention, the offence can be committed by anyone without restriction, including corporate entities. However, the liability of legal entities is separately disciplined under the Legislative Decree n. 231/2001.³⁰⁰

2.7.2.2. The Recipient

When defining the possible recipients of international bribes, the Italian legislation distinguishes among two different categories. The first category is represented by public officials of European Institutions, while the second one is represented by public officials of other countries or international organizations. In both cases these subjects are identified on the basis of the function put in place rather than on the basis of the role covered.³⁰¹ Corrupt payments involving officials of European Institutions lead to a broader set of

²⁹⁷ OECD, *supra* n. 236, p. 6.

²⁹⁸ It includes different forms of corruption: Articles. 314, 316, 317, 320-322 of the Italian Penal Code.

²⁹⁹ Italian Penal Code, Article 322-bis.

³⁰⁰ The Italian system is a hybrid system in which corporate entities are recognized to be liable for crime, but this liability is defined as ‘administrative’. This choice is made in order to respect the provisions of Article 27 of the Constitution according to which criminal liability is personal.

³⁰¹ Italian Penal Code, Article 322 bis, 2.

restrictions, since they are treated like crimes committed with national public officials.³⁰²

2.7.2.3. Criminal Conduct and *Mens Rea*

The Italian legal system differentiates between the case in which the corrupt behaviour targets public officials of foreign countries (and of international public organizations) and the case in which it targets public officials of the European Institutions.³⁰³ In the first case the conduct is subject to criminal liability if the payment has been made “in order to obtain, for himself or for another, an undue advantage in international economic transactions or in order to obtain or maintain an economic or financial activity”. The second hypothesis of bribes has a broader scope and it entails the application of the provisions defined for national bribery also to European officials.

This different treatment remains also with regard to the subjective element of crime whereas considering that the objective to obtain a business advantage is required only for bribes paid to foreign public officials. In this case the exception for facilitating payments applies.

2.7.3. The Jurisdictional Scope

Under Article 6 of the Italian Criminal Code, a crime is committed in Italy, when part of the criminal action or omission took place in the Italian territory (principle of territoriality). This means that Italian companies and foreign companies based in Italy can be held liable for bribes paid abroad, if any part of the criminal offense (whether action or omission) happened in Italy. In addition, article 4 of the Legislative Decree n. 231/2001 explicitly recognized the Italian jurisdiction over crimes entirely committed abroad if the following

³⁰² In particular, they are also subject to criminal liability misappropriation of public funds (Article 314 of the Italian Penal Code), misappropriation of public funds taking advantage by third party's mistake (Article 316 of the Italian Penal Code), extortion (Article 317 of the Italian Penal Code) for any public official who, abusing his/her own position or powers, forces someone to give or promise, to himself/herself or to a third party, any undue pecuniary or other advantage; misconduct (Article 323, par. 1 of the Italian Penal Code).

³⁰³ Italian Penal Code, Article 322 bis, 1.

conditions are satisfied: (i) the offense was committed by an employee of a company based in Italy, for the benefit and in the interest of his company; and (ii) the offense is not being prosecuted in the State in which the offense took place.³⁰⁴

2.7.4. The Liability Model

The Italian legislative system, whenever a violation of the law prohibiting transnational bribery of foreign public officials occurs, provides for two different forms of liability, on the basis of the circumstance that the crime has been committed by an individual or by a legal entity. In the first case, art. 322-bis of the Penal Code. refers to the provisions that sanction different forms of national corruption. In particular, natural persons are subject to penalties comprised in a range between six months to three years of imprisonment.³⁰⁵

With regard to legal entities, the Italian legislation sanctions ‘organizational failure’ and, despite the fact that the liability is based on the conduct carried out by an employee of the corporation, it does not depend on a previous indictment of the natural persons.³⁰⁶ The system in fact established the autonomy of the organizational liability from the individual liability³⁰⁷. This choice was made in order to facilitate and to promote the liability of complex business entities in which sometimes it is difficult to identify the exact agent that put in place the criminal conduct.

When the company is found liable, the following sanctions can be imposed: pecuniary fines (Arts. 10-12), disqualification sanctions (Arts. 9, par. 2, 13 -

³⁰⁴ See also, Human Rights International Corner et al., Italian Legislative Decree n. 231/2001: A model for Mandatory Human Rights Due Diligence Legislation? November 2019 < <https://www.humanrightsic.com/post/italian-legislative-decree-no-231-2001>> accessed 10.01.2021.

³⁰⁵ These sanctions are imposed for a bribe offered, promised or given to a public official to obtain the performance of acts related to the public official to obtain an omission or delay of an act relating to the official’s office or the performance of an act in breach of official duties (Articles 318-319, 321-322 of the Italian Penal Code).

³⁰⁶ Italian Legislative Decree n. 231/2001, supra n. 35, Article 8 establishing the principle of autonomy of the liability of the legal entity.

³⁰⁷ Ibid.

17, 23), seizure of the proceeds or profit of crime (Art. 19) and the publication of the sentence (Art. 18).³⁰⁸ The pecuniary penalty depends on the “nature and gravity” of the offence and it is calculated on a two-steps procedure.³⁰⁹ In the first step the judge determines the number of shares to be issued, according to the objective and subjective seriousness of the offence; in the second step the judge determines the value of these shares according to the economic capacity of the organization.³¹⁰ This two-steps procedure has been considered to be more adequate to respond to both the request of deterrence, on the one hand, and the principle of proportionality on the other one³¹¹.

In July 2010 the Italian Ministry of Justice presented a proposal for amending the Italian Legislative Decree n. 231/2001 disciplining the liability *ex crime* of legal entities. The proposal suggested, among other things, to introduce a process of certification of the compliance programs and to recognize advantages to companies that comply with such certified standards. One of the most relevant advantage suggested was the exclusion of the criminal liability in case in which the model adopted was not only certified but also

³⁰⁸ Human Rights International Corner et al., *supra* n. 304, note 312.

³⁰⁹ Italian Legislative Decree n. 231/2001, *supra* n. 35, Article 25. Bribery for officials acts (Article 318 of the Italian Civil Code) is punishable by a fine of up to €309,800. Bribery for acts against official duties (Article 319 of the Italian Civil Code) and aggravated bribery where the offence was committed in favour of or against a party to legal proceedings (Article 319-ter of the Italian Civil Code) are punishable by a fine of €51,600 to 929,400. Where there are aggravating circumstances or where aggravated bribery results in a wrongful conviction or involves the award of public offices, salaries, pensions or contracts with the government, a fine of €77,400 to 1,239,200 applies. OECD, Italy: Phase 2 - Report on the Application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 1997 Recommendation on Combating Bribery in International Business Transactions, 2004, p. 48 <<http://www.oecd.org/daf/anti-bribery/anti-briberyconvention/33995536.pdf>> accessed 24.01.2021.

³¹⁰ Italian Legislative Decree n. 231/2001, *supra* n. 35, Article 10(2) specifies that the pecuniary sanction is to be levied as no fewer than 100 and no more than 1,000 shares, with the amount of each share ranging from a minimum of €258.22 to a maximum of €1,549.37. Article 11 sets the criteria that the court must follow in determining both the number of shares and the amount of the single share. With regard to the number of shares, this will be determined on the basis of the seriousness of the crime, the degree of the corporation’s responsibility, and its activities to remove or minimize the consequences of the offence and to prevent the commission of future offences. As per the amount of the single shares, the court’s decision must be based on the economic condition of the corporation.

³¹¹ This principle is also required by Article 3 of the OECD Convention, *supra* n. 36.

not modified since such certification.³¹² However, this proposal has not been introduced as it was criticized by the National Judges Association that considered the introduction of such advantage a way of shielding corporations and managers from the risks of criminal liability.³¹³

2.7.5. The Impact of Corporate Compliance Programs on the Liability Regimes

Despite the initial objections, the Italian legislation opted for a tough approach against corporate crime by sanctioning legal entities irrespectively of the previous indictment of their agents. This strict regime is mitigated by the possibility to exclude the culpability of legal entities and to mitigate the sanctions imposed on them, under some circumstances. The exclusion of the culpability operates in a different way whether the offence has been committed by high-level personnel or by simple employees.³¹⁴ In fact in the first case the burden of proof is reversed and the culpability is excluded only in case high-level personnel demonstrates its extraneity from the offence³¹⁵. In case in which the crime is committed by simple employees, the culpability is excluded, whenever the corporation proves that it had implemented “effective organizational models”.³¹⁶

³¹² AREL, Presentation of the ‘Proposal to modify D.Lgs. 231/2001 regarding administrative liability of corporate entities’(Presentazione della ‘Proposta di modifica D.Lgs. 231/2001 in materia di responsabilità amministrativa degli enti’), 27.09.2010 <<http://www.arel.it/attivita/convegni/presentazione-della-proposta-di-modifica-d-lgs-2312001-in-materia-di-responsabilita-amministrativa-degli-enti>> accessed 24.01.2021.

³¹³ This opinion was expressed by the Secretary of the National Judges Association, dott. G. Cascini. See S. LUCIANO, La 231 verso la riforma bipartisan. Responsabilità oggettiva da correggere anche per la sinistra in *ItaliaOggi*, 30.09.2010 <<https://www.italiaoggi.it/archivio/la-231-verso-la-riforma-bipartisan-1679501>>, 03.03.2021.

³¹⁴ Italian Legislative Decree n. 231/2001, supra n. 35, Articles 6 and 7.

³¹⁵ In particular, the following points shall be proven: ‘*effective preventive compliance programs had been adopted and applied to prevent crimes from being committed; a special control committee, with full supervisory autonomy, had been set up within the organization to guarantee the maximum efficiency of the organizational model; the senior manager had committed the crime by “fraudulently evading” the preventive compliance programs; and there were no omissions or acts of negligence by the control committee.*’ Italian Legislative Decree n. 231/2001, supra n. 35, Article 6.

³¹⁶ Italian Legislative Decree n. 231/2001, supra n. 35, Article 7.

Moreover, the existence of compliance programs may be taken into account also in order to mitigate the sanctions and, in particular, by reducing the pecuniary measures up to 50%, if the corporate entity has fully compensated the victim for the damage and if it has implemented compliance programs able to prevent similar crimes in the future.³¹⁷

This system of sanctions has been criticised by the OECD WGB because it appeared not to provide sufficiently “effective, dissuasive and proportionate” sanctions.³¹⁸ This concern was raised during the third phase of evaluation of the implementation of the OECD Convention, when looking at the sanctions awarded, in concrete, by the Court. In fact, it was shown that in the period of time between the entry into force of the Convention and March 2014, Italy had prosecuted 133 persons (104 natural persons and 29 legal persons) in foreign bribery cases.³¹⁹ Despite this number only 12 persons (9 individuals and 3 legal persons) had been sanctioned, while 72 defendants had their case dismissed.³²⁰ The three cases that were sanctioned were decided through a plea bargaining³²¹ in which a reduction of the sanction was recognized in

³¹⁷ Italian Legislative Decree n. 231/2001, supra n. 35, Article 12. Certain mitigating factors may reduce the fine imposed in a given case. For example, the fine is reduced by one-half and, in any event, cannot exceed €100,000 if the perpetrator committed the offence mainly in the interest of him/herself or a third party, or if the pecuniary damage caused is ‘small’ (Article 12.1). A fine is reduced by between one-third and one-half if, before a trial against a legal person commences, the legal person (i) compensates any victims, takes effective steps to eliminate the consequences of the offence, or does its utmost to this effect; or (ii) implements an appropriate organisational model to prevent similar offences in the future (Article 12.2). If both conditions in the preceding sentence are met, the fine is reduced by between one-half and two-thirds (Article 12.3). Regardless of the above-mentioned mitigating factors, however, a fine cannot be reduced to less than €10,000 (Article 12.4).

³¹⁸ OECD, Italy: Phase 2, 2004, supra n. 309.

³¹⁹ OECD, Italy: Follow Up to the Phase 3 - Report and Recommendations, 2014 <<http://www.oecd.org/daf/anti-bribery/ItalyP3WrittenFollowUpReportEN.pdf>> accessed 21.01.2021.

³²⁰ Ibid.

³²¹ The prosecutor can also allow for a reduction of the fine to be imposed on the corporate entity through a plea bargaining procedure (*patteggiamento*). This is allowed for crimes that are subject to a punishment that would be less than five-year imprisonment and, if the defendant pleads guilty, the following benefits are awarded: (1) reduction of the maximum penalty up to one third, (2) possible conditional deferral of the sentence, (3) it is possible to grant the following rewards to the defendant: (i) reduction of one-third of the maximum penalty allowed by statute, (ii) possible conditional deferral of the sentence, (3) expungement of the conviction if the same kind of offence is not committed within five years from the plea bargaining agreement. In Italy, plea bargaining is regulated by the Code of Criminal Procedure (Articles 446-448). The parties can enter into a

order to incentivize the agreement and on the basis of the fulfilment of certain requirements, among which the implementation of organizational models.

Consistently with what provided for by other jurisdictions³²², in the Italian legal system the simple existence of compliance programs is not considered to be sufficient to grant a benefit to the legal entity. It is, in fact, necessary to prove that these programs are effective. The Legislative Decree does not specify these elements but, in order to promote transparency, has requested that business associations shall define business codes of conduct, together with the Ministry of Justice.³²³ In particular the National Association of Industries issued Guidelines³²⁴ containing the procedures that companies can put in place to prevent offences, included bribery. The Guidelines specify that the prevention of bribery by corporate entities should be based on a careful risk assessment, with the following actions³²⁵:

- a) identification of the activities in relation to which offences may be committed;

plea bargain after the Prosecutor brings the charges into the competent Court and the Court issues the orders required for the process to be conducted. When both the prosecutor and defendant have come to an agreement, the proposal is submitted to the Judge, who can refuse or accept the plea bargaining. It is also possible that an offer from the defendant is accepted by the Court, with or without the consent of the Prosecutor. The plea agreement always takes the form of a final Court ruling, except in the case of Prosecutor's dissenting opinion where the same Prosecutor can appellate the decision.

³²² In particular, by the UKBA and the FCPA.

³²³ Italian Legislative Decree n. 231/2001, supra n. 35, Article 6 (3).

³²⁴ See the document published by the Italian national association representing manufacturing and service companies: Confindustria, Decree 231: New Guidelines from Confindustria for the development of organisational models, 2014 <<https://www.confindustria.it/notizie/dettaglio-notizie/linee-guida-confindustria-231-modelli-organizzativi>> accessed 10.01.2021. Notice that, in February 2019 an additional document on organisational models was published by Confindustria, together with the Italian Chamber of Commerce, the Italian Banking Association and Italian Association of Chartered Accountants. See: Consiglio Nazionale dei Dottori Commercialisti e degli Esperti Contabili et al., 'Principi consolidati per la redazione dei modelli organizzativi e l'attività dell'organismo di vigilanza e prospettive di revisione del d.lgs. 8 giugno 2001, n. 231'

< https://www.commercialisti.it/visualizzatore-articolo?_articleId=1237669> accessed 10.01.2021.

³²⁵ B. ASSUMMA, 'Il ruolo delle linee guida e della best practice nella costruzione del modello di organizzazione e di gestione e nel giudizio di idoneità di esso' (2010) 4 *Rivista* 231 193.

- b) introduction of specific direct protocols regarding training and implementation of decisions to be adopted by internal bodies;
- c) identification of the procedures for the management of financial resources;
- d) introduction of the obligations to pass information to the supervisory body;
- e) introduction of a disciplinary system to punish non-compliance with the measures set out in the program;
- f) compensation of the employees who report to the competent authorities the offences;
- g) an adequate internal whistleblowing mechanism³²⁶.

Despite this general guideline, the effective implementation of compliance programs requires a regular verification of the system and the implementation of changes, when necessary.³²⁷ These elements can be assessed only on a case-by-case basis during judicial investigations.³²⁸ Case law has emphasized that organizational models have to be effective in practice and the mere adoption of them on paper is not sufficient to obtain a liability mitigation.³²⁹ In particular, the assessment of its efficacy aims to verify *ex-post* whether the model was well suited to prevent the crime, in the absence

³²⁶ Article 6, par. 2bis, introduced by Law No. 179/2017 on whistle-blowing ('Disposizioni per la tutela degli autori di segnalazioni di reati o irregolarità di cui siano venuti a conoscenza nell'ambito di un rapporto di lavoro pubblico o privato').

³²⁷ Italian Legislative Decree n. 231/2001, supra n. 35, Article 7.

³²⁸ With regard to anti-bribery compliance, an important decision is that of the Court of Milan, 20.09.2004. The Court was required to decide on a case of corruption for a competitive tender of the Ministry of Defence in order to secure military buildings. At the time the crime was committed, the corporation did not have a compliance programme in place. However, according to Article 17 of the Legislative Decree, the corporation could have avoided the application of disqualification measures if an effective compliance programme had been adopted and implemented. The corporation adopted the compliance programme after the crime was committed and before the hearing. The judge was, therefore, required to evaluate the effectiveness of this programme according to the following requirements: (1) risk analysis, (2) qualification of the supervisory board member, (3) reputation of the Supervisory board's members, (4) training courses, (5) content of the training courses, (6) disciplinary measures, (7) procedures to discover the risks, (8) monitoring system, (9) obligation of reporting and (10) procedures.

³²⁹ Cass. Pen., sez. II, judgment No. 327/2013; Cass. Pen., sez. II, judgment No. 4677/2013; Cass. Pen., sez. II, judgment No. 11209/2016.

of unforeseen events which may have caused it.³³⁰ For this reason, an effective organisation model shall be flexible and able to adjust to the evolving practical context in which the firm operates.³³¹

An important characteristic of the Italian system is the introduction of an independent supervisory body (*Organismo di Vigilanza*), in charge of verifying the effectiveness of the compliance programs, to conduct its own investigations and to propose sanctions.³³² The legislation does not specify the nature of this body, but the academic debate has identified three possible hypotheses. The first hypothesis is to outsource this activity; the second hypothesis is to identify the supervisory body with an organ having supervisory function, already existing within the corporate entity; the third hypothesis is represented by the case in which there is the *ad hoc* creation of an organ within the corporate entity. In all these circumstances, the members of the supervisory body shall fulfil the requirements of independence, autonomy, professionalism and integrity.³³³

In 2011 a new possibility to have a supervisory body was introduced for listed companies, whose members were statutory auditors.³³⁴ This last hypothesis has been criticized by those who believed that, in this way, the independence of the members would be challenged³³⁵. In a decision the Italian Supreme Court highlighted that the possibility to have statutory auditors as members of the supervisory body shall be conditional on the effective independence of

³³⁰ A. PRESUTTI et al., *La responsabilità degli enti*, Cedam, 2008, p. 118.

³³¹ Cass. pen., Sez. V, 18 dicembre 2013, n. 4677.

³³² Article 6, b), Legislative Decree n. 231/2001.

³³³ Consiglio Nazionale dei Dottori Commercialisti e degli Esperti Contabili et al., n. 324, *supra*, p. 32.

³³⁴ Article 6, par. 4-bis, Legislative Decree n. 231/2001.

³³⁵ In particular, against this choice, there has been the position of the Association of the members of the Supervisory Bodies and the Italian Law Enforcement Agency responsible for financial crimes and smuggling ('Guardia di Finanza'). See: Guardia di Finanza, 'Attività della Guardia di Finanza a tutela del mercato dei capitali', Circolare n. 83607 2012 <https://www.odcec.roma.it/images/file/gdf_20120402.pdf> accessed 10.04.2021.

these members, from the type of function they are required to supervise.³³⁶

2.7.6. Third-Party Agents

The Italian legislation does not explicitly address the liability of corporate entities for the criminal conduct put in place by third parties. Nevertheless, this rather narrow interpretation can be expanded, by looking at the provisions of article 5 of the Legislative Decree n. 231/2001, where the characteristics of individual agents triggering organizational liability are specified. Precisely a company is liable if:

“a) individuals with the function to represent, administer or direct the company or one of its unity, with financial independence and functional independence as well as by individuals that exercise, even factually, the management and control of the company; b) individuals under the direction and control of one of the subjects under letter a) above.”

These provisions do not specify the exact role that agents need to play in order to make legal entities culpable, but they rather indicate their function and their relationship with corporate representatives. Given their broad scope, two different interpretations with regard to third-party agents follow. One part of the doctrine interpreted such clauses as allowing for the imputation of the criminal conduct of third-party agents on corporate entities, as long as they are under the direction and control of top-level agents.³³⁷ Another part of the literature has excluded the possibility to extend the liability to cases in which business partners are involved, limiting the application of article 5 exclusively to corporate employees.

³³⁶ Repubblica Italiana, Corte Suprema di Cassazione, Sezioni Unite Penali, ThyssenKrupp AST Spa, RGN 38343/2014, 24.04.2014. Even though this decision did not deal specifically with international bribery, it can be extended to these cases.

³³⁷ V. MONGILLO, ‘The Bribery Act 2010, corporate criminal liability for bribery offences’ *Corporate Criminal Liability and Compliance Programs*, Jovene Editore 2012, p. 312.

In order to take a stance between these two contrasting positions, it is necessary to look at the ways through which the corporation, even though outside an employment relationship, can exercise a control over its agents. This instrument can be represented by the implementation of third-party due diligence, in the broader context of the adoption of anti-bribery compliance and ethics programs.

This requirement has been specified in a judicial case, where the Italian Court was called to decide over the culpability of Siemens AG for the corrupt conduct of a contractual joint-venture, formed with two Italian companies, Ansaldo Energia S.p.A. and Ansaldo Caldaie S.p.A.³³⁸ The judicial authority, after having looked at the facts and allegations stated that: “[...] a model of corporate management and organization, adopted as per article 6 and 7 of the Legislative Decree n. 231/2001, which does not provide adequate instruments to identify the area of risk of the activity of the corporation and to identify the elements from which it is possible to infer the involvement in a criminal conduct, such as the use of foreign bank accounts and the use of foreign intermediaries, shall not be considered an adequate instrument to prevent the criminal conduct ”.³³⁹

Moreover, in this context, the participation of a third-party intermediary in the corrupt transaction has been interpreted as a strategic choice of the corporate entity, in order to conceal the corrupt conduct.³⁴⁰ This circumstance seems to support the position of those who consider excessively narrow and possibly open to abuse, the application of the organizational liability exclusively to cases in which the criminal conduct has been carried out by employees.³⁴¹

³³⁸ Tribunale di Milano, Ordinanza, 28 Ottobre 2004, Pres. ed est. Mannocci; Siemens AG.

³³⁹ Ibid.

³⁴⁰ Tribunale di Milano, Gip Salvini, Ordinanza 27 aprile 2004 – Ordinanza Siemens: applicazione di misura interdittiva ex D. Lgs. 231/01, p. 23.

³⁴¹ Cass., IV Sez. pen., sent. n. 34285 del 2011.

A separate analysis shall focus on the application of a corporate criminal liability regime in the context of corporate groups. A holding is criminally liable for the conduct of its subsidiary, when the following two conditions are satisfied³⁴²:

- (i) the criminal conduct has been put in place under the direction and control of the managers of the holding;
- (ii) the action had the intent to benefit the group.

The first condition is satisfied on the basis of an accurate analysis of the involvement of those agents, despite the functions normally implemented in the corporate group context. The intent to benefit the group is inferred from the analysis of the concrete circumstances and it can occur either directly (e.g. from the commission of the criminal conduct) or indirectly (e.g. with the distribution of corporate dividends).³⁴³ Consequently, the liability of a holding can be excluded in cases in which the criminal conduct has been put in place fully independently by a subsidiary, without the participation of the holding. A possible exception to this rule can be taken into account when:

- the legal independence of the subsidiary is only apparent;
- the control is not directly on the subsidiary but rather on an agent that works for the subsidiary.³⁴⁴

Furthermore, the Supreme Court has clarified that the same assessment of the existence of the requirement of control and corporate intent, must be satisfied with regard to cases in which the criminal conduct of the holding needs to be extended to its subsidiary.³⁴⁵

³⁴² This aspect has been highlighted in a decision of the Court with regard to a corporate group. See Suprema Corte di Cassazione, sentenza n. 24583/2011 (High Court Decision). A. MAZZONI, 'Gruppi Multinazionali, Regole di Responsabilità e Applicazione del D. Lgs. 231/2001 a Fattispecie Internazionali di Gruppo' (2011) 1(2) *Jus* 227, 247.

³⁴³ P. BURLA, E. CIERI and I. MACCANI, La responsabilità da reato della società, *Il Sole 24 Ore*, 2009, p. 39.

³⁴⁴ MONGILLO, *supra* n. 337, pp. 308-317.

³⁴⁵ Cass., VI Sez. pen., sent. n. 2658 del 2014.

Finally, the activity of control and prevention of the criminal conduct, whether committed through agents or subsidiaries, needs to be assessed on the basis of the adequacy of a third-party due diligence program. This program shall be implemented in the context of anti-bribery compliance and ethics measures, defined as per art. 7 of the Legislative Decree n. 231/2001. In particular, when dealing with business partners, companies are required to introduce “specific contractual arrangements, particularly with agents and consultants, aiming at preventing corruptive acts, both with public and private representatives, stating that: they are aware of the content of the organizational model; they will abstain from putting in place a conduct which may integrate a criminal act under the Legislative Decree n. 231”.³⁴⁶

Among other things, the most important contractual arrangements are:

- (i) the provision of a sanctions in case of violations of third-party compliance obligations;
- (ii) the internal and external transmission of the organizational model and of the ethics code adopted;
- (iii) the general creation of an entity which verifies the correct implementation of the organizational model, which updates it constantly and which periodically communicates the conclusions of the activities developed by the top-level subjects of the entity.

These requirements are specified for limiting the general risk of crime deriving from the use of intermediaries in business transactions. However, with regard to international bribery, additional requirements with regard to two specific sources of risk are considered:

- (i) the first source of risk is represented by the arrangements of partnership with third-party agents for commercial cooperation. In

³⁴⁶ See the document published by the national association of companies: Confindustria, 2014, *supra* n. 324.

this case the following measures are recommended: specific monitoring activities; control of external co-operators; control of the congruity of the payments with regard to the geographic area in which the investment takes place; special procedures of authorization of the payment of immaterial services, such as commercial consulting; traceability of financial movements.

- (ii) The second source of risk is represented by the participation to a public tender with other partners (e.g. joint-venture partners, consortium, etc.). In order to reduce the risk of being involved in a corrupt deal, the company must: (i) carry out adequate preventive controls over the potential partners; (ii) identify a homogeneous approach with regard to the implementation of corporate organizational models; (iii) specify audit clauses; (iv) specify ethics clauses, dealing with suppliers and partners.³⁴⁷

2.8. The United Nations Convention Against Corruption

2.8.1. Introduction

The UNCAC was adopted in 2003 and it is the result of seven years of negotiations, since in 1996 the General Assembly adopted the United Nations Declaration against Corruption and Bribery in International Commercial Transactions³⁴⁸. The Convention involves³⁴⁹ 140 signatories and 170 parties and it represents the first truly global attempt to curb corruption.³⁵⁰

The Convention is constituted by four parts: (i) preventive measures; (ii) criminalization and law enforcement; (iii) asset recovery; and (iv) international cooperation and monitoring. This broad set of objectives makes it “unique as compared to other conventions, not only in its global coverage

³⁴⁷ Ibid.

³⁴⁸ UNCAC, *supra* n. 37.

³⁴⁹ These data refer to the signatories and ratification status as of 2 April 2014 <<http://www.unodc.org/unodc/en/treaties/CAC/signatories.html>> accessed 24.01.2021.

³⁵⁰ E. BURGER and M. HOLLAND, ‘Why the Private Sector is Likely to Lead the Next Stage in the Global Fight Against Corruption’ (2006) 30(1) *Fordham International Law Review* 60.

but also in the extensiveness and detail of its provisions”.³⁵¹ With regard to the measures dealing with criminalization of corrupt behaviours and law enforcement it is important to consider that the UNCAC allows for the criminalization of the demand side of international bribery, on a discretionary basis. Moreover, it addresses not only bribery but also other conducts prodromic to bribery, such as the obstruction of justice, illicit enrichment, and embezzlement.

The provisions of the UNCAC regulating the criminalization of bribery are based on the OECD Convention and these measures have been defined to be “complementary and mutually supportive”³⁵². This type of relationship emerged since the drafting of the UNCAC when some members of the OECD Anti-Corruption Secretariat have attended meetings of the committee to develop a review mechanism and to provide country-specific information. Consequently the UNCAC treats foreign bribery in a similar manner as the OECD Convention (e.g. including provisions mutual legal assistance, extradition and money laundering) but it also brings an important contribution to the global anti-corruption movement.³⁵³ In particular the UNCAC can be distinguished from the OECD Convention on two important points: the criminalization of the demand side of international bribery (even though on a voluntary basis); and the exclusion of the exception for facilitating payments. Moreover, the UNCAC has a greater reach compared to the OECD Convention, given the number of ratifying Countries.

The UNCAC is not a self-executing instrument and the signatory parties must adopt several legislative and administrative measures for its implementation. The implementation of the Convention by national legislators implies a trade-off between the need to respect the sovereignty of signatory States in criminal

³⁵¹ UN Interregional Crime and Justice Research Institute, “How Many Can Fit Here? Corruption: One Man's Gain Is Everyone's Loss”, Freedom from Fear, n. 4, 05.02.2014 <<https://shop.un.org/zh/node/68593>> accessed 10.04.2021.

³⁵² UNODC, UNCAC Legislative Guide, *infra* n 368.

³⁵³ OECD, Working Group on Bribery: Annual Report 2008, p. 33 <<https://www.oecd.org/daf/anti-bribery/44033641.pdf>> accessed 24.01.2021.

matters and the need to have a harmonized and effective system against corruption.³⁵⁴ In order to improve the effectiveness of the Convention, Chapter VII requires to set up an implementation mechanism with the following objectives: to have a periodical review of the implementation of the Convention; to improve the Convention, and to use the relevant information used by other regional and international measures³⁵⁵.

2.8.2. The Elements of the Criminal Conduct

2.8.2.1. The Offender

The UNCAC has a broader approach in the fight against transnational bribery since it criminalises both the demand side and the supply side. However, it is important to notice that the criminalization of the demand side is only required on a discretionary basis.³⁵⁶ This different treatment is due to the circumstance that the public officials involved could be sanctioned under the different provision of the UNCAC dealing with national bribery³⁵⁷. For the purpose of this analysis the criminalization of the supply side will be the only one taken into account. The offender of the supply side can be ‘anyone’ and the analysis of Section 2.6.2.1, developed for the OECD Convention, applies to this context.

2.8.2.2. The Recipient

The UNCAC criminalizes bribes paid to foreign public officials as well as private-to-private corruption. The criminalization of this last hypothesis can be adopted on a discretionary basis but it is not object of this analysis.³⁵⁸ With

³⁵⁴ A particularly harsh criticism has been raised by Webb, who defines the UNCAC as a ‘*lex simulate without teeth*’ and considers it a missed opportunity to effectively deter corruption. See P. WEBB, ‘The United Nations Convention against Corruption: Global Achievement or Missed Opportunity?’ (2005) 8 (1) *Journal of International Economic Law* 191, 229.

³⁵⁵ For further information regarding the review process, see UNODC, Conference of the States Parties to the United Nations Convention against Corruption <<https://www.unodc.org/unodc/en/corruption/COSP/conference-of-the-states-parties.html#:~:text=The%20Conference%20of%20the%20States,and%20implement%20anti%2Dcorruption%20activities>> accessed 24.01.2021.

³⁵⁶ UNCAC, supra n. 37, Article 16 (2).

³⁵⁷ UNCAC, supra n. 37, Article 15, b, This provision criminalises both the demand side and supply side of national bribery.

³⁵⁸ UNCAC, supra n. 37, Article 21.

regard to bribery of public officials of a foreign country the UNCAC provides an autonomous definition as follows:³⁵⁹ “any person holding a legislative, executive, administrative or judicial office of a foreign country, whether appointed or elected; and any person exercising a public function for a foreign country, including for a public agency or public enterprise”³⁶⁰. It is important to notice that, together with administrative bodies, the Convention takes into account also a public enterprise, despite its legal form whenever the government exercises a dominant influence.³⁶¹ With regard to officials of public international organizations the Convention applies an institutional approach and specifies that it refers to “an international civil servant and to any person who is authorized by such an organization to act on behalf of that organization”³⁶².

2.8.2.3. Criminal Conduct and *Mens Rea*

The UNCAC criminalises the “promise, offering or giving to a foreign public official” an undue advantage. With regard to the subjective requirement, the Convention specifies that the conduct shall be carried out “intentionally”³⁶³ and “in order to obtain or retain business or other undue advantage in relation to the conduct of international business”³⁶⁴. The provision has the narrow scope of the OECD Convention with the specific requirement of the business advantage. However, the UNCAC does not exclude routinely governmental payments (i.e. ‘facilitating payments’) since they can be disciplined under the definition of any other “undue advantage”.³⁶⁵ This different approach is justified on the basis of the circumstance that the UNCAC does not have the narrow scope of preventing bribery in order to avoid distortion of competition, but it also looks at the seriousness of the possible threats posed

³⁵⁹ This form of bribery is discipline under Article 16 of the OECD Convention, *supra* n. 36.

³⁶⁰ UNCAC, *supra* n. 37, Article 2 (b).

³⁶¹ M. KUBICIEL, ‘Core Criminal Law Provisions in the United Nations Convention against Corruption’ (2009) 9 (1) *International Criminal Law Review* 143.

³⁶² UNCAC, *supra* n. 37, Article 2 (c).

³⁶³ UNCAC, *supra* n. 37, Article 16, par. 1.

³⁶⁴ UNCAC, *supra* n. 37, Article 16.

³⁶⁵ M. KUBICIEL, *supra* n. 361, p. 154.

by corruption to democracy and the rule of law.³⁶⁶ In addition, as discussed, even though the OECD Convention does not criminalise facilitating payments, the 2009 Anti-Bribery Recommendation urges Member States to discourage these payments.³⁶⁷

2.8.3. The Jurisdictional Scope

The UNCAC, under article 16, provides for the criminalization of the criminal conduct carried out transnationally but it does not specify any further what kind of jurisdictional link shall be applied. However, when looking at the UNCAC Legislative Guide³⁶⁸ it is necessary to exclude the sole application of the territorial principle. In fact, the Guide states that “States with only territorial jurisdiction will have to make an exception” in order to cover this particular offence, which will usually be committed by nationals abroad.

2.8.4. The Liability Model

With regard to the liability deriving from bribing abroad, the UNCAC distinguishes between crimes committed only by individuals and crimes committed by legal entities through individuals. For the crimes committed by individuals³⁶⁹ it requires the criminalization of their behaviour, while with regard to legal persons³⁷⁰ it allows for the adoption also of criminal, administrative and civil measures. The UNCAC also specifies that the introduction of liability for corporate entities shall not exclude the liability of individuals. With regard to the penalties it specifies that, similarly to the OECD Convention, they shall be “effective, proportionate and dissuasive”.³⁷¹

³⁶⁶ See UNCAC, *supra* n. 37, Preamble. L.S. BORLINI and M. ARNONE, *supra* n. 63, p. 328.

³⁶⁷ See section 2.6.2.3 *supra*.

³⁶⁸ UNODC, Legislative Guide for the Implementation of the United Nations Convention against Corruption, Second Revised Edition 2012, p. 68, n. 213 <https://www.unodc.org/documents/treaties/UNCAC/Publications/LegislativeGuide/UNCAC_Legislative_Guide_E.pdf>

accessed 10.04.2021, [hereinafter UNODC, UNCAC Legislative Guide].

³⁶⁹ UNCAC, *supra* n. 37, Article 16 (1).

³⁷⁰ UNCAC, *supra* n. 37, Article 26.

³⁷¹ *Ibid.*

2.8.5. The Impact of Corporate Compliance Programs on the Liability Regimes

Article 26 of UNCAC states that “[e]ach State Party shall adopt such measures as may be necessary, consistent with its legal principles, to establish the liability of legal persons for participation in the offences established in accordance with this Convention”. The possible impact of the adoption of ABC programs on sanctions is not explicitly mentioned by the UNCAC. However, it is indirectly recognised when clarifying that State Parties can hold companies liable for foreign bribery, accommodating their provisions to their own legal systems and approaches.³⁷² In addition, the implementation of ABC programs is also explicitly mentioned as a possible non-monetary sanction.³⁷³ The requirements necessary for an effective ABC program have been clarified in 2013 with the publication *An Anti-Corruption Ethics and Compliance Programme for Business: A Practical Guide* (UNODC Practical Guide for Business).³⁷⁴

2.8.6. Third-Party Agents

The UNCAC, when identifying the agents that can trigger the criminal liability of a corporate entity, specifies that “each State Party shall criminalize the criminal offense of paying, promising or offering a bribe when it is committed either directly or indirectly.”³⁷⁵ The interpretation of such provision seems to be consistent with the idea that the criminal conduct can be triggered by employees of the corporate entity, as well as by agents acting outside the realm of the employment relationship.

The possibility to hold corporate entities liable for the conduct of third party intermediaries can be also inferred from the wording of article 34 UNCAC,

³⁷² This would include liability regimes based on the need to prove organisational failure. See, on this, UNODC, UNCAC Legislative Guide, supra n. 368, p. 91.

³⁷³ Id., p. 93.

³⁷⁴ UNODC, *An Anti-Corruption Ethics and Compliance Programme for Business: A Practical Guide*, 2013 <http://www.unodc.org/documents/corruption/Publications/2013/13-84498_Ebook.pdf> accessed 08.01.2021.

³⁷⁵ UNCAC, supra n. 37, Article 16, par. 1.

providing for the adoption, within a contractual arrangement, of clauses dealing with the possibility to nullify a contract if the other party engaged in corrupt activities.³⁷⁶ The scope of this standard has been further clarified by the UNODC Practical Guide for Business.³⁷⁷ The Guidance first clarifies that the definition of business partners is quite broad and encompasses a variety of subjects, such as “suppliers, contractors, agents, subsidiaries and joint ventures”³⁷⁸.

Additionally it specifies that corporations can relate to these business partners on the basis of a different level of interaction (e.g. through informal relationships, single contractual relationships, or the tight integration of business activities) and on the basis of a different level of influence (e.g. while some business partners remain fully independent, others may act on behalf of the company or are financially related in the form of minor or major investments).

Hinging upon those two standards, the following categories of business partners have been identified: subsidiaries; affiliates; joint ventures; agents and intermediaries; contractors and suppliers.³⁷⁹ Each type of third-party agent entails some opportunities, as well as a different level of risk (i.e. regulatory risk and reputational risk). Companies are required not to overlook this risk and to adopt precautionary measures tailored to each business partner. A brief analysis of the risks and of the compliance and ethics requirements, provided for each business partners follows:

- a. Subsidiaries: the UN Guidelines consider them to represent the strongest form of business relationship. This strength is inferred from the economic participation and from the related managerial power

³⁷⁶ Article 34 of the Convention, which provides for States Parties to ‘[...] consider corruption a relevant factor in legal proceedings to annul or rescind a contract, withdraw a concession or other similar instrument or take any other remedial action’.

³⁷⁷ UNODC, *supra* n. 374.

³⁷⁸ *Id.*, p. 54.

³⁷⁹ *Ibid.*

(e.g. the company can exercise such control by deciding the composition of the board of directors or by influencing important business decisions).

- b. Affiliates: this second category is represented by business partners whose shares are partially owned (less than 50%) by the corporation. As for the subsidiary the ability of the holding to control the affiliate is inferred from the existence of the economic participation.
- c. Joint venture: analogously to what provided for subsidiaries and affiliates, the Guidance require a corporate entity to invest in anti-bribery measures on the basis of the actual level of investment (whether occurring through a new corporate vehicle or through an agreement). Additionally, the stipulation of an exit clause, in case of violation of anti-corruption standards, is required.
- d. Agents and intermediaries: this category of business partners is represented by separate organizations or individuals that act on behalf of the company and over whom the company has a determining influence.³⁸⁰ They usually provide specialized services aiming at facilitating the entrance of the company in a new market. The provision of specialized services may create a level of dependence of the corporation towards its intermediaries that may negatively affect its ability to control them. On the contrary the company can be considered to exercise a certain level of control over the intermediary, not on the basis of the existence of a participation through shares, but on the basis of its negotiating power and market power.³⁸¹
- e. Contractors and suppliers: when looking at the power of a company to control them, they are considered to be the weakest category. In order to minimize the risks associated with their involvement, a corporation shall implement the instruments usually applied also for intermediaries and for agents. However, they entail an additional

³⁸⁰ UNODC, *supra* n. 374, p. 56.

³⁸¹ *Ibid.*

challenge, represented by the high number of partners a company may deal with.³⁸²

It is important to notice that, even though some third parties may be associated with a lower level of control by firms, the investment in compliance needs to respond to the risk assessment exercise. Consequently, firms may be expected to invest more in the prevention of crime associated with intermediaries because the lower monitoring ability entails red flags.

2.9. The UK Bribery Act

2.9.1. Introduction

Before the adoption of the OECD Convention the UK had a tolerant attitude towards bribes paid internationally since these payments were even considered as legitimate business expenses and, consequently, they were deductible from the tax base.³⁸³ Consequently the ratification of the OECD Convention imposed important substantive and procedural changes in the existing legislation in order to comply with the standards set internationally.³⁸⁴ In particular the following changes were required: (i) to extend the territorial scope of anti-bribery laws; (ii) to prohibit decisions based on the economic interest of the State, in compliance with article 5 of the OECD Convention; (iii) to avoid the use of the term “corruptly”, when assessing the liability; and (iv) to implement a regime that would ensure the existence of “effective, proportionate, and dissuasive sanctions” against individuals and against business entities.³⁸⁵

The process of adapting the national legislation to the OECD Convention required almost ten years and several recommendations of the OECD

³⁸² Id., p. 57.

³⁸³ This practice was finally prohibited on 01.04.2002 by the Finance Act 2002, c. 23, section 68(2) (UK) <http://www.legislation.gov.uk/ukpga/2002/23/pdfs/ukpga_20020023_en.pdf> accessed 24.01.2021.

³⁸⁴ These changes were both substantive and procedural. For a brief analysis of those changes see P. ALLDRIDGE, ‘The UK Bribery Act: The Caffeinated Younger Sibling of the FCPA’ (2012) 73(5) Ohio State Law Journal 2012, pp.1181-1216.

³⁸⁵ Id. p. 1188.

WGB.³⁸⁶ An important event in speeding up this process is represented by the Al-Yamamah case.³⁸⁷ The case regarded one of the biggest exporting contracts, signed by the UK with Saudi Arabia. The contract was signed between the two governments but BAE Systems (then British Aerospace) was the prime contractor because the deal included the sale of 120 Tornado fighter jets.

In 2004 the Serious Fraud Office (SFO) started an investigation on alleged accounting irregularities with regard to the BAE-Yamamah deal for the value of £20 million. In 2006 the Director of the SFO wrote to the Attorney-General to inform him that the SFO was suspending the investigation considering that its continuation risked “real and imminent damage to the UK’s national and international security and would endanger the lives of UK citizens and service personnel.”³⁸⁸ In 2008 the OECD WGB conducted a further visit and required reforms to be implemented in order to obtain compliance with the OECD Convention.³⁸⁹ In 2009 the Government introduced a further bill, along the lines proposed by the Law Commission and on July 1st 2011, the UKBA came into force.

The adoption of this act not only ensured the compliance of the United Kingdom with the OECD Convention³⁹⁰ but it also introduced what has been considered “among the strictest” legislation dealing with international

³⁸⁶ In particular, see Joint Comm. On Draft Corruption Bill, Draft Corruption Bill: Report and Evidence, 2002-4, HC 705, H.L. Paper 157, par. 107, 118 (UK) <<http://www.publications.parliament.uk/pa/jt200203/jtselect/jtcrr/157/157.pdf>> accessed 24.01.2021. OECD, UK: Phase 2 - Report on the Application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 1997 Recommendation on Combating Bribery in International Business Transactions, 2005, par. 1-2 <<https://www.oecd.org/daf/anti-bribery/anti-briberyconvention/34599062.pdf>> accessed 24.01.2021.

³⁸⁷ A. JOSHI, ‘Britain’s Fight Against the ‘Silver Lance’ A Radical Overhaul of the UK’s Bribery Laws’ (2009) 33 *The Champion* 36, 37.

³⁸⁸ Ibid.

³⁸⁹ OECD, UK: Phase 2bis, *supra* n. 92, par. 38, at 4.

³⁹⁰ Law Commission No. 313, *Reforming Bribery*, 2008, HC 928, at 137, UK.

bribery.³⁹¹ In fact, differently from the FCPA, it criminalizes also the demand side of bribery as well as the cases of private-to-private corruption.³⁹² Finally the Act does not provide any exclusion in case of facilitating payments. This change in the legislation had also an impact on the implementation of the anti-bribery measures and a recent report published by Transparency International included the UK among the countries with a high level of enforcement.³⁹³

2.9.2. The Elements of the Criminal Conduct

2.9.2.1. The Offender

As already mentioned, the UKBA has a broader scope than other acts criminalizing transnational bribery since it deals with both the demand side and the supply side of transnational bribery.³⁹⁴ For the purpose of this analysis the focus will be exclusively on the supply side and the UKBA does not require any special qualification, referring to the offender as “a person”. The only specification is done with regard to legal entities. In this case the UKBA specifies that “a relevant commercial organization”³⁹⁵ shall be considered responsible for the offense of transnational bribery committed by an “associated person”³⁹⁶.

2.9.2.2. The Recipient

The UKBA criminalizes both the payment of bribes to foreign public officials and the payment to private parties (‘commercial bribery’). In the definition of international public official is included: an individual “who holds a legislative, administrative or judicial position of any kind, whether appointed

³⁹¹ Transparency International UK, The Bribery Act Adequate Procedure Guidance, March 2012 <<https://www.transparency.org.uk/publications/adequate-procedures-guidance-uk-bribery-act-2010>> accessed 24.01.2021.

³⁹² Respectively, Articles 1, 2 and 6 of the UKBA, supra n. 34.

³⁹³ Transparency International, Exporting Corruption 2020 <https://images.transparencycdn.org/images/2020_ReportFull_ExportingCorruption_English.pdf> accessed 10.01.2021.

³⁹⁴ UKBA, supra n. 34, Articles 1 and 2.

³⁹⁵ UKBA, supra n. 34, Article 7, (5), specifies the meaning of ‘*relevant commercial organization*’.

³⁹⁶ UKBA, supra n. 34, Article 8 specifies the meaning of associated person. In general, it is possible to say that this is a person ‘*who performs services for or on behalf of C*’.

or elected, of a country or territory outside the United Kingdom (or any subdivision of such a country or territory), exercises a public function for or on behalf of a country or territory outside the United Kingdom (or any subdivision of such a country or territory), or for any public agency or public enterprise of that country or territory (or subdivision), or is an official or agent of a public international organization.”³⁹⁷

From this definition it is possible to infer that the UKBA adopts both a functional and an institutional approach and criminalizes the corrupt conduct of those who are officially in charge of a public office, as well as of those who exercise a public function. With regard to public international organizations it exclusively refers to an institutional approach but without any restriction.³⁹⁸

2.9.2.3. Criminal Conduct and *Mens Rea*

The UKBA regulates three different hypotheses of active bribery and all of them can be enforced if committed abroad.³⁹⁹ According to the first hypothesis, it is subject to a criminal liability the act of offering, promising or giving a financial or other advantage: 1) to induce a person to improperly perform a relevant function or duty; 2) to reward a person for an improper activity; 3) to know or believe that the acceptance of the advantage would itself be an improper performance of a function or duty.⁴⁰⁰ The second hypothesis criminalises the payment of bribes to foreign public officials “in order to obtain or retain business”.⁴⁰¹ Finally the UKBA explicitly sanctions a company for the bribes paid by its “associated persons” with the intention to obtain or retain a business or an advantage for the company.⁴⁰²

³⁹⁷ UKBA, supra n. 34, Article 6 (5).

³⁹⁸ UKBA, supra n. 34, Article 6 (6).

³⁹⁹ M. RYZNOR and S. KORKOR, ‘Anti-Bribery Legislation in the United States and United Kingdom: A Comparative Analysis of Scope and Sentencing’ (2011) 76(2) *Missouri Law Review* 441.

⁴⁰⁰ UKBA, supra n. 34, Article 1.

⁴⁰¹ UKBA, supra n. 34, Article 6. This article explicitly refers to the OECD Convention, supra n. 36.

⁴⁰² UKBA, supra n. 34, Article 7.

From the reading of those articles it is possible to draw two different conclusions: the mental element of the criminal conduct refers to the intent to obtain a business advantage; the UKBA does not grant any exception for “facilitating payments”. With regard to facilitating payments, the UK Ministry of Justice has declared that a facilitating payments exception could “create artificial distinctions that are difficult to enforce, undermine corporate anti-bribery procedures, confuse anti-bribery communication with employees and other associated persons, perpetuate an existing 'culture' of bribery and have the potential to be abused.”⁴⁰³

2.9.3. The Jurisdictional Scope

With regard to the identification of the jurisdiction under the UKBA it is important to distinguish between the offences disciplined under article 1 and 6 and article 7 of the UKBA. In the first two hypotheses the principle of territorial jurisdiction, as defined by article 12 of the UKBA, applies. These articles extend the jurisdiction of the SFO for crimes committed by companies that carry out the criminal conduct in the United Kingdom as well as for those who have a “close connection” with the United Kingdom⁴⁰⁴.

The scope is broadened in the interpretation of close connection that, apart from including British citizens and British nationals, it also includes “an individual ordinarily resident in the United Kingdom”⁴⁰⁵ and “a body incorporated under the law of any part of the United Kingdom”⁴⁰⁶. With regard to the offence committed ex art. 7 of the UKBA, the jurisdiction of the SFO not only applies to legal entities that are incorporated in the UK⁴⁰⁷ but it

⁴⁰³ UK Ministry of Justice, The Bribery Act 2010, Guidance about procedures which relevant commercial organisations can put into place to prevent persons associated with them from bribing (section 9 of the Bribery Act 2010), March 2011, paragraph n. 18 <<http://www.justice.gov.uk/downloads/legislation/bribery-act-2010-guidance.pdf>> accessed 24.01.2021 [hereinafter UKBA Guidance].

⁴⁰⁴ UKBA, supra n. 34, Article 12, 2 (c).

⁴⁰⁵ UKBA, supra n. 34, Article 12, 4, g.

⁴⁰⁶ UKBA, supra n. 34, Article 12, 4, h.

⁴⁰⁷ In particular, it applies to corporate entities that are incorporated in the UK and that carry out the criminal conduct in the UK or elsewhere, see Article 7 (2) of the UKBA, supra n. 34.

also applies to a legal entity, “wherever incorporated”, “which carries on a business, or part of a business, in any part of the United Kingdom”⁴⁰⁸.

The Official Guidance issued by the Ministry of Justice has not clarified any principle through which it is possible to identify whether the conduct has been carried out partially in the United Kingdom. However, it is reasonable to believe that this concept will be interpreted in an extensive way also in order to avoid putting companies incorporated in the United Kingdom at a comparative disadvantage.⁴⁰⁹ In particular, the UK jurisdiction is likely to apply anytime the payer is associated with the commercial organisation and the payment was done to obtain and retain business or to advantage the commercial organisation.⁴¹⁰

2.9.4. The Liability Model

The UKBA provides for the criminalization of active bribery of foreign public officials for both individuals and corporate entities. With regard to legal entities the identification principle and the holistic model apply.⁴¹¹

The identification principle was the sole existing model until the enactment of the UKBA in 2010. This system is particularly burdensome because it requires the proof of the involvement and awareness of those representing the ‘directing mind and will’⁴¹² of a corporation, while performing their own functions⁴¹³. This proof can be obtained relatively easily in the case of small corporate entities but it becomes more difficult in case of complex legal

⁴⁰⁸ UKBA, supra n. 34, Article 7, 5.

⁴⁰⁹ C. BINHAM, ‘SFO Chief Warns of New Global Reach’, *Financial Times*, 23.05.2011 <<https://www.ft.com/content/8c056ce2-8562-11e0-ac32-00144feabdc0>> accessed 10.04.2021.

⁴¹⁰ L. FORD, ‘United Kingdom: Global bribery offenses guide’ *DLA Piper Publications*, 04.12.2019 <<https://www.dlapiper.com/en/us/insights/publications/2019/09/bribery-offenses-guide/united-kingdom>> accessed 10.01.2021.

⁴¹¹ See supra par. 2.3.

⁴¹² This definition includes ‘directors, managing directors, company secretaries and other officers who are responsible for managing the company business’. M. T. TRAPASSO, *Corporate Criminal Liability in the United Kingdom*, in *Corporate Criminal Liability and Compliance Programs*, vol. 1, Jovene Editore 2012.

⁴¹³ The requirements for the identification principle to be satisfied are specified in *Tesco Supermarkets Ltd v. Natrass*, 1972, AC 153 at 170 and 173.

entities in international business transactions.⁴¹⁴ Moreover, according to this model not only individual and corporate liabilities coexist⁴¹⁵ but individual liability is the necessary condition to hold corporate entities responsible for criminal offences.⁴¹⁶ For these reasons the exclusive application of the ‘identification theory’ has been considered insufficient to deal with international bribery.⁴¹⁷

In order to overcome this limitation, the UKBA introduced the hypothesis of liability for corporate entities in case of “failure of commercial organizations to prevent bribery”⁴¹⁸. In this case a corporate entity can be held criminally liable for the offence of bribery, independently from a conviction of an individual agent acting on its behalf. Therefore, it is not required to prove *the mens rea* of the briber and the liability is imposed on corporate entities, unless they prove to have adopted adequate measures to prevent this crime.⁴¹⁹

The violation of the provisions of the UKBA leads to a conviction to imprisonment of up to ten years and to a fine up to £150,000, for the case of individuals. With regard to corporate entities, monetary fines are imposed up to a statutory maximum⁴²⁰ for the offences of active bribery as defined under articles 1 and 6, while no limits are set for the case of bribery deriving from an organizational failure. With the enactment of the UKBA some doubts emerged on the applicability of automatic debarment, in compliance with the

⁴¹⁴ C. WELLS, ‘Corporate responsibility and compliance programs in the United Kingdom’ in S. MANACORDA, F. CENTONZE and G. FORTI (eds.) *Preventing Corporate Corruption*, p. 512.

⁴¹⁵ U.K. Bribery Act, s.3. C. WELLS, *supra* n. 414, p. 507.

⁴¹⁶ This principle, together with the direct liability principle and the holistic principle is one of the ways to impute the criminal conduct of one agent to a corporate entity. In the UK, apart from the case of bribery and corporate manslaughter, the ‘identification principle’ is used to impute the criminal conduct to corporate entities for crimes in which it is necessary to prove the *mens rea*. On the other hand, for regulatory crimes in which it is not necessary to prove the *mens rea*, strict vicarious liability applies. M. PIETH et al., *supra* n. 63, p. 178.

⁴¹⁷ OECD, UK: Phase 2, *supra* n. 386, pp. 62-66. OECD, UK: Phase 2bis, *supra* n. 92, p. 9.

⁴¹⁸ UKBA, *supra* n. 34, Article 7.

⁴¹⁹ S. GENTLE, ‘The Bribery Act 2010: (2) The Corporate Offence’ (2011) *Criminal Law Review* 101, 110.

⁴²⁰ Current statute law does not provide this maximum yet. MONGILLO, *supra* n. 337, p. 319.

UK Public Contracts Regulation and with the 2006 Utilities Contracts Regulation.⁴²¹

The Public Contracts Regulations clarified that mandatory debarment applies only to the case in which the corporate entity has been condemned for the offences pursuant to art. 1 and 6 of the UKBA.⁴²² Therefore, automatic debarment has been excluded for the crime committed according to article 7 of the Bribery Act, even though it may still be applied on a discretionary basis.⁴²³

2.9.5. The Impact of Corporate Compliance Programs on the Liability Regimes

The UKBA acknowledges the effort put in place by a corporate entity in order to avoid transnational bribery by allowing the exclusion of its culpability anytime it proves⁴²⁴ that “had in place adequate procedures designed to prevent the persons associated with [the organization] from undertaking such conduct”⁴²⁵. In order to clarify the conditions according to which a procedure can be considered to be adequate for the deterrence of bribery, the UKBA required the Secretary of State to publish a specific guidance.⁴²⁶

⁴²¹ These regulations were introduced in order to transpose, in the UK, the obligations set by Article 45 of the Directive 2004/18/EC of 31.03.2004.

⁴²² The Public Contracts Regulations 2015 (SI 2015/102) implement Directive 2014/24 on public procurement [2014]

OJ L94/65 in England and Wales, art. 57, 1 c).

⁴²³ A. WEBSTER, ‘Could a Company be Debarred Following a Conviction for Failure to Prevent Bribery?’ (2016) 7 *Criminal Law Review* 485, 486.

⁴²⁴ The burden of proof is, therefore, reversed. The Bribery Act 2010 Explanatory Notes <<https://www.legislation.gov.uk/ukpga/2010/23/notes/data.pdf>> accessed 10.04.2021. Section 50 of the Explanatory Notes specifies that: ‘*Although not explicit on the face of the Act, in accordance with established case law, the standard of proof the defendant would need to discharge in order to prove the defence is the balance of probabilities*’. This standard is applied in civil law cases and it is based on the ‘most likely than not’, which is satisfied with 50%, unlike the case of the public accuse, which has to satisfy the requirement of ‘beyond any reasonable doubt’.

⁴²⁵ UKBA, supra n. 34, section 7, (2).

⁴²⁶ UKBA, supra n. 34, section 9.

The UKBA Guidance has been issued on March 2011⁴²⁷ and it clarifies how the purpose of granting a defence in case adequate procedures were in place is twofold: on the one hand, it is done in order to avoid to sanction “innocent firms” and, on the other hand, it is done in order to incentivize firms to adopt compliance programs. The guidance suggests six principles whose adoption may favour the effectiveness of the anti-bribery procedure but, at the same time, specifies that its adequacy shall be assessed by the judiciary on a case-by-case basis.⁴²⁸ The principles of prevention that have been identified by the guidance are the following⁴²⁹:

1) Proportionate procedures: the procedure of prevention of corruption must be proportionate to the risks of a corrupt act being committed. The proportionality is assessed on the basis of a risk-based approach. The guidance specifies the procedures⁴³⁰ according to which this risk⁴³¹ shall be calculated. Those procedures shall be clear, practical, accessible and implemented.

2) Top-level commitment: for an efficient implementation of preventive measures, it is necessary to have the commitment of high-level officials and of chief executive officers (CEOs) of the corporate body or of an equivalent person. This can be ensured through forms of communication in which the corporate entity clarifies a ‘zero tolerance policy’ towards bribery. In large

⁴²⁷ UKBA Guidance, supra n. 403.

⁴²⁸ The Guidance specifies that the above-mentioned principles are general and each corporate entity shall adjust them to the corporate structure, with a particular attention to its size. According to some authors, the guidance must be interpreted as an instrument provided mostly for small and medium-sized enterprises doing business abroad, considering that multinational corporations were already familiar with the anti-bribery standards set by the FCPA. S. GENTLE, supra n. 419, 101-110.

⁴²⁹ UKBA Guidance, supra n. 403.

⁴³⁰ The word ‘procedures’ is used in a broad way, which includes both preventive and policies and enforcement policies.

⁴³¹ The risks of corruption can vary from one single entity to another on the basis of the following elements: the dimension, the nature and complexity of the activity, the people that are connected, the clients and markets in which the organisation operates, the involvement of the management, the procedures of risk assessment, due diligence, facilitating payments, transparency of transactions, procedures dealing with the delegation of powers, conflict of interests, enforcement and whistle-blowing.

multinational corporations it is recommended to hold the board accountable for the implementation of anti-bribery provisions.

3) Risk-Assessment: commercial organizations shall assess in a periodic manner the nature and intensity of different risks. This assessment shall be established in a proportionate manner, taking into account the size of the corporation, the access to adequate resources, the due diligence. The guidance specifies also the difference between two different types of risks: the external risk⁴³² and the internal risk⁴³³.

4) Due Diligence: another important element of an efficient prevention of corruption is the exercise of a ‘due diligence’ in order to reduce the risk of bribery connected to agents operating on behalf of the organization. The due diligence requirement is particularly relevant with regard to local intermediaries of foreign countries, with regard to associated persons, and in the case of a merger or acquisition of a different company.

5) Communication (including training): the organization must ensure that the policies and procedures to contrast corruption must be known and understood by the employees and stakeholders of the entity through an adequate system of communication. This procedure should also encourage individuals within the organization to speak up and to raise concerns about suspicious conducts.

6) Monitoring and Review: the guidance requires the commitment of the top management to the implementation of anti-bribery measures by favouring, among other things, the exchange of information between the organization and the compliance officer.

⁴³² External risk: risk based on the country; it depends on the sector involved: extractive industries, for example, are subject to a higher risk; risk-opportunity: projects with a high value; partnership risk: risk based on the circumstance that there is a partnership with foreign public officials.

⁴³³ Internal risk: some of the risks may depend on the internal policy; lack of training, bonus culture (which induce people to take excessive risks) and lack of transparency with regard to the policies concerning hospitality and promotions.

With regard to the possibility to conclude a pre-trial agreement, it is important to notice that in February 2014 the SFO issued a guidance⁴³⁴ on the application of deferred prosecution agreements solely to corporate entities. This guidance, among other factors, takes into account the existence of effective compliance programs in order to assess whether the SFO should decide whether to enter into a DPA or not. The adoption of a DPA entails that a prosecutor can charge a company with a criminal offence, but actions are automatically suspended if the company agrees to a number of conditions. Among these conditions particularly relevance is attributed to the implementation of effective compliance programs. Effective compliance programs must be “proportionate, risk-based and regularly reviewed and tested, and the Company should be able to evidence that its programme has these traits, is adopted at board level and is sufficiently well-resourced”.⁴³⁵ Moreover with regard to the deterrence of international corporate bribery, it specifies the application of the UKBA Guidance.⁴³⁶

In 2011 the British Standards Institute, in response to the enforcement wave in the aftermath of the adoption of the UKBA, developed a standard of effective ABC programs which could be applied by multinational companies and small enterprises.⁴³⁷ This standard (BS 10500) was then superseded by the adoption of ISO 37001 on anti-bribery management systems.⁴³⁸

⁴³⁴ Deferred Prosecution Agreements Code of Practice, Crime and Courts Act 2013 <<https://www.legislation.gov.uk/ukpga/2013/22/schedule/17/enacted>> accessed 24.01.2021. The Guidance was issued pursuant to par. 6(1) of Schedule 17 to the Crime and Courts Act 2013. These principles have also been confirmed by the recently published SFO Operational Handbook, Deferred Prosecution Agreements <https://www.sfo.gov.uk/publications/guidance-policy-and-protocols/sfo-operational-handbook/deferred-prosecution-agreements/?preview=true#_ftn62> accessed 10.01.2021.

⁴³⁵ SFO Operational Handbook, *supra* n. 434.

⁴³⁶ *Ibid.*

⁴³⁷ BS 10500, ‘Specification for an anti-bribery management system’ <<https://shop.bsigroup.com/ProductDetail?pid=000000000030238856#:~:text=BS%2010500%20outlines%20a%20systematic,have%20a%20chance%20to%20escalate>> accessed 24.01.2021.

⁴³⁸ UKAS, Accreditation for Certification of Anti-Bribery Management Systems (ISO 37001:2016) <<https://www.ukas.com/services/technical-services/development-of-new-areas-of-accreditation/current-pilot-projects/accreditation-for-certification-of-anti-bribery-management-systems-iso-370012016>> accessed 10.01.2021.

2.9.6. Third-Party Agents

The British system allows for the imputation of the criminal conduct of third-party agents on corporate entities, on the basis of articles 6(3)(a) and 7 of the UKBA. The first article provides for the liability of a corporate entity if it was involved in a corrupt payment “directly or through a third party”. Unlike the FCPA, the UKBA does not specify the meaning of third-party agents nor the *mens rea* requirement. However, consistently with the identification doctrine, the latter can be inferred from the involvement of high-level officials, for the hypothesis regulated by article 6(3).⁴³⁹

Article 7 deals with third-party agents by allowing the imputation of a criminal conduct on legal entities when committed by an associated person and the company has failed to implement adequate preventive measures. In this case the *mens rea* requirement is represented by the “wilful disregard” and “reckless behaviour”.⁴⁴⁰ Article 8 specifies the definition of associated person, by clarifying that it entails any person that “performs services for or on behalf of the organization” and that can encompass employees, agents or subsidiaries, since the capacity in which this agent performs the service does not matter. When the agent is an employee, “it is to be presumed unless the contrary is shown that [the employee] is a person who performs services for or on behalf of [the firm]”.⁴⁴¹ Alternatively, the nature of the services provided by independent agents to a legal entity has to be “determined by reference to all the relevant circumstances”⁴⁴², beyond the formal relationship between them.

⁴³⁹ MONGILLO, *supra* n. 337, p. 310.

⁴⁴⁰ F. WARIN, C. FALCONER and M. DIAMANT, ‘The British are Coming! Britain Changes its Law on Foreign Bribery and Joins the International Fight Against Corruption’ (2010) 46(1) *Texas International Law Journal* 1, 72.

⁴⁴¹ UKBA, *supra* n. 34, section 8(5).

⁴⁴² UKBA, *supra* n. 34, section 8(4).

This difference is even greater when considering that, by moving away from a formalistic approach, an associated person can be outside a formal principal-agent relationship.⁴⁴³ In particular the following cases have been included:

- (i) Subjects interacting with the corporation at arm's length, such as distributors, contractors and sub-contractors.⁴⁴⁴ They are encompassed in the definition of associated persons, as long as they acted "for or on behalf of the organization".
- (ii) Subsidiaries: a holding is liable for its subsidiaries when they acted with the intent to benefit the group, despite the material accrual of any economic advantage.⁴⁴⁵
- (iii) Joint-ventures: the Guidance makes a distinction between two different forms of joint-ventures, by looking at:
 - a. A joint-venture operating through an independent entity: in this case the members of the corporate vehicle are held criminally liable for the conduct put in place by the hybrid organization when the "joint-venture is performing services for the member and the bribe is paid with the intention of benefiting that member".⁴⁴⁶ On the contrary, if the members of the joint venture benefit from the corrupt conduct, exclusively on an indirect basis, they are not liable.
 - b. A joint-venture operating through a contractual arrangement: in this case the behaviour carried out by an agent of a participant to the joint-venture is imputed to such participant, unless there are evidences that he is acting on behalf of the joint-venture as a whole. This last condition can be inferred on the basis of the

⁴⁴³ UKBA Guidance, supra n. 403, section 37.

⁴⁴⁴ UKBA Guidance, supra n. 403, sections 38 and 39.

⁴⁴⁵ UKBA Guidance, supra n. 403, section 42.

⁴⁴⁶ Id., section 40.

degree of control that the participant has over the joint-venture agreement.⁴⁴⁷

Different business partners raise a different level of bribery risk. This degree of riskiness must be assessed on the basis of a due diligence process, whose steps are defined in the UKBA Guidance.⁴⁴⁸ When dealing with third-party agents, the UKBA Guidance identifies internal and external sources of bribery risk. The latter is mainly represented by the risk associated with the country and with the business sector in which the investment takes place.⁴⁴⁹ The former is made up of the following elements: the ownership structure; the reference to the services offered by third parties; the reference to the costs, commissions, fees and means of remuneration; the degree of physical control companies have over those agents. The inadequate response to the risk raised by the different business partners can be interpreted as a “wilfully blind” behaviour.⁴⁵⁰

⁴⁴⁷ Id., section 41.

⁴⁴⁸ Id., Principle 1, Proportionate procedures.

⁴⁴⁹ Id., p. 16.

⁴⁵⁰ UKBA Guidance, *supra* n. 403, section 7: Failure of commercial organisations to prevent bribery.

Table 1. Corporate Criminal Liability for Foreign Bribery: Comparison

Legislative Acts	Criteria of Comparison			
	Criminal Offence - Offender - Recipient - <i>Actus reus</i> - <i>Mens rea</i>	Jurisdiction	Liability	Compliance - <i>Ex-ante</i> - <i>Ex-post</i> - Requirements
OECD Convention	- “any person” (supply side) - foreign public officials/intern. public officials - “to offer, promise or give any undue pecuniary or other advantage” - intention and objective “to obtain or maintain business”	- territorial principle - active nationality	- criminal liability for individuals - necessary measures for legal entity. Fines shall be “effective, proportionate and dissuasive”	-2009 Recommendation on private sector involvement (no incentives specification)
UNCAC	- demand side and supply side of bribery - foreign public officials and international public officials (including public agencies or enterprises) - private-to-private - bribery (active and passive)+ other forms of corruption - “promise, offering or giving to a	- territorial principle - other principles necessary to extend beyond territorial principle	- criminal liability for individuals - civil, criminal or administrative liability for legal persons (sanctions shall be “effective, proportionate and dissuasive”).	-2013 An Anti-Corruption Ethics and Compliance Programme for Business: A Practical Guide (UNODC Practical Guide for Business)

	<p>foreign public official an undue advantage”</p> <p>- intention and objective “to obtain or retain business”</p>			
<p>Italian Legislative Decree 231/2001</p>	<p>- anybody</p> <p>- foreign public officials, international public officials, officials of European institutions</p> <p>- offer to pay, promise to pay or pay</p> <p>- in order to obtain, for himself or for another, an undue advantage in international economic transactions or in order to obtain or maintain an economic or financial activity”</p>	<p>- territorial principle and active nationality principle</p>	<p>- criminal liability for individuals</p> <p>- administrative liability for corporate entities (mix regime)</p>	<p>- adoption of effective compliance programs excludes the culpability (distinction employees-high level personnel)</p> <p>- Guidelines issued by the National Association of Industries (Confindustria)</p>
<p>FCPA</p>	<p>-US issuers, domestic concerns and others (supply side)</p> <p>-foreign public officials/international public officials</p> <p>-“offering to pay, paying or promising to pay” money or anything of value</p>	<p>- principle of territoriality and principle of active nationality</p>	<p>- vicarious strict liability</p> <p>- criminal and civil liability</p>	<p>- mitigation of the sanctions (US Sentencing Guidelines)</p> <p>- Plea agreements, deferred prosecution agreements, non-prosecution agreements (Federal Prosecuting Guidelines)</p>

	<ul style="list-style-type: none"> - intention and objective to “obtain or maintain business” - companies and citizens 			
UKBA	<ul style="list-style-type: none"> - “a person” and “relevant commercial organization (supply side)” - foreign public officials, international public officials and private-to-private corruption - giving a financial or other advantage, paying bribes in order to obtain or maintain business, persons associated to a company paying bribes with the intention to obtain or retain business for the company 	<ul style="list-style-type: none"> - territorial principle and active nationality 	<ul style="list-style-type: none"> - criminal liability - imputation models: identification on theory and holistic model 	<ul style="list-style-type: none"> - holistic model: adequate procedures exclude the culpability (Bribery Act Guidance on adequate procedures) - 2014 Serious Fraud Office Guidance on pre-trial agreements

Table 2. Corporate Criminal Liability for Foreign Bribery Paid by Intermediaries: Comparison

Legislative Acts	Criteria of Comparison		
	Extension of liability to third-party agents	<i>Mens Rea</i>	Compliance
OECD Convention	Directly or through Intermediaries Subsidiaries	Wilful Blindness Vicarious and Direct	Due Diligence
UNCAC	Direct or Indirect Payments	Wilful Blindness	Due Diligence Contractual Arrangements can be Null and Void (art. 34)
Italian Legislative Decree 231/2001	Anybody under direction and control of top-level agents (art.5) Subsidiaries	Wilful Blindness (Siemens) Direct, Wilful Blindness	Due Diligence
FCPA	Direct or Indirect payment Subsidiaries	Wilful Blindness Direct, Vicarious and Wilful Blindness	Due Diligence
UKBA	Art. 6(3) UKBA: direct or indirect payment Art. 7 UKBA: Associated Person	Identification Doctrine Wilful Blindness	Due Diligence

2.10. International Chamber of Commerce Standards for Third-Party Agents in International Corrupt Practices

The analysis of the provisions dealing with third-party agents in corrupt international business transactions has shown that all the legislations require the implementation of a due diligence in order to assess the risk inherent to business partners. Moreover, the inadequate response of corporations to the risk emerged from this process is associated with a reckless behaviour.

The ICC has requested the voluntary adherence to a similar procedure, in order to limit this negative effect.⁴⁵¹ According to the ICC Rules, an intermediary is any individual “that act on an enterprise’s behalf, including agents, business development consultants, sales representatives, customs agents, general consultants, resellers, subcontractors, franchisees, lawyers, accountants or similar intermediaries”. The ICC justifies the extension of the liability outside the employment relationship on the basis of the fact that “third parties are subject to the control or determining influence of the enterprise and thus within its proper sphere of responsibility”. Consequently, a company, when carrying out a business activity through third-party agents, needs to adopt the following measures:

- **Due diligence:** this process has to do with the activity of screening business partners before entering into a business relationship with them. The analysis aims to identify the possible external sources of risk inherent to the type of partner. In particular the following elements can function as benchmarks: the industry or geographical areas in which the agent operates; their reputation; the functions they have to perform; their relationship with foreign public officials or with foreign governmental agencies.

⁴⁵¹ International Chamber of Commerce, Guidelines on Agents, Intermediaries and Other Third Parties, Document 195-11 Rev2 Final EN VS/zse, 2010.

- **Ongoing Monitoring Activity:** after having decided to enter into a business relationship with third-party agents, the corporation can implement effective measures in order to mitigate the risks of noncompliance with anti-bribery standards. Some of the most important instruments are: the provision of information about anti-bribery compliance and ethics programs; the assessment of the adequacy of the remuneration of agents; the stipulation of a written agreement with business partners, where they commit to adhere to anti-bribery standards; the agreement to terminate the contractual partnership in case of violation of anti-bribery standards; the authorization to provide audit rights with regard to activities carried out on the enterprise's behalf; the agreement to submit to a prior approval of the corporation the choice to delegate their functions to subcontractors.

- **Reparatory Measures:** the ICC Rules provides for the adoption of reparatory measures in case in which the agent violates anti-bribery standards. In particular the right "to suspend or terminate the contract immediately upon unilateral good faith concern that there has been a violation of any applicable anti-corruption law or provision of the agreement without paying any compensation to the third party" is defined.⁴⁵² Additionally third parties must agree to indemnify the company for the costs associated with such violation. These conditions are particularly relevant given that companies face a trade-off: on the one hand public authorities, after a violation occurred, can interpret the continuation of a business partnership as a sign of the existence of the *mens rea*. On the other hand, the suspension of this business relationship can lead to an additional cost for the corporation. This is represented by the private lawsuit of the business partner for noncomplying with contractual arrangements.

⁴⁵² Ibid.

The ICC requires corporate entities to adequately respond to the level of risk deriving from the due diligence process. In doing so, they must decide on a case-by-case basis and they must favour substance over the form. For example, an agent defined as a “distributor” may act more like a “sales agent” and this classification may be more adequate in order to capture the level of risk entailed.⁴⁵³

2.11. Conclusions

From the comparative analysis of the measures analysed in this chapter and, in particular, from the comparison of the provisions dealing with the involvement of third-party intermediaries in international corrupt business transactions, the following conclusions can be drawn.

In the first instance, all the legislative measures object of the analysis extend the liability of corporate entities to cases in which the corrupt payment has been paid outside the realm of the employment relationship. This extension can happen in an explicit or in an implicit way and has led to the modification of the more traditional concept of *mens rea*. In particular the legislators moved away from the request to satisfy the direct knowledge standard and allowed for the identification of a reckless behaviour of the corporation.

Moreover, the psychological requirement was usually considered satisfied on the basis of the existence of a certain level of control, associated with the employment relationship. Outside this context, alternative standards have been developed. In particular, a certain level of control has been inferred from the existence of an economic participation (e.g. subsidiaries, associates, joint venture) or from the existence of a contractual power.

Finally, as far as the ABC measures are concerned, the UNCAC and the UKBA require a greater investment in anti-bribery compliance measures, when third parties are addressed. In particular, the use of intermediaries is

⁴⁵³ Ibid.

seen as a source of risk and companies are required to increase their investment when the risk of corruption is higher. This condition is based on the legal rationale that the inadequate response to third-party violations may show the intent of the corporation to be involved in corrupt deals through business partners. Chapter III will look at the economic principles justifying the extension of vicarious liability beyond the employment relationship and will look at the desirable standards of investment in ABC programs, for intermediaries.

“If a punishment is to serve its purpose, it is enough that the harm of punishment should outweigh the good which the criminal can derive from the crime, and into the calculation of this balance, we must add the unerringness of the punishment and the loss of the good produced by the crime. Anything more than this is superfluous and, therefore, tyrannous” (Beccaria, On Crime and Punishment – p. 64)

3. Law and Economics of Anti-Bribery Laws: Optimal Liability Regimes for Employees and Third-Party Agents

3.1. Introduction

Over the last decade, the policy debate on the prevention of international corruption, has increasingly stressed the importance of addressing the conduct of intermediaries.⁴⁵⁴ Consistently with this objective, most of the signatories of the OECD Convention have extended the application of corporate criminal liability measures beyond the scope of employment.⁴⁵⁵ In particular, when bribes are paid, firms can be held accountable in 76% of the countries for unrelated intermediaries (e.g. consultants), and in 78% of the member states for related agents (e.g. subsidiaries).⁴⁵⁶ Moreover, in both circumstances, corporations are expected to invest in the prevention, detection and sanction of bribes, through compliance programs and third-party due diligence.⁴⁵⁷ Consistently with what provided for employees, the efficient investment in these activities can be associated with a liability mitigation.⁴⁵⁸

⁴⁵⁴ OECD, supra n. 257, Annex I. G20 Guiding Principles on the Enforcement of the Foreign Bribery Offence, 2013
<https://www.g20.org/sites/default/files/media/g20_guiding_principles_on_enforcement_of_foreign_bribery_offence.pdf> accessed 21.02.2021.

⁴⁵⁵ OECD, The Liability of Legal Persons for Foreign Bribery: A Stocktaking Report, 2016, pp. 79-91
<<http://www.oecd.org/corruption/liability-of-legal-persons-for-foreign-bribery-stocktaking-report.htm>> accessed 21.02.2021. Notice that these statistics refer to countries whose legal framework allows to hold companies accountable for the conduct of their (related or unrelated) intermediaries (*de jure*).

⁴⁵⁶ Ibid.

⁴⁵⁷ See Chapter II supra.

⁴⁵⁸ Ibid.

Notwithstanding the widespread adoption of these measures,⁴⁵⁹ little attention has been paid by the economic literature to the efficiency of vicarious liability for intermediaries' offenses.⁴⁶⁰ The analysis conducted in this chapter aims to fill this gap and develops as follows. In sections 3.2 and 3.3 the economics of vicarious liability is discussed. In particular, section 3.3 clarifies the twofold objective of corporate criminal liability: (i) the internalization of the social harm of crime; and (ii) the promotion of self-enforcement activities.⁴⁶¹

Sections 3.3.1 and 3.3.2 look at different corporate liability regimes and compare them on the basis of their ability to achieve, in a cost-effective manner, these two objectives. While strict liability is inadequate to promote corporate self-enforcement activities, a more appropriate incentive is provided by duty-based standards. These regimes reward private investment in crime prevention and detection, with a full exemption (i.e. negligence) or with a reduction (i.e. duty-based regimes and compound regimes) of the expected sanction. Duty-based sanctions are particularly desirable when public enforcement activities are insufficient to achieve full deterrence.⁴⁶²

Section 3.4 hinges upon the insights of the existing economic literature and identifies the specific features of criminal liability measures, when the offenses are committed by intermediaries. In the first instance, section 3.4.1, argues that the application of vicarious criminal liability beyond the employment relationships is justified by the need to induce the internalization of the social harm of crime. In the absence of this sanction, firms would not respond for the offenses of their intermediaries, even when bribes were paid *"in the interest and on behalf of the corporation"*⁴⁶³.

⁴⁵⁹ OECD, *supra* n. 455.

⁴⁶⁰ Most of the economic studies on intermediaries and corruption do not address the definition of optimal liability sanctions. See, for instance, G. BAYAR, *supra* n. 22. M. DRUGOV et al., *supra* n. 24. K. HASKER and C. OKTEN, *supra* n. 25. One exception is represented by J. LAMBSDORFF, *supra* n.28.

⁴⁶¹ See *infra* section 2.

⁴⁶² J. ARLEN, *supra* n. 48.

⁴⁶³ R. KRAAKMAN, 'Economic policy and the vicarious liability of firms' in J. ARLEN (ed.) *Research Handbook on the Economics of Torts*, 2014, p. 235.

When looking at the objective to induce self-enforcement activities, the efficiency of vicarious liability for independent contractors is less clear. Differently from employees, intermediaries are not part of the hierarchical structure of the organization, but they interact through horizontal market mechanisms.⁴⁶⁴ Section 3.4.2 looks at this difference and shows that the implementation of ABC programs is often associated with higher information asymmetries and greater agency costs.⁴⁶⁵ Sections 3.5, 3.6 and 3.7 verify, through a theoretical economic model, whether optimal compliance standards and liability regimes are affected by this difference. The results of this analysis shed some light on the efficiency of the existing legislation against third-party intermediaries in foreign bribery offenses.

3.2. Optimal Liability Regimes Against Corporate Crime

Starting from the 1968 seminal contribution of Becker⁴⁶⁶, the tools of economic science have been extended beyond the context of market relationships and have been applied, among other fields, to the study of crime. One of the most important features of this approach is represented by the adoption of the principle of perfect rationality, for the identification of optimal deterrence.⁴⁶⁷ The application of this concept, in the context of organizational offenses, has important implications for the definition of the objectives of corporate criminal liability.

The first objective is represented by the need to internalize the social **harm associated with the criminal conduct**.⁴⁶⁸ Perfectly rational firms would prevent organizational offenses, only if their expected benefits are lower than

⁴⁶⁴ Ibid.

⁴⁶⁵ UNODC, *supra* n. 374, p. 54.

⁴⁶⁶ G. BECKER, 'Crime and Punishment: An Economic Approach' (1968) 76(2) *Journal of Political Economy* 169, 217.

⁴⁶⁷ T. ULEN, 'Rational choice theory in law and economics' in B. Bockaert, G. De Geest and C. NAGEL (eds.) *Encyclopedia of Law and Economics*, First Edition, Edward Elgar, 2000, p. 11.

⁴⁶⁸ J. ARLEN, *supra* n. 48, p. 145.

their expected costs.⁴⁶⁹ In a simplified scenario⁴⁷⁰, where firms' assets are unlimited (or sufficiently large), deterrence can be easily achieved, by setting the sanction equal to the harm, divided by the probability of detection.⁴⁷¹ In this context, social and private incentives could be aligned, with a minimum investment of public resources in policing.⁴⁷²

However, these conditions are scholarly assumptions and do not capture the complexity of real-life situations. When the social harm of crime is high, and the probability of detection is low, firms may be 'judgement proof' and may not be able to pay "fully the amount for which they have been found legally liable".⁴⁷³ In these circumstances, deterrence can be better achieved if enforcement entities increase their investment in policing measures, leading to a lower expected sanction.⁴⁷⁴

Nevertheless, this activity is costly and public resources are also limited.⁴⁷⁵ Under perfect rationality, regulators do not only aim to eliminate the social harm of crime but they are also concerned with the objective of minimizing the social costs of enforcement ('optimal deterrence').⁴⁷⁶ This objective can, more easily, be achieved if firms invest in self-enforcement measures. They are, in fact, often better positioned than courts to prevent and detect the criminal conduct of their agents. In particular firms can undertake the following actions⁴⁷⁷:

⁴⁶⁹ T. ULEN, *supra* n. 467, p. 11.

⁴⁷⁰ J. ARLEN, *supra* n. 48, p. 160.

⁴⁷¹ W. MULLIN, *supra* n. 51, p. 229. Note that if criminals are risk-averse, the alignment of public and private incentives would be efficiently achieved by setting the sanction lower than the harm.

⁴⁷² J. ARLEN, *supra* n. 48, p. 161.

⁴⁷³ Sometimes, limits may even be set by legislators, with the definition of maximum caps for the applicable sanctions. S. SHAVELL, 'The Judgment Proof Problem' (1986) 6(1) *International Review of Law and Economics* 45, 58. R. KRAAKMAN, 'Corporate Liability Strategies and the Costs of Legal Control' (1984) 93(5) *Yale Law Journal* 881.

⁴⁷⁴ W. MULLIN, *supra* n. 51, p. 229. J. ARLEN, *supra* n. 48, p. 155. S. SHAVELL, 'A Note on Marginal Deterrence' (1992) 12(3) *International Review of Law and Economics* 345.

⁴⁷⁵ W. MULLIN, *supra* n. 51, p. 231.

⁴⁷⁶ *Ibid.*

⁴⁷⁷ J. ARLEN and R. KRAAKMAN, 'Controlling Corporate Misconduct: An Analysis of Corporate Liability Regimes' (1997) 72 (4) *New York University Law Review* 693.

(a) Financial and ethical incentives: corporations can avoid the criminal activity by influencing their agents' behaviour, through monetary and non-monetary leverages.⁴⁷⁸ In the first instance, they can increase the *ex-ante* costs of the criminal behaviour, by creating internal gates that hinder the conduct and by forcing employees to invest effort in order to circumvent them.⁴⁷⁹ For example they can achieve this objective by implementing corporate ethics programs, with the purpose to change the perception of criminal activities in the organizational context.⁴⁸⁰ Additionally firms can reduce the *ex-post* benefit deriving from crime by changing their compensation, promotion and tenure policies.⁴⁸¹ In particular, compensation policies focusing on long-run profits appear to be better suited than short-term incentives for discouraging harmful behaviour.⁴⁸²

(b) Monitoring: these activities can be conducted on a continuous basis or through random audits and, differently from the measures described above, they can be carried out before or after a crime occurs. *Ex-ante* activities have the objective to reduce agents' opportunities to commit misconduct, without affecting the probability of sanctioning the firm.⁴⁸³ *Ex-post* policing is, instead, undertaken after a specific unlawful conduct occurs and is associated with the detection and sanction of criminal offenders.⁴⁸⁴ Monitoring measures are particularly important for the enforcement of intentional criminal activities that public authorities find difficult to detect. In those circumstances they are, not only, better positioned to identify the authors of the conduct but they are, also, able to do so, at a lower cost than regulators.⁴⁸⁵

⁴⁷⁸ Ibid.

⁴⁷⁹ Ibid.

⁴⁸⁰ According to Arlen: "Firms also can increase the cost of crime by creating a genuine corporate culture of legal compliance that imposes either direct psychological costs on those who commit crimes or increase the likelihood that fellow employees will report suspected wrongdoing (Tyler and Blader (2005) at 1153; Conley and O'Barr 1997)". See J. ARLEN, *supra* n. 48, p. 164.

⁴⁸¹ J. ARLEN and R. KRAAKMAN, *supra* n. 477.

⁴⁸² Ibid.

⁴⁸³ Ibid.

⁴⁸⁴ Ibid.

⁴⁸⁵ S. ODED, 'Inducing Corporate Compliance: A Compound Corporate Liability Regime' (2011) 31(4) *International Review of Law and Economics* 275. J. ARLEN, *supra* n. 48, p. 164.

(c) **Ex-post sanctioning**: corporate entities can increase the expected costs faced by their agents as a consequence of a criminal activity, not only by increasing their probability of detection, but also by setting organizational sanctions. Apart from imposing a monetary sanction, a particularly strong incentive is represented by the threat of the corporation to terminate the relationship with its agent.⁴⁸⁶ Even though the risk of dismissal is particularly strong, its effectiveness needs to be assessed on a case-by-case basis, looking at the existence of alternative opportunities for employees.⁴⁸⁷

(d) **Ex-post cooperation**: this action is exercised once the criminal conduct is detected. Corporations can, not only, sanction employees through internal measures, but they can also report their conduct to law enforcement authorities and cooperate with them during the investigations. The first action of self-reporting is particularly beneficial for social welfare, since it leads to an important reduction of administrative costs, such as the costs associated with the detection of misconduct, evidence collection, and litigation.⁴⁸⁸ Moreover, when parties are risk averse, risk-bearing costs are reduced, since they pay a certainty equivalent.⁴⁸⁹

The second action is represented by the cooperation during the investigation, through the disclosure of important information that emerged while carrying out internal policing activities.⁴⁹⁰ Finally an additional form of cooperation can be carried out even after the investigation is terminated. Specifically,

⁴⁸⁶ J. ARLEN, *supra* n. 48, pp. 165-166.

⁴⁸⁷ M. POLINSKY and S. SHAVELL, 'Should Employees Be Subject to Fines and Imprisonment Given the Existence of Corporate Liability?' (1993) 13(3) *International Review of Law and Economics* 240.

⁴⁸⁸ J. ARLEN, *supra* n. 48, p. 164; S. ODED, *supra* n. 485, p. 275; J. ARLEN and R. KRAAKMAN, *supra* n. 477.

⁴⁸⁹ L. KAPLOW and S. SHAVELL, 'Optimal Law Enforcement with Self-Reporting Behavior' (1994) 102(3) *The Journal of Political Economy* 583.

⁴⁹⁰ A particularly important form of cooperation is represented by the disclosure of information regarding the involvement of individuals in the criminal conduct. In fact, the possibility to hold those agents accountable has been considered as one of the most effective ways to deter corporate crime. S.Q. YATES, *Individual Accountability for Corporate Wrongdoing*, US Department of Justice, Office of the Deputy Attorney General, 09.09.2015, p. 1.

firms can agree to implement corporate ethics and compliance programs and to hire independent monitors.⁴⁹¹ This form of cooperation is aimed at increasing social welfare in the future, by setting adequate instruments to prevent the criminal conduct and to encourage internal enforcement measures.⁴⁹²

3.3. Economic Analysis of Liability Regimes

Under the framework of economic analysis of organizational offenses, optimal crime prevention can be achieved if the following goals are efficiently obtained: (i) the internalization of the social harm of crime; and (ii) the promotion of corporate self-enforcement activities.⁴⁹³ These two objectives are greatly affected by the structure of corporate criminal liability, chosen by regulators.⁴⁹⁴ In this section I explore the legal regimes available and I compare them on the basis of their ability to pursue full deterrence, in a cost-effective manner.

3.3.1. Vicarious Strict Liability and Its Limitations

Under a vicarious strict liability regime, the author of the criminal conduct is subject to a sanction any time its agents are found guilty. Specifically, consistently with the predictions of the theory of optimal deterrence, the expected sanction is set equal to the full amount of the harm imposed on society, discounted by the probability of detection.⁴⁹⁵

In this context, firms bear the full consequences of their activity and private and public incentives are aligned. However, starting from her 1994 seminal work⁴⁹⁶, Arlen raised concerns about the efficiency of a vicarious strict

⁴⁹¹ See Chapter II, comparative analysis *supra*.

⁴⁹² *Ibid.*

⁴⁹³ J. ARLEN and R. KRAAKMAN, *supra* n. 477, p. 687.

⁴⁹⁴ *Ibid.*

⁴⁹⁵ G. BECKER, *supra* n. 466. Notice that this corporate sanction applies in addition to individual sanctions, if we depart from the following assumptions: employees have unlimited wealth, neither the state nor the firm incurs into enforcement costs. See on this J. ARLEN, *supra* n. 48, p. 162.

⁴⁹⁶ J. ARLEN, 'The Potentially Perverse Effect of Corporate Criminal Liability' (1994) 23(2) *Journal of Legal Studies* 833, 867.

liability regime imposed on legal entities. In particular, when moving beyond the simplified setting, a drawback may emerge.⁴⁹⁷

In fact, despite the investment in self-enforcement activities, some offences can go undeterred. Nevertheless, compliance programs may still increase the probability of detection for these cases and work as ‘self-incrimination’ mechanisms if corporations are always liable for their employees’ actions (i.e. ‘liability enhancement effect’). If this effect exceeds the prevention effect, strict liability may discourage corporate deterrence, rather than encourage it (i.e. the ‘perverse effect’ of vicarious strict liability).⁴⁹⁸

In this context, a vicarious strict liability regime is insufficient to incentivize internal enforcement measures.⁴⁹⁹ This outcome is the result of the circumstance that private and public incentives are not aligned. In fact, under this regime, regulators benefit from the private investment in compliance, without incorporating the associated costs.

3.3.2. Regimes Encouraging Self-Enforcement Activities

From the analysis carried out in the previous section, the inadequacy of strict vicarious liability in encouraging the investment in self-enforcement measures emerged. This drawback has a particularly negative effect on social welfare, when considering that public resources are limited and that optimal deterrence cannot be achieved by solely increasing the fine.⁵⁰⁰

Given the shortcomings of strict vicarious liability, the literature has studied the possibility to implement alternative liability regimes, better suited to balancing this trade-off. In particular, liability measures rewarding the direct (i.e. costs of implementing those measures) and indirect (due to the ‘enhancement enforcement effect’) costs associated with the investment in

⁴⁹⁷ J. ARLEN, *supra* n. 48, pp. 163-164.

⁴⁹⁸ *Id.*, p. 173.

⁴⁹⁹ *Id.*, p. 158.

⁵⁰⁰ *Id.*, p. 159.

self-enforcement measures, have been considered. This compensation is efficient only if these costs equal the benefits attributed to society. The literature has identified the possibility to achieve a balance between these two objectives, with four alternative regimes.⁵⁰¹

The first alternative solution to the application of strict vicarious liability is the adoption of a **negligence-based liability rule**. Under a negligence rule, the corporation is liable for the harm deriving from the criminal conduct of its agents, unless it has complied with certain standards, defined by public authorities. When the corporation meets this standard, it can be fully exempted from the sanction.

A negligence liability regime, properly designed, provides incentives for corporate entities to invest in the socially optimal level of enforcement measures. In fact, an investment above the standard of due care would lead to an extra cost for the corporation that would not be rewarded. On the contrary, an investment below the standard of due care would lead to a strict liability regime, despite the social benefit associated with it.⁵⁰²

However, the identification of a standard of due care can entail high administrative costs, leading to the uncertainty to make it an *ex-post* determination by courts.⁵⁰³ In this context, companies may fail to take adequate measures to obtain a socially desirable level of deterrence. On the one hand, if errors in the determination of the standard of care lead to the identification of a lower standard than socially desirable, insufficient measures to fully internalize the social costs of crime will be adopted. In fact, by simply meeting this condition, companies would be fully indemnified and would undertake excessive commercial activity.⁵⁰⁴ On the other hand, if the

⁵⁰¹ Id., p. 177.

⁵⁰² S. SHAVELL, *Foundations of Economic Analysis of Law*, Harvard University Press 2004, p. 180.

⁵⁰³ J. ARLEN and R. KRAAKMAN, *supra* n. 477.

⁵⁰⁴ W. MULLIN, *supra* n. 51, p. 236.

standard of care is set excessively high, companies may undertake too little economic activities⁵⁰⁵

When considering the measures adopted for the deterrence of cross-border corporate bribery, analysed in the comparative chapter above, the negligence regime has been adopted by the UK and by the Italian legislator. In the UK, firms' culpability is excluded, when anti-bribery ethics and compliance programs satisfy the requirements set out in the UKBA.⁵⁰⁶

The Italian legislator has provided additional guidance, in order to ascertain that the 'due diligence' standard is socially efficient. Specifically, the regulator has distinguished between the hypothesis in which the author of the criminal conduct is a low-level employee and the case in which he is a high-level agent.⁵⁰⁷ In the first case, firms can be exempted from liability measures, if they are compliant with a standard of due care. In the second case, an additional step is required. In fact, when high-level personnel is involved, firms are required to prove that such conduct is the result of a fraudulent avoidance of the compliance programs, previously adopted.⁵⁰⁸ This additional requirement reduced the administrative costs of enforcement bodies and shifts the burden of proof on corporations.

When considering the objective to minimize the harm of crime, a negligence liability regime appears to be an insufficient instrument to achieve optimal deterrence. In order to overcome these limitations, the economic literature has identified additional liability measures.

A first attempt is represented by the so-called '**probability-fixed strict liability**'.⁵⁰⁹ This form of liability is represented by an attempt to insulate

⁵⁰⁵ Ibid.

⁵⁰⁶ UKBA Guidance, supra n. 403. See Chapter II, supra, p. 55.

⁵⁰⁷ Supra n. 31, Article 7.

⁵⁰⁸ Id., Article 6.

⁵⁰⁹ J. ARLEN and R. KRAAKMAN, supra n. 477.

corporations from their enforcement activities, by keeping the probability of deterrence fixed. This result can be achieved through the use of privileges or immunity provisions.⁵¹⁰ According to these provisions the corporation can enjoy certain advantages with regard to the use of the evidence collected by the organization.

Specifically, while public authorities and corporations can use this information against the authors of the criminal conduct, prosecutors cannot use corporate records against the enterprise.⁵¹¹ However the existence of this benefit does not impede the use of the available information by third parties, for example, for filing private lawsuits. Consequently, when aiming to limit the ‘perverse effect’, this regime is not regarded as a strong alternative solution to strict liability. Given the complexity of the implementation of this liability regime, none of the anti-bribery legislations analysed in the chapter above can fit into this standard.

An alternative regime is represented by the **composite liability standard**. This regime represents an alternative solution for limiting the ‘perverse effect’ of vicarious strict liability. It is described as a combination of a duty-based liability with a strict liability measure.⁵¹² In the first instance firms are strictly liable for the criminal conduct carried out by their agents (i.e. default sanction) and, additionally, they are liable for the failure to implement self-enforcement activities (i.e. residual sanction).⁵¹³

In order to induce an optimal behaviour, this liability shall set a high default sanction when firms do not implement self-enforcement measures. Moreover, it has to provide a sufficiently high residual sanction, even when these

⁵¹⁰ Ibid.

⁵¹¹ Ibid.

⁵¹² Ibid.

⁵¹³ Ibid.

measures are implemented.⁵¹⁴ This residual sanction is necessary to provide sufficient incentive for investing in the prevention of the criminal conduct.⁵¹⁵

The composite liability regime overcomes the limitations of vicarious strict liability, “by ensuring that a firm’s expected costs are always lower when it engages in optimal policing than when it does not”⁵¹⁶. In order to obtain this result, self-enforcement measures have been distinguished in the following activities: policing, *ex-post* sanctioning and *ex-post* self-reporting. Consequently, the mitigation is efficient when it is assigned in a gradual way, for each phase of corporate cooperation.⁵¹⁷ Notice that, compared to the negligence regime, the identification of the standard associated with these steps entails higher regulatory costs.

This assumption implies that, even when the conduct is not prevented and the corporation does not report it to public authorities, it may still benefit from a reduction of the sanction, as long as it has implemented optimal self-enforcement measures. In fact, the compliance with optimal standards, does not exclude the possibility of failure in some of the steps of the self-enforcement measures.

When looking at the measures dealing with cross-border corporate bribery, the FCPA appears to be modelled on a composite liability standard. In fact, even though the American regulator has opted for the implementation of vicarious strict liability, this position has been mitigated by the enforcement policy. In particular, the Sentencing Guidelines indicate several factors that, starting from a base fine, can increase or decrease the sanction, on the basis of a culpability score.⁵¹⁸

⁵¹⁴ Ibid.

⁵¹⁵ Ibid.

⁵¹⁶ Ibid.

⁵¹⁷ Ibid.

⁵¹⁸ See *supra* Chapter II.

One of these factors is represented by the investment in ABC programs, whose effective implementation is described in the Resource Guide to the FCPA.⁵¹⁹ Finally, it is important to notice that when corporations voluntarily self-disclose criminal offenses committed by their agents, they can receive a full declination of the criminal prosecution.⁵²⁰ This more lenient treatment departs from a simple composite liability standard and appears more consistent with a compound liability regime, whose characteristics are discussed below.

The Italian legislation, apart from the provision of the negligence standard defined above⁵²¹, allows for the reduction of the sanction, up to 50% of the total amount, if the corporate entity, after the criminal conduct took place, has fully compensated the victim and has implemented effective compliance programs. This incentive is justified by the necessity to induce firms to invest in self-enforcement activities and can be classified as a composite liability regime.⁵²²

Finally, an alternative model is represented by the **compound liability regime**. Similarly to the composite regime, compound liability entails a two-tier liability rule.⁵²³ In this framework corporate entities are strictly liable for the criminal conduct carried out by their agents, despite their attempt to avoid it. Public authorities exclusively reward, with a mitigation of the sanction, a specific form of organizational effort. This is represented by the activity of

⁵¹⁹ US Department of Justice, FCPA: A Resource Guide to the US Foreign Corrupt Practices Act, supra n. 147, p. 57.

⁵²⁰ The possibility to obtain a full declination was first introduced by Assistant Attorney General Leslie Caldwell on 05.04.2016. See The Fraud Section's Foreign Corrupt Practices Act and Guidance <<https://www.justice.gov/archives/opa/blog-entry/file/838386/download>> accessed 21.02.2021. In November 2017, Deputy Attorney General Rosenstein announced the incorporation of the Pilot Program in the United States Attorneys' Manual. See <<https://www.justice.gov/opa/speech/deputy-attorney-general-rosenstein-delivers-remarks-34th-international-conference-foreign>> accessed 21.02.2021.

⁵²¹ Italian Legislative Decree n. 231/2001, supra n. 35, Articles 6 and 7.

⁵²² See Chapter II supra.

⁵²³ S. ODED, supra n. 485, p. 272.

self-reporting the criminal conduct that the corporation has failed to prevent, once detected.⁵²⁴

At a first look this liability measure may seem to be insufficient in aligning private and public incentives, since it does not reward each step of the investment in self-enforcement activities.⁵²⁵ However a corporation needs to efficiently invest in self-policing measures, in order to be able to undertake self-reporting activities.⁵²⁶ Corporate employees would anticipate this investment and, consequently, they would be effectively discouraged by organizational incentives.

Finally, a compound liability regime entails lower administrative costs than the ones associated with the implementation of a negligence or a composite standard. In fact, the effectiveness of a self-reporting activity is cheaply verifiable. Moreover, the alignment of private and public incentives can, more easily, be obtained because the liability mitigation corresponds to the enforcement costs saved by regulators.⁵²⁷

In conclusion, it is possible to highlight the existence of a trade-off between the objective of inducing an optimal internalization of the harm deriving from the criminal activity and the objective of inducing an optimal investment in corporate enforcement activities. In particular, while strict liability seems to be the most appropriate instrument for achieving the first objective, the alternative regimes allowing for a mitigation of the sanction are more appropriate for incentivising the second one. Moreover, these measures can also be compared on the basis of the administrative costs borne by public authorities for their implementation. The ability of the different liability regimes to achieve those goals are summarized in the *Table 3* below:

⁵²⁴ Ibid.

⁵²⁵ Id., p. 279.

⁵²⁶ Ibid.

⁵²⁷ Ibid.

*Table 3. The Economic Objectives of Corporate Criminal Liability:
A Comparison of Corporate Criminal Liability Regimes*

Liability Regimes						
Objectives	Strict Liability	Duty-Based Liability	Probability-Fixed Strict Liability	Composite Liability	Compound Liability	
Prevention	Lack of credibility given the “liability enhancement effect”.	Imperfect internalization of the harm in case in which the crime occurs, even when the standard is met.	Efficient internalization of the harm.	Efficient prevention of the criminal conduct, given a high default sanction, associated with a residual sanction.	Efficient prevention of the criminal conduct, given high default and residual sanctions.	

Enforcement	“Liability enhancement effect” and insufficient incentives to implement self-enforcement measures.	High incentives for meeting the due care standard, since it leads to a full exemption of liability.	Low incentives for enforcement activities given the limited ability to efficiently insulate corporations from the use of evidence by third parties.	Efficient implementation of enforcement measures, given the reduction of the phase of the corporate activity.	Efficient implementation of enforcement measures.
Administrative Burdens	Low administrative costs for the definition of the standards of self-enforcement activities.	High administrative costs to establish a due care standard.	Lower administrative costs.	High administrative costs to assess and to verify the optimal corporate behaviour for each enforcement activity.	Low administrative costs, given that the benefits deriving from self-reporting are easily and cheaply verifiable.

3.4. Third-Party Intermediaries

When investing cross-border, corporations face unfamiliar markets, characterised by complex regulatory, cultural and financial institutions. In these contexts, intermediaries are often employed by corporations to act in their interests and on their behalf.⁵²⁸ Third-party agents are, in fact, more familiar than employees with the formal and informal institutional settings of the hosting country.⁵²⁹ Moreover, in some circumstances, the involvement of local consultants is explicitly required by regulatory standards.⁵³⁰

However, intermediaries may also engage in illegal activities. In particular, empirical studies have shown that, in three out of four cases of foreign bribery violations, corrupt payments were channelled through third parties.⁵³¹ As shown in Chapter II above, national and international regulators have responded to this phenomenon and have extended the application of corporate sanctions to criminal offenses committed by these agents. This target is very broad and can range from related legal persons, within the same corporate group (i.e. subsidiaries), to unrelated intermediaries (e.g. consultants; joint-venture partners; contractors and distributors).⁵³² In addition, they can be distinguished between individuals and corporate vehicles. For the purpose of simplicity, this study focuses on business partners, represented by legal persons.

Notwithstanding the expansive response of legislators⁵³³, the economic literature on vicarious liability for corruption has exclusively focused on employees.⁵³⁴ This section aims to fill this gap and investigates the efficiency of extending vicarious liability for offenses committed by third-party

⁵²⁸ R. KRAAKMAN, *supra* n. 463.

⁵²⁹ OECD, *supra* n. 11.

⁵³⁰ *Ibid.*

⁵³¹ OECD, *supra* n. 10.

⁵³² OECD, *supra* n. 455.

⁵³³ See Chapter II, comparative analysis *supra*.

⁵³⁴ To the best of my knowledge, the only exception is represented by J. LAMBSDORFF, *supra* n. 28. In this paper, Lambsdorff considers the risk of ‘paper-based’ compliance, when attributing a liability mitigation for third-parties’ offences.

intermediaries. In particular, the analysis focuses on the achievement of the two objectives of corporate criminal liability: (i) the internalization of the social harm of crime; and (ii) the promotion of firms' self-enforcement activities, through the investment in compliance programs.⁵³⁵

3.4.1. Internalization of the Social Harm of Crime: The Risk of Strategic Delegation

The first objective of corporate crime prevention is represented by the need to induce firms to internalize the social harm deriving from organizational offenses.⁵³⁶ As discussed in section 3.2 above, this goal can be achieved if the expected sanction faced by firms (i.e. the fine multiplied by the probability of detection) equals the negative consequences of crime.

From a legal perspective, the existence of an employment relationship is the standard condition for the application of vicarious liability.⁵³⁷ However, economic studies have shown that, if regulators limit its application to this hypothesis, inefficiencies may emerge.⁵³⁸ Even though this literature has looked at corporate civil law violations, the same principles can be extended to organizational criminal offenses, specifically, to foreign bribery violations.⁵³⁹

In the first instance, the existing economic scholarship has shown that if vicarious liability is exclusively triggered by the conduct of employees, firms may have the incentives to strategically outsource certain activities to asset-proof independent contractors.⁵⁴⁰ Additionally, they may prefer delegation, even though efficiency considerations would encourage the provision of business services through vertically integrated systems. In both cases, firms'

⁵³⁵ R. KRAAKMAN, *supra* n. 463.

⁵³⁶ J. ARLEN, *supra* n. 496.

⁵³⁷ J. ARLEN and W.B. MCLEOD, *supra* n. 39.

⁵³⁸ A. SYKES, 'The Boundaries of Vicarious Liability: An Economic Analysis of the Scope of Employment Rule and Related Legal Doctrines' (1988) 101(3) *Harvard Law Review* 563, 609. R. KRAAKMAN, *supra* n. 463, p. 237.

⁵³⁹ W. MULLIN, *supra* n. 51, p. 237.

⁵⁴⁰ J. ARLEN and W.B. MCLEOD, *supra* n. 39.

decision would exclusively be driven by the aim to reduce the costs of the expected liability.⁵⁴¹

These two outcomes can be explained by the following considerations. If the provision of a certain service may potentially entail the involvement in a criminal activity, independent contractors will anticipate the costs of their expected individual liability and will transfer these costs, through the wage system, to the corporation entering in the contractual agreement.⁵⁴² However an asset-proof independent contractor would not have enough resources to internalize the full costs of the criminal conduct and, consequently, would ask a lower wage.⁵⁴³

In the attempt to maximize their profits corporations, all else being equal, would prefer to delegate certain activities to the cheapest provider of a specific service.⁵⁴⁴ Consequently, the prevention of the criminal conduct is sub-optimally achieved because independent contractors are not able to fully internalize the social costs of crime. In this way, the legal entities involved may be encouraged to undertake socially harmful choices.

The advantage for enterprises to strategically outsource certain activities to independent contractors is also supported by the empirical literature. In particular, experimental studies have looked at the effects of delegation in a principal agent relationship. Results show that principals are more prone to employ external agents, in order to incentivize the implementation of

⁵⁴¹ Ibid.

⁵⁴² Ibid.

⁵⁴³ Id., p. 122,

⁵⁴⁴ Id.

immoral actions.⁵⁴⁵ Even disregarding the costs of legal sanctions, the delegation to third parties would be favoured by the following conditions:⁵⁴⁶

- i. In the first instance, by separating themselves from the criminal conduct, principals may face lower level of moral costs associated with this activity. Under this hypothesis they are more concerned with the perceived morality of their actions, rather than with the effective value of their behaviour.
- ii. In the second instance, the delegation of the immoral conduct may, not only, influence the perception of one's own behaviour but it may also institutionalize it. This effect is particularly evident when intermediaries gain a special knowledge of the procedures to access public officials and when the latter use them as a vehicle to perpetrate corrupt behaviours.⁵⁴⁷

The existing provisions against foreign bribery violations, analysed in Chapter II above, appear consistent with the predictions of the economic theory. In particular, in compliance with international treaties, national legislators have extended the application of vicarious corporate criminal liability to bribes, 'indirectly' channelled by independent contractors.⁵⁴⁸ However, the effective implementation of these standards can be affected by the legal basis required for the imputation of the criminal conduct.

In particular, in the UKBA, corporations are criminally liable when they fail to prevent bribes paid by any "associated person".⁵⁴⁹ This requirement is satisfied when the illegal payment has been channelled by any agent "who

⁵⁴⁵ J. HAMMAN, G. LOEWENSTEIN and R.A. WEBER, 'Self-Interest Through Delegation: An Additional Rationale for the Principal-Agent Relationship' (2010) 100 (4) *The American Economic Review* 1826, 1846. R. KRAAKMAN, *supra* n. 463, p. 251. The author refers to the possibility to extend the liability of corporations for the conduct of independent contractors as a form of 'piercing a horizontal veil'.

⁵⁴⁶ J. HAMMAN, G. LOEWENSTEIN and R. A. WEBER, *supra* n. 545.

⁵⁴⁷ M. DRUGOV et al., *supra* n. 24.

⁵⁴⁸ OECD, *supra* n. 257.

⁵⁴⁹ UKBA, *supra* n. 34, Article 7.

performs services for or on behalf” of the corporation, irrespective of its legal capacity.⁵⁵⁰ On the contrary, in the Italian legal system, corporate liability for independent contractors is not expressively covered and should be deducted by courts, every time complicity is proven.⁵⁵¹ Finally, according to the FCPA, the *mens rea* of corporations can be inferred when they are aware of the criminal conduct of their agents.⁵⁵² When intermediaries are addressed, this standard is satisfied even when courts prove a ‘deliberate ignorance’ of firms, in case of ineffective ABC programs.⁵⁵³

This broad interpretation of the knowledge requirement limits the risk of firms acting opportunistically, by putting a third-party agent between them and foreign officials. For instance, an important example can be represented by the decision regarding the Lesotho Highlands Water Project.⁵⁵⁴ In 1986 Lesotho and South Africa agreed to build dams and tunnels for the provision of water and electricity. For the supervision of this project a specific authority, the Lesotho Highlands Development Authority, was created. Numerous European and Canadian companies formed a consortium in order to participate in this project. A Canadian enterprise, Acres International Ltd, entered in consulting agreements with intermediaries for the provision of information and for being supported in the bidding process.

The High Court of Lesotho accused Acres to have paid to the Chief Executive of the Lesotho Highlands Water Project, Masha Ephraim Sole, 493,061.60 Canadian dollars in order to loosen the controls over the award of the service contracts. Acres affirmed that these payments were intended to remunerate

⁵⁵⁰ UKBA, *supra* n. 34, Article 8.

⁵⁵¹ OECD, *supra* n. 455, p. 96.

⁵⁵² See US Department of Justice, FCPA: A Resource Guide to the US Foreign Corrupt Practices Act, *supra* n. 147, p. 22; see also FCPA, *supra* n. 32, section 78dd-1(f)(2) (defining the term ‘knowing’ in the FCPA).

⁵⁵³ US Department of Justice, FCPA A Resource Guide to the US Foreign Corrupt Practices Act, *supra* n. 147, p. 22. OECD, *supra* n. 455, p. 100.

⁵⁵⁴ *R. v. Acres International Ltd.* (2002), CRI/T/144/02 (Appeal Court of Lesotho); affirming (2002), CRI/T/2/2002 (High Court of Lesotho); and *R. v. Sole* (2002), CRI/T/111/91 (Appeal Court of Lesotho), affirming (2002), CRI/T/111/99 (High Court of Lesotho).

the provision of legal consulting services and claimed lack of knowledge of illicit activities. However, enforcement authorities found strong circumstantial evidence regarding the involvement of the company and, irrespective of its declarations, held Acres accountable for corruption.⁵⁵⁵

3.4.2. Corporate Self-Enforcement Activities: Differences Between Employees and Independent Contractors

The second objective of corporate criminal liability is represented by the need to encourage corporate self-enforcement activities. As highlighted in section 3.2 above, firms are often better positioned than courts to monitor, detect and sanction the criminal conduct of their employees.⁵⁵⁶ However, when intermediaries are involved, an important distinction should be considered. In particular, third-party agents are not part of the hierarchical structure of organizations but they interact with firms, through horizontal market mechanisms.⁵⁵⁷ This section looks at the different steps of preventive and policing activities and verifies whether, when independent contractors are addressed, firms face specific challenges. In particular:⁵⁵⁸

a. Monetary incentives:

When choosing monetary incentives for independent contractors, firms face a trade-off. On the one hand, they need to ensure the efficient performance of their agents and, on the other hand, they need to discourage socially harmful activities.⁵⁵⁹ As far as the economic performance is concerned, short-term bonuses seem to be the best suited instruments for remunerating third parties.⁵⁶⁰ In fact, differently from employees, these agents are usually employed to perform a specific task, in a limited timeframe.⁵⁶¹ Consequently,

⁵⁵⁵ J. LAMBSDORFF, *supra* n. 28, pp. 6-7.

⁵⁵⁶ J. ARLEN, *supra* n. 496.

⁵⁵⁷ J. LAMBSDORFF, *supra* n. 28, pp. 6-7. M. JENSEN and W. MECKLING, 'Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure' (1976) 3(4) *Journal of Financial Economics* 305, 360.

⁵⁵⁸ R. KRAAKMAN, *supra* n. 463, p. 243.

⁵⁵⁹ A. SYKES, *supra* n. 40, p. 4.

⁵⁶⁰ *Id.*, p. 11.

⁵⁶¹ *Id.*, p. 2.

corporations cannot monitor their productivity over time and periodic payments are inefficient.⁵⁶²

However, short-term bonuses may also be more often associated with illicit activities.⁵⁶³ For instance, the US Resource Guide to the FCPA considers the attribution of “excessive commissions to third-party agents or consultants” to be the indication of a potential risk of bribery.⁵⁶⁴ In fact, this type of remuneration may signal to corporate agents that firms are not concerned with the long-run consequences of specific business strategies (for instance, regulatory and reputational sanctions).⁵⁶⁵ Consequently, when looking at monetary incentives, firms appear to be better able to induce an ethical behaviour of their employees, as opposed to the case of their independent contractors.

b. Ethical programs:

Firms are required to prevent organizational crime by shaping and modifying, the moral value of their agents. When employees are involved, this objective can be pursued through ethical programs, informing about organizational values. When independent contractors, represented by corporate vehicles, are addressed this can be done with contractual arrangements.⁵⁶⁶ In particular, firms are expected to negotiate with third parties the implementation of ethical courses for training their employees.⁵⁶⁷

⁵⁶² M. SPENCE and R. ZECKHAUSER, ‘Insurance Information and Individual Action’ (1971) 6192) *American Economic Review* 380, 387.

⁵⁶³ US Department of Justice, FCPA: A Resource Guide to the US Foreign Corrupt Practices Act, *supra* n. 147, p. 61.

⁵⁶⁴ *Ibid.*

⁵⁶⁵ J. ARLEN, *supra* n. 48, p. 157.

⁵⁶⁶ International Chamber of Commerce, Anti-Corruption Clause, 2012 <<https://cdn.iccwbo.org/content/uploads/sites/3/2012/10/ICC-Anti-corruption-Clause.pdf>> accessed 21.02.2021.

⁵⁶⁷ S. KILLINGSWORTH, ‘The privatization of compliance’ in M. GREENBERG (ed.), *Transforming Compliance: Emerging Paradigms for Boards, Management, Compliance Officers, and Government*, Rand Corporation 2014, p. 39 <https://www.rand.org/content/dam/rand/pubs/conf_proceedings/CF300/CF322/RAND_CF322.pdf>, 10.04.2021.

Empirical studies have shown that the strength of ethics programs depends on the top-level commitment and on the peer-pressure exercised in the organization, rather than on the amount of information transmitted.⁵⁶⁸ Consequently, the change in organizational culture is achieved with more difficulty through a single contractual arrangement. Moreover, given the contractual nature of ethics programs addressing independent contractors, its effectiveness depends on the ability of corporations to monitor and to enforce their correct implementation. These activities require additional costs that may be excessive, especially when considering the short-term relationship with independent contractors.⁵⁶⁹

c. Monitoring:

As highlighted in section 3.2 above, monitoring activities can have *ex-ante* preventive and *ex-post* policing effects. In the first instance, audits aim to reduce agents' opportunities to undertake an unlawful conduct.⁵⁷⁰ In addition, whenever a violation occurs, the information collected through these activities can lead to a higher probability of detection.⁵⁷¹ However, monitoring is costly and the full verification of agents' conduct cannot be achieved.⁵⁷² Moreover, intermediaries are associated with higher information asymmetries than employees.⁵⁷³ In particular, in order to audit their independent contractors, firms need to carry out costly negotiations and to agree on a 'right-to-audit' clause.⁵⁷⁴ Even if this agreement is reached, the effective exercise of this right is assessed on a case by case basis.⁵⁷⁵

⁵⁶⁸ G. MILLER, The Compliance Function: An Overview, in J. N. GORDON and W-G. RINGE (eds.), The Oxford Handbook of Corporate Law and Governance, Oxford University Press, 2015. S. KILLINGSWORTH, *supra* n. 567, p. 25. OECD Anti-Bribery Report, An Analysis of the Crime of Bribery Foreign Public Officials, 2014, p. 24.

⁵⁶⁹ S. KILLINGSWORTH, *supra* n. 567, p. 41.

⁵⁷⁰ J. ARLEN and R. KRAAKMAN, *supra* n. 477, p. 693.

⁵⁷¹ *Ibid.*

⁵⁷² A. SYKES, *supra* n. 40, p.7.

⁵⁷³ *Id.*, p. 2.

⁵⁷⁴ *Id.*, p. 6.

⁵⁷⁵ See, for instance, section 5 of the Commentary on the International Chamber of Commerce, Anti-Corruption Clause, *supra* n. 566.

Moreover, contracts are imperfect⁵⁷⁶ and firms may need to renegotiate some provisions, when new elements of risk emerge.⁵⁷⁷ This is possible only if corporations carry out a continuous and costly verification of the red flags raised by third parties.⁵⁷⁸

According to a survey published by KPMG in 2015, third-parties auditing is perceived to be the highest challenge in the implementation of anti-bribery ethics and compliance programs.⁵⁷⁹ Irrespective of the regulatory obligations, only 56% of the companies surveyed admitted having right-to-audit clauses in the contracts with intermediaries.⁵⁸⁰ Moreover, only 41% of them have exercised this right⁵⁸¹ and formal risk-based operations are conducted in 31% of the companies.

d. Ex-post internal sanctioning:

Corporate entities are also required to discourage criminal activities by directly sanctioning offenders.⁵⁸² Employees can be punished on the basis of their employment relationship, with a salary reduction, a demotion or a discharge. According to the US Federal Prosecuting Guidelines, their application can be regarded as an important factor, not only, for reducing monetary fines⁵⁸³ but also for entering into plea, deferred or non-prosecution agreements⁵⁸⁴. From November 2016, US authorities have started to explicitly quantify the numbers of employees addressed by these remedial

⁵⁷⁶ O. WILLIAMSON, 'The Theory of the Firm as Governance Structure: From Choice to Contract' (2002) 16(3) *The Journal of Economic Perspectives* 171, 195.

⁵⁷⁷ Ibid.

⁵⁷⁸ KPMG Anti-Bribery and Corruption: Rising to the Challenge in the Age of Globalization, 2015, p. 14 <<https://home.kpmg.com/xx/en/home/insights/2015/09/rising-to-the-challenge.html>> accessed 21.02.2021.

⁵⁷⁹ Ibid.

⁵⁸⁰ Ibid.

⁵⁸¹ Ibid.

⁵⁸² J. ARLEN and R. KRAAKMAN, *supra* n. 477.

⁵⁸³ US Department of Justice, Justice Manual, *supra* n. 188, section 9-28.300 'Factors to be considered'.

⁵⁸⁴ US Department of Justice, Justice Manual, *supra* n. 188, section 9-28.800 'Corporate Compliance Programs'.

actions. According to DOJ resolution documents, in less than a year, nearly 160 employees have been subject to termination or disciplinary measures.⁵⁸⁵

According to the US Federal Prosecuting Guidelines⁵⁸⁶, when determining whether to bring charges against a company, a prosecutor should consider firms' investment "on the integrity and credibility of its remedial and disciplinary measures rather than on the protection of the wrongdoers".⁵⁸⁷ With the exception of self-reporting measures⁵⁸⁸, the threat of dismissal is the strongest deterrent available and may represent an important factor for inferring firms' commitment to prevent new offenses in the future.⁵⁸⁹

It is important to notice that the application of this sanction would not conflict with labour law standards. In fact, employees are protected by 'wrongful termination' of their employment relationship exclusively when they have been fired illegally.⁵⁹⁰ In the context of foreign bribery violations, this condition is satisfied when employees have been fired for refusing to participate in the illegal act or in retaliation of reporting the offense.⁵⁹¹

⁵⁸⁵ M. KOEHLER, The Hidden Employee Cost of FCPA Scrutiny and Enforcement, 17.04.2017. FCPA Professor blog <<http://fcpprofessor.com/hidden-employee-costs-fcpa-scrutiny-enforcement>> accessed 21.02.2021.

⁵⁸⁶ US Department of Justice, Justice Manual, supra n. 188, section 9-28.1000 - A 'Restitution and Remediation: General Principles'.

⁵⁸⁷ US Department of Justice, Justice Manual, supra n. 188, section 9-28.1000 - B 'Restitution and Remediation: Comments'.

⁵⁸⁸ Discussed by the US Department of Justice, Justice Manual, supra n. 188, section 9-28.900.

⁵⁸⁹ In fact, even though employees may move to other employment, they would rather avoid this option, since they often earn returns in excess compared to what they can earn in their next best employment opportunity.

⁵⁹⁰ Most employment contracts in the US can be terminated at will and protection is minimal. See OECD, United States: Phase 2 - Report on Application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 1997 Recommendation on Combatting Bribery in International Business Transactions, 2002, p. 11 <<https://www.oecd.org/daf/anti-bribery/anti-briberyconvention/1962084.pdf>> accessed 10.04.2021. The tort of 'wrongful termination' in violation of public policy is a narrow exception to the employment at-will doctrine.

⁵⁹¹ OECD, The Detection of Foreign Bribery, 2017, p. 29 <<http://www.oecd.org/corruption/anti-bribery/The-Detection-of-Foreign-Bribery.pdf>> accessed 21.02.2021. In 1984, the Supreme Court of Washington adopted the tort of wrongful discharge in violation of the accounting provisions of the Foreign Corrupt Practices Act. The court stated that *'If appellant's discharge was premised upon his compliance with the accounting requirements of the Foreign Corrupt Practices Act and intended as a warning to other St. Regis controllers, as appellant alleges, then*

When independent contractors are represented by corporate vehicles, firms can sanction them on the basis of contractual arrangements. In particular, companies are encouraged to negotiate anti-corruption clauses, in which parties agree to take adequate measures to prevent and detect bribery.⁵⁹² If, as a result of auditing activities, one party suspects the violation of ethics standards, remedial actions can be adopted.⁵⁹³ In particular, when breaching parties do not show to have implemented sufficient countermeasures, contracts can be suspended or terminated.⁵⁹⁴

Even though the termination of a contract is a strong deterrent, corporations need to balance its benefits with its costs. In the first instance, non-breaching parties bear the burden of proof of violations and, given the higher information asymmetries faced, this is a costly and difficult exercise.⁵⁹⁵ In addition, these cases are often dealt with through arbitration. Given the lack of the expertise and the resources necessary to carry out independent investigations, arbitrators are often reluctant to decide over corruption allegations.⁵⁹⁶ Finally, the termination of contracts for bribery violations does not exempt non-breaching parties from paying the amount due by law, creating conflicting incentives to adopt these measures.⁵⁹⁷

e. Self-reporting activities:

Once corporations identify a criminal conduct, they can also increase the agent's expected penalty by reporting their behaviour to public authorities. This activity is particularly valuable for enforcement entities and, in some jurisdictions, is regulated by specific legislative measures.⁵⁹⁸

his discharge was contrary to a clear mandate of public policy and, thus, tortious'. Thompson v. St. Regis Paper Co., 102 Wn.2d 219, 685 P.2d 1081, 1984.

⁵⁹² International Chamber of Commerce, *supra* n. 566.

⁵⁹³ *Ibid.*

⁵⁹⁴ *Ibid.*

⁵⁹⁵ OECD, *supra* n. 591, p. 127.

⁵⁹⁶ M.D. VEIT, 'Proving Legality Instead of Corruption' in P. SHAUGHNESSY and S. TUNG (eds.), *The Powers and Duties of an Arbitrator: Liber Amicorum*, p. 373, Wolters Kluwer 2017.

⁵⁹⁷ International Chamber of Commerce, *supra* n. 566, p. 3.

⁵⁹⁸ OECD, *supra* n. 591, p. 14.

In the United Kingdom, self-reporting activities can lead to settlement agreements⁵⁹⁹ and mitigated sanctions⁶⁰⁰. For instance, in recent deferred prosecution agreements, the UK authorities reduced monetary penalties up to 50%, in order to encourage self-reporting.⁶⁰¹ In the United States, in addition to settlements⁶⁰² and reduced sanctions (up to 50%)⁶⁰³, self-reporting activities may lead to a presumption of declination of the criminal action.⁶⁰⁴ This benefit is associated with firms' cooperation and with the adoption of remedial actions, in particular, disgorgement of the profits of crime.⁶⁰⁵

Self-reporting activities may have a different impact on firms, depending on the circumstance that employees or intermediaries are addressed. As discussed in section 3.4.2 above, when corporate crime is committed by external agents, firms face lower moral costs.⁶⁰⁶ For this reason, when companies self-report the offenses committed by third parties, they may face lower reputational sanctions. This would be the only situation in which the interaction with external parties may be preferable. However, it is not possible to ignore that, in the context of foreign corporate bribery, companies are responsible for the conduct of their intermediaries and the reputational impact of this action may still be high.

3.5. Efficient Deterrence of Intermediaries' Offences: An Economic Model

When corporate entities delegate business activities to third-party intermediaries, they are not insulated from the risk of criminal sanctions

⁵⁹⁹ The impact of self-reporting on settlement agreements is regulated by the 2012 Serious Fraud Office's Guidance on Corporate Self-reporting <<https://www.sfo.gov.uk/publications/guidance-policy-and-protocols/corporate-self-reporting>> accessed 21.02.2021.

⁶⁰⁰ Ibid.

⁶⁰¹ OECD, *supra* n. 591, p. 17.

⁶⁰² US Department of Justice, *Justice Manual*, *supra* n. 188, section 9-47-120, FCPA Corporate Enforcement Policy.

⁶⁰³ Ibid.

⁶⁰⁴ Ibid.

⁶⁰⁵ Ibid.

⁶⁰⁶ See *supra* section 3.4.2.

associated with corruption.⁶⁰⁷ As highlighted in Chapter 2, the legislative measures against foreign bribery violations have a broad scope of application, varying from related business partners (e.g. subsidiaries) to unrelated agents (e.g. consultants).⁶⁰⁸ In section 3.4.1, the analysis has focused on the need to extend, beyond the employment relationship, the application of vicarious liability. This requirement is a necessary tool to induce an optimal internalization of the social harm deriving from crime.⁶⁰⁹

In addition, corporations are expected to invest in the prevention, detection and sanction of third-parties' offenses.⁶¹⁰ This activity is rewarded by public enforcement agencies with more lenient sanctions, settlement agreements and declinations.⁶¹¹ However, as summarized in the *Table 4* below, this activity is associated with higher information asymmetries and greater agency costs than those raised by employees.⁶¹² For the purpose of simplicity, this study focuses on intermediaries represented by corporate vehicles.⁶¹³

⁶⁰⁷ OECD, *supra* n. 455.

⁶⁰⁸ *Ibid.*

⁶⁰⁹ See *supra* section 3.4.1.

⁶¹⁰ See Chapter II *supra*.

⁶¹¹ *Ibid.*

⁶¹² R. KRAAKMAN, *supra* n. 463, p. 244. G. MILLER, *supra* n. 568.

⁶¹³ OECD, *supra* n. 11.

Table 4. Firms' Self-Enforcement Activities:
Employees and Independent Contractors

Agents	Monetary Incentives	Ethics Programs	Monitoring (<i>ex-ante</i> and <i>ex-post</i>)	Ex-Post Sanctioning	Ex- Post Self-Cooperation
Employees	Long-run incentives: lower risk of crime.	Peer pressure and top-down approach: strong effect on employee.	Greater ability to monitor on a continuous basis and cheaper access to information	Salary reduction, demotion or discharge; strong incentives; higher probability of enforcement.	Higher moral and reputational costs.
Independent Contractors	Performance-Based Incentives: higher risk of crime.	Delegation through contracts: high transaction costs and weak effect.	'Right-to-audit' clause: high transaction costs and weak effects.	Contractual resolution: high negotiation costs; lower probability of enforcement.	Lower moral and reputational costs.

This section hinges upon these differences and, through the insights of a theoretical economic model, verifies their impact on the objectives of corporate criminal liability. In particular, the analysis investigates how the lower monitoring ability associated with third-party intermediaries affects: (i) the optimal standard of ABC programs and (ii) the optimal penalty associated with this standard.

This model contributes to the economic literature on vicarious corporate liability, in which the role of independent contractors has been underexplored.⁶¹⁴ However, two important differences are considered. On the one hand, the model hinges upon the assumption that firms' assets are not sufficient to internalize the social harm of crime.⁶¹⁵ In addition, differently from Arlen (1994) and Arlen and Kraakman (1997), the analysis exclusively focuses on *ex-ante* organizational preventive measures.⁶¹⁶ Consequently, the 'liability-enhancement' effect associated with *ex-post* activities is not investigated and the liability mitigation discussed in the model is not associated with this phenomenon. This choice allows to simplify the exposition and to focus on the new element of interest, which is firm's monitoring ability over its agents, be them employees or intermediaries.⁶¹⁷ A further analysis, investigating how the lower monitoring ability associated with third-party intermediaries affects the *ex-post* measures of ABC programs would be an interesting development. However, this would require a separate analysis, which is not undertaken in this study.

Assuming that firms and the social planner are risk neutral, let:

z = social harm deriving from foreign bribery; ($z > 0$);

s = probability of detecting and sanctioning foreign bribery violations; ($0 < s < 1$);

⁶¹⁴ To the best of my knowledge, this is the first article addressing these issues.

⁶¹⁵ Notice that, even though scholars have not excluded this phenomenon, the literature has mainly focused on individuals affected by the 'judgment proof' problem. See, for instance, S. SHAVELL, *supra* n. 473.

⁶¹⁶ J. ARLEN, *supra* n. 496 and J. ARLEN and R. KRAAKMAN, *supra* n. 477.

⁶¹⁷ J. ARLEN, *supra* n. 496.

A = firms' assets; ($A > 0$);

\hat{f} = notional fine imposed on firms violating foreign bribery laws; ($\hat{f} > 0$);

$f = \min\{\hat{f}, A\}$ = actual fine imposed on firms violating foreign bribery laws; ($f > 0$);

x = corporate effort in foreign bribery prevention; ($x \geq 0$);

x^{**} = socially optimal standard of effort in crime prevention;

x^* = privately optimal effort in crime prevention;

e^{-mx} = probability of crime taking place; ($0 < e^{-mx} \leq 1$);

m = firm's monitoring ability; ($m \geq 1$);

$C(x) = cx$ = total costs of corporate effort in crime prevention;

c = marginal costs of corporate effort in crime prevention; ($c > 0$);

\bar{f} = reduced sanction in case of compliance with the socially desirable standard of effort in crime prevention (x^{**}); ($0 \leq \bar{f} < f$).

$B_W(x) = -z * e^{-mx}$ = expected social benefit of x ;

$B_F(x) = -sf * e^{-mx}$ = expected private benefit of x ⁶¹⁸;

$U_W(x) = B_W(x) - C(x)$ = social welfare as a function of x ;

$U_F(x) = B_F(x) - C(x)$ = corporate gains as a function of x .

Since the only difference between the investment that maximises corporate gains and social welfare arises from a difference between z and sf , by making them equal one can induce private firms to make socially optimal investment choices.⁶¹⁹ Consistently with Becker (1968),⁶²⁰ optimal deterrence could thus be obtained by setting a notional sanction: $\hat{f} = \frac{z}{s}$. Of course, offenders will base their decisions on such sanction, only if they expect that they might actually have to pay the full amount of the penalty, which requires sufficient assets, $A \geq \hat{f} = \frac{z}{s}$, so that $f = \hat{f}$.

⁶¹⁸ The expected private benefit deriving from the investment in ABC measures does not include the private benefit deriving from crime. This captures in a simple way the fact that the expected net benefit deriving from crime (discounted by the expected sanction) is always negative for companies. The alternative hypothesis in which the corporate benefit deriving from crime is greater than the expected sanction appears more relevant for cases of petty corruption, explicitly excluded from this study.

⁶¹⁹ G. BECKER, supra n. 466. A. POLINSKY and S. SHAVELL, supra n. 487.

⁶²⁰ Ibid.

If instead sanctions cause bankruptcy, they would only pay up to the value of their assets, $f = A < \hat{f} = \frac{z}{s}$, and anticipating this they would not invest at the socially desirable level of prevention. Even though the economic literature has mainly looked at the situation in which asset insufficiency affects individual agents⁶²¹, this is also a relevant problem for corporate entities, and this model focuses on this hypothesis. As discussed below, in cases of international corruption s may be very low and z very high, hence the subsequent analysis will focus on the case of $A < \frac{z}{s}$, which is both relevant and interesting.

3.6. Optimal deterrence with effort in crime prevention

3.6.1. Optimal investment in crime prevention for employees

When looking at corporate crime violations, the theoretical setting analysed above is often inadequate.⁶²² In particular, the exclusive investment of public resources in enforcement, even setting $\hat{f} = \frac{z}{s}$, may not be sufficient to efficiently address the social consequences of corruption and achieve the social optimum.⁶²³

In the first instance, public resources available for policing activities are limited and the probability of detecting and sanctioning organizational offenses (s) is often low.⁶²⁴ Investigations are challenged by high information asymmetries, especially when they aim to identify the individual agents responsible for the criminal conduct.⁶²⁵ In addition, financial crime

⁶²¹ R. KRAAKMAN, *supra* n. 473, p. 869.

⁶²² J. ARLEN, *supra* n. 48, p. 162.

⁶²³ 'A recent estimate put the annual cost of bribery alone at about \$1.5 to \$2 trillion (roughly 2 percent of global GDP)'. See International Monetary Fund, Corruption: Costs and Mitigating Strategies, Staff Discussion Note, 16.05.2016, p. 5 <<http://www.imf.org/en/Publications/Staff-Discussion-Notes/Issues/2016/12/31/Corruption-Costs-and-Mitigating-Strategies-43888>> accessed 21.02.2021.

⁶²⁴ J. ARLEN, *supra* n. 48, p. 163.

⁶²⁵ *Ibid.*

does not have immediate visible consequences and may go undetected for long time.⁶²⁶

These considerations are consistent with the data shown by a recent OECD publication, looking at the sources of detection of foreign bribery violations between 1999 and 2017.⁶²⁷ According to this study, only 2% of 263 foreign bribery schemes, investigated and sanctioned in this period, have been detected by law enforcement agencies.⁶²⁸ The detection of foreign bribery violations appears to be the result of the activity of multiple actors, such as public agencies (other than law enforcement bodies) and the private sector.⁶²⁹

In addition, the social harm of bribery is regarded to be particularly high, especially if focusing on grand corruption and excluding small facilitating payments.⁶³⁰ In particular, a 2016 IMF publication sets “the annual cost of bribery alone at about \$1.5 to \$2 trillion (roughly 2 percent of global GDP)”.⁶³¹ This estimate refers to the total amount of money paid through bribes and does not incorporate indirect harmful consequences.⁶³² Even though the specific effects of a single violation are hard to calculate, anecdotal evidence regarding specific cases is available.

A significant example is represented by the bribery scandal involving Petrobras, a semi-public Brazilian multinational corporation, operating in the oil sector.⁶³³ According to Brazilian authorities, between 2004 and April

⁶²⁶ A. DYCK, A. MORSE and L. ZINGALES, ‘Who Blows the Whistle on Corporate Fraud?’ (2010) 65(6)*The Journal of Finance* 2213, 2253. R. KRAAKMAN, *supra* n. 473, p. 881.

⁶²⁷ OECD, *supra* n. 591.

⁶²⁸ *Id.*, p. 10.

⁶²⁹ Notice that, in 22% of cases, detection and enforcement is associated with self-reporting activities. See OECD, *supra* n. 591, p. 149.

⁶³⁰ A. ARGANDOÑA, ‘Corruption and Companies: The Use of Facilitating Payments’ (2005) 60 *Journal of Business Ethics* 251, 264 and P. Nichols, ‘Are Facilitating Payments Legal?’ (2014) 54(1) *Virginia Journal of International Law* 127, 156.

⁶³¹ International Monetary Fund, *supra* n. 623, p. 6.

⁶³² *Ibid.*

⁶³³ This bribery scandal is also known as ‘operation car wash’, named after a money laundering investigation, initiated by the Brazilian Police in 2009. See on this, Petrobras Annual Report, 2016, p. 21 <<http://www.investidorpetrobras.com.br/en/annual-reports/integrated-report/annual-report>> accessed 21.02.2021.

2012, a group of companies colluded to obtain contracts from Petrobras and overcharged the company for these contracts, using the overpayments for financing individuals involved in this scheme (including politicians).⁶³⁴ According to an estimate of Global Witness, this bribery scheme “could have cost the government at least £11bn in revenue in lost tax and lost dividends from its stake in the company”.⁶³⁵ This sum represents nearly 1% of the Brazilian GDP in 2016, one fourth of the public spending for education.⁶³⁶

Assumption 1.

It is assumed that firms’ assets are lower than the social harm of bribery, divided by the probability of detection ($A < \frac{Z}{s}$).

The magnitude of this phenomenon in foreign bribery violations is currently underestimated because, the existing legislation calculates the penalty on the basis of the private gains from crime.⁶³⁷ However, even in this context, companies may incur into excessive losses.⁶³⁸ A particularly significant example is represented by the settlement agreement between the US DOJ and the Brazilian construction company, Odebrecht S.A., and Braskem S.A., its

⁶³⁴ Ibid.

⁶³⁵ E. DAVEY, Enough to Educate 17 Million Children: The True Cost of Brazil’s Car Wash Scandal, 23.03.2018 <<https://www.globalwitness.org/en/blog/enough-educate-17-million-children-true-cost-brazils-car-wash-scandal/>> accessed 21.02.2021.

⁶³⁶ OECD Economic Surveys, Brazil, February 2018, p. 8 <https://read.oecd-ilibrary.org/economics/oecd-economic-surveys-brazil-2018_eco_surveys-bra-2018-en#page10> accessed 21.02.2021.

⁶³⁷ See Chapter II. M. POLINSKY and S. SHAVELL, ‘Should Liability Be Based on the Harm to the Victim or the Gain to the Injurer?’ (1994) 10(2) *Journal of Law, Economics and Organization* 427, 437.

⁶³⁸ This is especially the case when considering reputational sanctions. See S. TIBBS, D. L. HARRELL and R. E. SHRIEVES, ‘Do Shareholders Benefit from Corporate Misconduct? A Long-Run Analysis’ (2011) 8(3) *Journal of Empirical Legal Studies* 449, 476. J. ARMOUR, C. MAYER and A. POLO, Regulatory Sanctions and Reputational Damage in Financial Markets’ (2016) 52(4) *Journal of Finance and Quantitative Analysis* 1429, 1448. J. KARPOFF, D. SCOTT LEE and G.S. MARTIN, ‘Foreign Bribery: Incentives and Enforcement’, 2017, unpublished working paper <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1573222> accessed 21.02.2021. Searle Civil Justice Institute, The Foreign Corrupt Practices Act: Economic Impact on Targeted Firms, George Mason University School of Law, Law and Economics Center, June 2014 <[http://masonlec.org/site/rte_uploads/files/FCPA%20II%20Final%20\(6.4\).pdf](http://masonlec.org/site/rte_uploads/files/FCPA%20II%20Final%20(6.4).pdf)> accessed 21.02.2021.

petrochemical affiliate.⁶³⁹ In this agreement Odebrecht admitted to have paid, between 2001 and 2016, nearly \$ 800 million to public officials of more than 12 countries in order to secure contracts. This bribery scheme led to an estimated gross pecuniary gain of \$3 billion and, on the basis of the United States Federal Sentencing Guidelines, the Court calculated that the appropriate penalty would have been \$4,503,600,000.⁶⁴⁰ However, the company declared its inability to pay a fine greater than \$2,600,000,000 and, after an independent analysis was conducted by the DOJ⁶⁴¹, the Court agreed for a reduced sanction.⁶⁴²

This ‘judgement proof’ problem can be partially addressed by increasing public expenditure in deterrence.⁶⁴³ However, public resources are also limited and, as discussed in section 3.2 above, firms are often better positioned than public regulatory agencies in preventing and detecting organizational crime.⁶⁴⁴ In this context, efficiency enhancing effects may be obtained with the involvement of the private sector.⁶⁴⁵

In the first instance, corporations can reduce the economic and social profitability of crime for individual offenders with an adequate system of remuneration, with a culture of integrity and with monitoring and auditing

⁶³⁹ US Department of Justice, Office of Public Affairs, Odebrecht and Braskem Plead Guilty and Agree to Pay at Least \$3.5 Billion in Global Penalties to Resolve Largest Foreign Bribery Case in History, 21.12.2016 <<https://www.justice.gov/opa/pr/odebrecht-and-braskem-plead-guilty-and-agree-pay-least-35-billion-global-penalties-resolve>> accessed 21.02.2021.

⁶⁴⁰ See Odebrecht’s plea agreement, 21.12.2016, p. 17 <<https://www.justice.gov/opa/press-release/file/919916/download>> accessed 21.02.2021.

⁶⁴¹ United States v. Odebrecht S.A. Criminal Docket Number: 16-643 (RJD), US Sentencing Memorandum, 11.04.2017 <<https://buckleysandler.com/sites/default/files/Buckley%20Sandler%20-%20Case%201-16.pdf>> accessed 21.02.2021.

⁶⁴² *US Department of Justice v. Odebrecht SA*, Criminal Cause for Sentencing, 17.04.2017 <<https://www.complianceweek.com/sites/default/files/OdebrechtFines.pdf>> accessed 21.02.2021.

⁶⁴³ The term ‘judgment proof’ applies also to hypotheses in which firms are unable to pay a portion of the social loss associated with organisational crime. S. SHAVELL, ‘The Judgment Proof Problem’ (1986) 6(1) *International Review of Law and Economics* 45, 58.

⁶⁴⁴ In particular, J. ARLEN, *supra* n. 496 and J. ARLEN and R. KRAAKMAN, *supra* n. 477.

⁶⁴⁵ See section 3.2 *supra*.

activities (*ex-ante* compliance measures).⁶⁴⁶ In addition, they can detect, sanction and report undeterred violations (*ex-post* compliance measures).⁶⁴⁷ As mentioned above ⁶⁴⁸, this analysis exclusively focuses on *ex-ante* measures.

The private effort in crime prevention (x), measured in working hours of compliance officers,⁶⁴⁹ leads to a reduction of the probability of crime to happen, denoted by e^{-mx} .⁶⁵⁰ This outcome is associated with social and private benefits, B_W and B_F respectively. The former is resented by a reduction of the expected social harm from crime, $B_W(x) = -z * e^{-mx}$. The latter is the result of a reduced expected sanction, $B_F(x) = -sf * e^{-mx}$. The marginal cost of the investment in self-prevention (c) is represented by the hourly wage of compliance officers and the total costs of prevention increase linearly in the private effort in self-prevention, $C(x) = cx$.⁶⁵¹ Notice that, even though the costs of this activity are directly borne by the private sector, they are also internalized by society in the social welfare function.

The levels of effort in crime prevention that maximise the firm's gains U_F and social welfare U_W , if positive at all, are x^* and x^{**} , respectively:

$$x^* = \operatorname{argmax} U_F(x) = \frac{1}{m} \log\left(\frac{msf}{c}\right) \quad (1)$$

$$x^{**} = \operatorname{argmax} U_W(x) = \frac{1}{m} \log\left(\frac{mz}{c}\right) \quad (2)$$

⁶⁴⁶ UNODC, OECD and WORLD BANK, *supra* n. 109.

⁶⁴⁷ *Ibid.*

⁶⁴⁸ See section 3.5 *supra*.

⁶⁴⁹ Notice that the effort in compliance can also be represented by capital investment in specific technologies that facilitate monitoring and auditing activities. For simplicity purposes, these are not included in x .

⁶⁵⁰ J. ARLEN, *supra* n. 48, p. 144.

⁶⁵¹ Convex costs would not alter the picture. The concavity of the objective functions is assured by that of benefits.

Notice that x^* and x^{**} are positive if the monitoring ability is sufficiently high, that is, if $m > c/sf$ and if $m > c/z$, respectively, with the former inequality implying the latter due to assumption 1. In this case, due to limited assets, the private investment is sub-optimally low, $x^* < x^{**}$. I return on this point below. If instead the above conditions do not hold, the private and social optimum levels of preventive effort are zero.

To avoid corner solutions and to focus on the relevant scenario in which $x^* > 0$ and $x^{**} > 0$, I assume that $c < sf$ (remember that $m \geq 1$). I actually make this assumption even stronger, by assuming $ec < sf$, where e is Euler's number, in order to grant, as shown in Proposition 1 hereinafter, that x^* and x^{**} are monotonically decreasing functions of monitoring ability m .⁶⁵² I will thus focus on the following restrictions, which incorporate assumption 1.

Assumption 2. It is assumed that $ec < sf$.

Assumption 2 restricts attention to the case in which the expected sanction is substantially higher than the marginal cost of effort in prevention. Even though the costs of implementing ABC programs are regarded to be high⁶⁵³, estimates often refer to total expenses, incorporating post-enforcement

⁶⁵² Euler's number's value is approximately equal to 2.71828.

⁶⁵³ See Assistant Attorney General Lanny Breuer, Prepared Address at the 22nd National Forum on the Foreign Corrupt Practices Act, 17.11.2009: *'We recognize the issues of costs to companies to implement robust compliance programs, to hire outside counsel to conduct in-depth internal investigations, and to forego certain business opportunities that are tainted with corruption. Those costs are significant and we are very aware of that fact. The cost of not being FCPA compliant, however, can be far higher.'* <https://www.instituteforlegalreform.com/uploads/sites/1/restoringbalance_fcpa.pdf> accessed 21.02.2021. A. WEISSMANN and A. SMITH, Restoring the Balance – Proposed Amendments to the Foreign Corrupt Practices Act, US Chamber Institute for Legal Reforms, 2010, p. 5 <<https://www.instituteforlegalreform.com/research/restoring-balance-proposed-amendments-to-the-foreign-corrupt-practices-act>> accessed 21.02.2021. A. KOEHLER, 'Foreign Corrupt Practices Act Ripples' (2014) 3(3) *American University Business Law Review* 391, 451. G. APOLLON, 'FCPA Compliance Should Not "Cost an Arm and a Leg": Assessing the Potential for Enhanced Cost-Efficiency and Effectiveness for an Anti-Corruption Compliance Program with the Implementation of an Enterprise Legal Risk Management Framework' (2017) 5(2) *Penn State Journal of Law and International Affairs* 486, 537.

professional fees in legal and forensic consultants.⁶⁵⁴ However, the marginal cost of preventive measures are represented by the hourly wage of compliance officers and are significantly lower. In particular, the annual wage of compliance officers can range from a minimum of \$ 63,500 to a maximum of \$ 265,750.⁶⁵⁵ For the purpose of this study, it is considered the average value of \$ 129,362 per annum, resulting in \$ 62 an hour.⁶⁵⁶

Notice that the average penalty imposed on firms for a single infringement of the FCPA is estimated to be nearly \$ 60 million.⁶⁵⁷ Consequently, $ec < sf$ is satisfied any time the probability of crime being detected (s) is greater than 0,0000031.⁶⁵⁸ This result suggests that assumption 2 is easily satisfied, at least, for grand corruption cases. The alternative case, in which private and social harm are relatively low vis-à-vis the marginal costs of compliance, appears more relevant for describing corruption channelled through small facilitating payments. Since the criminalization of this form of bribery falls outside the scope of application of this study, this hypothesis is discussed in *Appendix 1* hereinafter.⁶⁵⁹

⁶⁵⁴ For instance, starting from 2013, Walmart has published such total expenses in its quarterly reports. Interestingly, out of the \$820 million spent in the period 2013-2017, only \$263 million was spent in anti-bribery compliance. The remaining \$557 million was spent on internal investigations regarding the alleged involvement of Walmart in a violation of the Foreign Corrupt Practices Act. M. KELLY, Walmart FCPA Costs: \$820 Million and Counting, 04.12.2016 <<http://www.radicalcompliance.com/2016/12/04/walmart-fcpa-costs-820-million-counting>> accessed 21.02.2021.

⁶⁵⁵ See, for the year 2018, Robert Half, Accounting and Finance Salary Guide, 2019, p. 13 <https://www.roberthalf.com/sites/default/files/documents_not_indexed/2019_Salary_Guide_Financial_US_0.pdf?elqTrackId=bbaf500981e74500ad2a7d0b79717403&elq=3b47855eba6344e0b24de9f29a9c272d&elqaid=41778&elqat=1&elqCampaignId=>> accessed 21.02.2021.

⁶⁵⁶ Considering that the average employee works approximately 40 hours a week, the total hours in a year would correspond to nearly 2,080 (40 x 52). Consequently, $\$129,362 / 2,080 = \62 .

⁶⁵⁷ Searle Civil Justice Institute, 'The Foreign Corrupt Practices Act: An Empirical Examination of Enforcement Trends: Preliminary Report', Table 1a, p. 28, George Mason University School of Law, Law & Economics Center, September 2012 <https://masonlec.org/site/rte_uploads/files/FINAL%20FCPA%20REPORT%20PDF.pdf>.

⁶⁵⁸ $ec < sf$, if and only if $s > \frac{ec}{f}$. If we assume that $c = \$62$ and $f = \$60,000,000$: $s > 0.0000031$.

⁶⁵⁹ Note that facilitating payments are not enforced under the FCPA (i.e., 'facilitating payments' exception), while they are enforceable under the UKBA. M. STEPHENSON, The FCPA's 'Facilitating Payments' Exception: Mostly Harmless, 2014, The Global Anti-Corruption Blog <<https://globalanticorruptionblog.com/2014/06/17/the-fcpas-facilitating-payments-exception-mostly-harmless/>> . http://www.jonesday.com/oecd_calls> accessed 21.02.2021.

3.6.2. Optimal Standard of Prevention for Intermediaries

When investing in the prevention of organizational offenses, firms face information asymmetries and agency problems.⁶⁶⁰ As highlighted in section 3.4, greater challenges are faced when dealing with intermediaries.⁶⁶¹ For instance, the remuneration policy adopted for intermediaries (i.e. short-term bonuses)⁶⁶², is also associated with a greater risk of crime.⁶⁶³ Similarly, monitoring activities, often negotiated through a right-to-audit clause, entail higher transaction costs and information asymmetries.⁶⁶⁴

These differences are incorporated in the model through a parameter, denoted by m , capturing firms' monitoring ability. In particular, firms' ability to monitor their employees is assumed to be greater than firms' ability to monitor intermediaries. For simplicity I let $m = 1$, for intermediaries and $m > 1$, for employees. Notice that the private investment in crime prevention, is assumed to reduce the probability of foreign bribery, denoted by e^{-mx} . For the same level of x , higher values of m lead to a lower probability of crime. This effect has important implications for the maximization of private and social utility functions, associated with the investment in crime prevention.

The effect of m on the privately and socially desirable investment in prevention is shown by the following conditions:

⁶⁶⁰J. MACEY, 'Agency Theory and the Criminal Liability of Corporations' (1991) 21(6) *Boston University Law Review* 242, 252.

⁶⁶¹ See section 3.4 supra.

⁶⁶² J. ABOWD, 'Does Performance-Based Managerial Compensation Affect Corporate Performance?' (1990) 43(3) *Industrial and Labor Relations Review* 52, 73. B. GERHART and G. MILKOVICH, 'Organizational Differences in Managerial Compensation and Financial Performance' (1990) 33(4) *The Academy of Management Journal* 663, 691.

⁶⁶³ US Department of Justice, FCPA: A Resource Guide to the US Foreign Corrupt Practices Act, supra n. 147, p. 61.

⁶⁶⁴ See, for instance, section 5 of the Commentary on the International Chamber of Commerce, Anti-Corruption Clause, stating that: 'The reference in the Clause to a contractually-provided audit right does not, however, imply that an audit right can be easily obtained in all circumstances nor that such audit right will be suitable for all situations'. International Chamber of Commerce, supra n. 566.

$$\frac{\partial x^*}{\partial m} < 0, \text{ if and only if: } m > \frac{ec}{sf} \quad (3)$$

$$\frac{\partial x^{**}}{\partial m} < 0, \text{ if and only if: } m > \frac{ec}{z} \quad (4)$$

This implies the following result.

Proposition 1. Given assumption 1 and 2, both the privately (x^*) and the socially (x^{**}) optimal investment in preventive measures are decreasing functions of the degree of control over firm's agents (m).

According to proposition 1, when firms employ third-party intermediaries, the socially desirable level of preventive measures shall be higher than the one that is socially optimal for employees. This result implies that if the monitoring ability is lower, the effort necessary to internalize the social costs of bribery rises. Even though this result may appear intuitive, it is not obvious. Alternatively, one may think that the lower monitoring ability may also be associated with lower levels of effort in the prevention of bribes paid by third parties. Companies may, in fact, choose to focus their effort on the more efficient activity of preventing the crime perpetrated by their employees. The economic model aims to clarify which of these two possible approaches may prevail in this trade-off.

However, it is important to notice that proposition 1 is subject to the assumption that the marginal costs of compliance are relatively low, compared to the expected sanction. If, differently from Assumption 2, $< ec$, then both x^* and x^{**} , would be hump-shaped functions of m . This means that the private effort in *ex-ante* measures can be, both, an increasing or decreasing function of firms' monitoring ability. In particular, the relationship between firms' control over their agents and the privately and socially desirable investment in crime prevention needs to be assessed on a case-by-case basis.

This hypothesis appears more relevant for small facilitating payments and, since this form of corruption is outside the scope of this study, the technical aspects are discussed in the *Appendix 1* hereinafter.

The lower ability of firms to monitor third-party agents is explicitly considered only in two of the legislative measures analysed: the UNODC Practical Guide for Business⁶⁶⁵ and the UKBA Guidance⁶⁶⁶. In the first case, intermediaries are divided in different categories on the basis of the level of control; in the second case, a general distinction between employees and intermediaries is drawn. In both circumstances, the lower monitoring ability/ability to control is treated as an inherent risk of corruption (red flag), which would then lead to greater risk mitigating activities. The investment in ABC program is, in fact, a two-part exercise. As shown in *Figure 1* below, in the first phase, corporations are expected to evaluate the inherent level of risk associated with each transaction, through a thorough risk assessment; in the second phase, firms are expected to invest in the mitigation of this risk, by concentrating more resources in high-risk areas.⁶⁶⁷

Figure 1. Flowchart: Risk-Based Anti-Bribery Compliance



⁶⁶⁵ The UNODC Practical Guide on Anti-Corruption Ethics and Compliance Programs has identified different categories and suggested that ‘companies are advised to establish policies that require similar standards from business partners over which they have effective control and determining influence’. See, UNODC, *supra* n. 109, p. 54.

⁶⁶⁶ UKBA Guidance, *supra* n. 403, section 39, p. 16.

⁶⁶⁷ US Foreign Corrupt Practices Act Guidelines, *supra* n. 147, p. 59 and UKBA Guidance, *supra* n. 403, p. 21. Notwithstanding organizational effort in prevention, the probability of corruption cannot be entirely eliminated and a residual net risk of crime would, then, derive from these two steps. Notice that the risk-based approach is not intended to lead to a uniform residual net risk of crime across transactions and the effectiveness of organizational effort shall be assessed on a case-by-case basis.

However, the element of control is not clearly referred to in the other national (the US and Italy) and international (the OECD Convention) measures analysed in Chapter II. Given Proposition 1, these provisions should be amended in order to mandate higher levels of investments in ABC programs, when companies have a more limited ability to control their agents (in particular, with intermediaries and contractors).

3.7. Optimal Sanction for Investment in Crime Prevention

3.7.1. Liability Mitigation for Employees

Under the restriction introduced with Assumption 1 above ($A < \frac{z}{s}$), the private investment in crime prevention is not sufficient to achieve full deterrence. In particular, since the expected sanction is lower than public losses ($sf < z$), the socially desirable effort always exceeds the private one for any value of m , as shown in inequality 5 below. Under these conditions, corporations underinvest in anti-bribery measures and the social harm of crime is not fully internalized.

$$x^{**} > x^* \quad (5)$$

In order to increase deterrence, social planners can set x^{**} as a regulatory standard of compliance for corporate entities. A higher effort in preventive measures would, in fact, result in an additional reduction of crime and would be socially beneficial. However, from a private perspective, this additional investment in prevention is not cost-justified. As shown in equation 6 below, the net utility for the firm from the investment in x^{**} is lower than the net utility from the investment in x^* . In the absence of a change in the sanction, all else being equal, private and public incentives are not aligned.

$$B_F(x^{**}) - C(x^{**}) < B_F(x^*) - C(x^*) \quad (6)$$

A natural way to induce compliance with the standard is to offer firms adequate incentives in the form of a reduced sanction for compliers, $\bar{f} < f$. Reduced (but positive) sanctions can induce compliance with the social optimum standard only if firm's assets, and hence the maximum sanction f that the firm can be actually called to pay, are sufficiently high, as captured by the following assumption.

Assumption 3. It is assumed that corporate assets satisfy $A \geq \frac{z}{se}$.

Together with assumptions 1, this means that $\frac{z}{e} \leq sf < z$, that is, that the private sanction for firms does not fall too much below the social harm.

If instead A , and hence f , are too low, no sanction reduction would provide a sufficient incentive to comply with x^{**} . If $A < \frac{z}{se}$, compliance would require a full liability exemption or an *ex-ante* reward (e.g. bonuses or prizes), that is, $\bar{f} < 0$. This hypothesis appears more relevant for, thinly capitalized, small and medium sized enterprises. Even though these organizations are not excluded from the scope of application of the legislation against foreign bribery, big multinational entities are the main targets. Specifically, according to OECD statistics, small and medium size enterprises are involved in only 4% of the cases of violations.⁶⁶⁸ I thus maintain assumption 3 in the main text and discuss the implications of the case in which $A < \frac{z}{se}$ in *Appendix 1* hereinafter.

Proposition 2. Given Assumptions 1, 2 and 3, the firm complies with the socially desirable standard of crime prevention (x^{**}), if the state applies a reduced sanction satisfying $\bar{f} \leq \frac{z}{s} + \frac{z}{s} \log\left(\frac{sf}{z}\right)$.

⁶⁶⁸ Note that this percentage refers to small and medium-sized enterprises sanctioned for foreign bribery violations. OECD, *supra* n. 10, p. 21.

When investing in *ex-ante* prevention, firms can face two different options. On the one hand, they can choose to invest x^* and pay an expected sanction, f , equal to their assets (A). On the other hand, they can invest x^{**} and pay an expected sanction, \bar{f} , lower than f . As shown in equations 7 and 8 below, when the reduced sanction is efficiently set, the utility associated with x^{**} equals the net utility associated with x^* . In this context, firms would comply with the standard set by regulators and public and private incentives would be aligned: for

$$\bar{f} = \frac{z}{s} + \frac{z}{s} \log\left(\frac{sf}{z}\right) \quad (7)$$

one has

$$B_F(x^{**}) - C(x^{**}) = B_F(x^*) - C(x^*) \quad (8)$$

It is important to highlight that the mitigated sanction, defined under proposition 2, differs from the mitigated sanction identified by Arlen (1994), Arlen and Kraakman (1997).⁶⁶⁹ In the first case, this incentive is necessary to induce a full internalization of the social harm from crime, when firms' assets are lower than the expected harm from crime ($A < \frac{z}{s}$). In the second case, the reduced sanction is necessary to compensate the 'perverse effect' associated with the investment in compliance. A future extension of this study may look at the 'liability-enhancement' effect, in order to verify whether this phenomenon is affected by the diverse monitoring ability companies have over their intermediaries.

3.7.2. Liability Mitigation for Intermediaries

As highlighted in section 3.7.1 above, the privately optimal investment in crime prevention (x^*) is lower than the socially desirable one (x^{**}). Proposition 2 shows that the state can correct this under-investment problem with an appropriate mitigation of the sanction. This section focuses on intermediaries and investigates whether the lower monitoring ability,

⁶⁶⁹ See section 3.3.2 *supra*.

associated with them, affects the under-investment problem ($x^{**} - x^*$) and the incentive necessary to overcome it (\bar{f}). The following result shows the effect on under-investment.

Proposition 3. Given Assumptions 1, 2 and 3, under-investment is given by

$$x^{**} - x^* = \frac{1}{m} \log\left(\frac{z}{sf}\right) \quad (9)$$

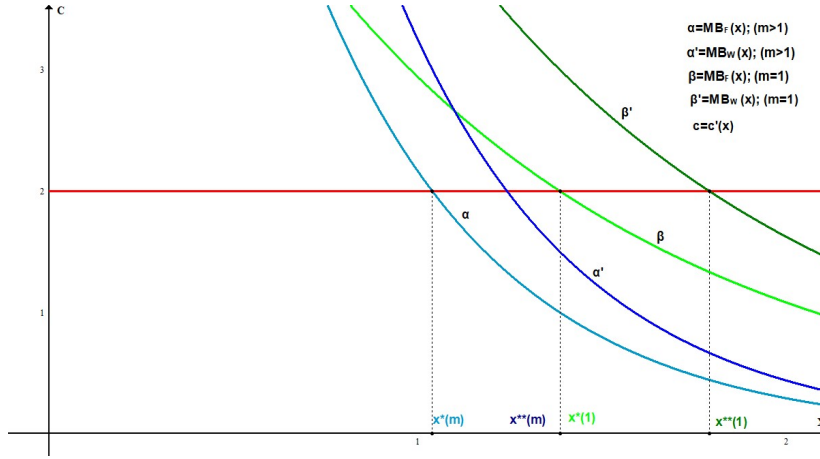
and it is a decreasing function of m .

Proposition 3 establishes that under-investment in crime prevention is a more serious problem when a firm is dealing with intermediaries than with employees. *Figure 2*, hereinafter, provides a graphical representation of the private and social marginal benefits of the investment in prevention of crimes committed by employees and intermediaries, and of their crossing with the marginal cost of such investments, which determines the optimal choices.

The values of the effort in crime prevention (x) are represented on the x axis, while on the y axis, its marginal costs (c) are shown. As far as employees are concerned, α and α' represent the private and social marginal benefit associated with the investment in crime prevention, $MB_F(x)$, ($m > 1$) and $MB_W(x)$ ($m > 1$) respectively. Similarly, β and β' represent the private and social marginal benefit from the investment in crime prevention of intermediaries' offenses, $MB_F(x)$, ($m = 1$) and $MB_W(x)$, ($m = 1$) respectively.

The distance between α and α' represents the difference between the privately and socially optimal investment in crime prevention for employees, denoted by x^* and x^{**} . Similarly, the distance between β and β' represents the difference between the privately and socially optimal investment in crime prevention for intermediaries, denoted by $x^*(m)$ and $x^{**}(m)$. As implied by the proposition, the figure shows that $x^{**}(m) - x^*(m) < x^{**}(1) - x^*(1)$.

Figure 2. Graph: Under-Investment in Crime Prevention⁶⁷⁰



Given Proposition 3, a higher mitigation of the sanction may appear necessary to compensate the greater distance between the private and social investment in the prevention of intermediaries' offenses. However, the reduced sanction defined in proposition 2 ($\bar{f} = \frac{z}{s} + \frac{z}{s} \log\left(\frac{sf}{z}\right)$), is independent of m . If efficiently set, the same liability mitigation is thus sufficient to induce firms to comply with the socially desirable standard, irrespective of the type of agent addressed. This yields the following result.

Proposition 4. Given Assumptions 1, 2 and 3, the state can induce firms to make the socially desirable investment in crime prevention by setting:

- (i) Sufficiently high notional sanctions, such as $\hat{f} = \frac{z}{s}$;
- (ii) Higher standards of investment for the prevention of crimes committed by intermediaries (for whom $m = 1$), $x^{**} = \log\left(\frac{z}{c}\right)$,

⁶⁷⁰ Note that this figure represents an example and, as far as corporate entities are concerned, it is based on the following values: $s = 0.4$; $d = 0$; $f = 20$; $c = 2$; $m = 1$ and $m = 2$ (when $m > 1$). As far as social welfare functions are concerned, the graph is based on the following values: $s = 0.4$; $d = 0$; $z = 12$; $c = 2$; $m = 1$ and $m = 2$ (when $m > 1$).

than for those committed by employees (for whom $m > 1$), $x^{**} = \frac{1}{m} \log\left(\frac{mz}{c}\right)$;

- (iii) A common mitigated sanction, $\bar{f} = \frac{z}{s} + \frac{z}{s} \log\left(\frac{sf}{z}\right)$, for firms complying with the relevant standard.

Proposition 4 sheds light on the relationship between firms' monitoring ability and efficient deterrence. In the first instance, it is clarified that the lower marginal productivity of firms' investment in crime prevention should be compensated by a higher effort. On the other hand, even though this higher standard leads to greater total costs⁶⁷¹ of prevention, the same mitigated sanction should apply. Consequently, the privately and socially net benefits deriving from the prevention of intermediaries' s offenses are lower than the privately and socially net benefits deriving from *ex-ante* measures focusing on employees. Notice that the generalization of this model is subject to the restrictions, discussed in *Appendix I* hereinafter.

The result of Proposition 4 is consistent with what provided for by the UNCAC and the UKBA, in which the same liability mitigation applies, irrespective of the greater investment in ABC programs demanded to compensate the lower monitoring ability. From this result, it is possible to argue that the investment in ABC programs addressing employees is associated with a lower private and social net benefit. However, it is important to highlight that this study does not look at *ex-post* sanctioning and cooperation and this result may not hold, when including these activities. In particular, as discussed in Arlen (1994) and Arlen and Kraakman (1997), the *ex-ante* and *ex-post* activities of ABC programs may be subject to a trade-off. A further extension of this study might explore whether the different level of control, firms have over intermediaries, has an impact on the sanction

⁶⁷¹ For instance, the lack of compliance with third-party audits is justified as a consequence of lack of resources. See Transparency International, *Managing Third Party Risk: Only as Strong as Your Weakest Link*, 2016, p. 44.

reduction necessary to compensate the liability-enhancement effect, introduced by Arlen.

3.8. Conclusions

This economic model developed in this chapter investigates, from an economic perspective, the challenges of vicarious liability applied to offenses committed by third-party intermediaries. The analysis contributes to the economic literature on corporate crime and sheds some light on the existing legislation against foreign bribery violations. In the first instance, this study has shown that vicarious corporate liability should be extended beyond the employment relationship, in order to avoid the risks of strategic delegation. The national and international provisions analysed in chapter II are consistent with this result and hold companies accountable, even when bribes are paid by third parties.

In addition, when implementing anti-bribery measures, an important distinction is drawn between employees and intermediaries. In particular, since third parties act outside the organizational structure, compliance is negotiated on a contractual basis and entails greater agency costs.⁶⁷² It is, therefore, assumed that the marginal returns from this investment are lower than those associated with employees. The theoretical economic model, discussed in this chapter, has verified how the differences in firms' monitoring ability affect: (i) the optimal standard of *ex-ante* measures; and (ii) the optimal penalty associated with this investment. On the one hand, when the marginal costs of compliance are relatively low⁶⁷³, the investment in preventive activities should increase, as the monitoring ability of firms decreases.⁶⁷⁴ Since companies are better positioned to control their employees, higher effort in *ex-ante* measures is necessary for independent contractors.⁶⁷⁵ On the other hand, the model shows that the same liability

⁶⁷² See section 3.4.2. *supra*.

⁶⁷³ Namely, *ec* < *sf*.

⁶⁷⁴ See section 3.6.2 *supra*.

⁶⁷⁵ *Ibid*.

mitigation applies for the private investment in prevention of offenses committed by employees, as well as by intermediaries.

The results highlighted above play an important role in clarifying the efficiency of the existing measures against foreign bribes, channelled through intermediaries.⁶⁷⁶ The analysis developed in this chapter shows that, when independent contractors are involved, a higher investment in compliance is necessary for intermediaries, in order to compensate the more limited ability of firms to control these agents. The UNODC Practical Guide for Business⁶⁷⁷ and the UKBA Guidance⁶⁷⁸ are consistent with these results and I argue that the same standards should be adopted by the FCPA, the Italian Legislative Decree n. 231/2001 and the OECD Convention.

Proposition 4 shows that, irrespective of the greater effort for third parties, the same liability mitigation should apply to ABC programs addressing employees and ABC programs addressing intermediaries. Consistently with this result, the legislative measures analysed in chapter II do not identify different liability mitigations, depending on whether ABC programs address employees or intermediaries. Finally, for the purpose of simplicity, this model does not look at *ex-post* measures (e.g. monitoring and sanctioning). A future extension of this study may include these activities, in order to verify whether the lower ability of firms to monitor third parties has an impact on the liability mitigation necessary to compensate the liability-enhancement effect, introduced by Arlen (1994) and Arlen and Kraakman (1997).

⁶⁷⁶ See Chapter II *supra*.

⁶⁷⁷ UNODC, *supra* n. 374.

⁶⁷⁸ UKBA Guidance, *supra* n. 403, section 39, p. 16.

Appendix 1. Mathematical Appendix

I. The Corporation

Being the private benefit from compliance: $B_F(x) = -sf * p(x)$, its marginal benefit ($MB_F(x)$) is:

$$\frac{dB_F(x)}{dx} = (e^{-mx}) m * sf$$

The private cost from the investment in compliance is: $C(x) = cx$. The marginal cost of compliance is:

$$\frac{dC}{dx} = c$$

Firms would choose the level of compliance x^* , for which marginal private benefits are equal to marginal private costs:

$$MB_F(x) = MC(x)$$

$$(e^{-mx}) m * sf = c$$

$$x^* = \frac{1}{m} \log \left[\frac{m * sf}{c} \right]$$

$x^* > 0$, if and only if:

$$m > \frac{c}{sf}$$

A2 implies that $0 < c < sf$. Hence: $x^* > 0$.

II. The Social Planner

It is assumed that firms' assets (A) are lower than the social consequences of crime, divided by the probability of detection (s). Consequently, full deterrence cannot be achieved exclusively by setting the expected sanction (sf) equal to the social harm of crime (z).

$$f = A < \frac{z}{s}$$

Being the social benefit from compliance: $B_w(x) = -z * e^{-mx}$, its marginal benefit is:

$$\frac{dB_w(x)}{dx} = (e^{-mx}) m * z$$

The Social Planner would choose the level of compliance x^{**} , for which marginal social benefits are equal to marginal social costs. Notice that private total and marginal costs of compliance are incorporated by society. Therefore:

$$MB_w = MC$$

$$(e^{-mx}) m * z = c$$

$$x^{**} = \frac{1}{m} \log \left[\frac{m * z}{c} \right]$$

$x^{**} > 0$, if and only if:

$$m > \frac{c}{z}$$

A2 implies that $0 < c < z$. Hence: $x^{**} > 0$.

Proposition 1.

Notice that the private optimal level of compliance depends on the monitoring ability of the firm and this is increasing in m , if and only if:

$$\frac{dx^*}{dm} > 0$$

$$\frac{1}{m^2} \left[1 - \log \frac{m*sf}{c} \right] > 0 \text{ if, and only if:}$$

$$m < \frac{ec}{sf}$$

A 2 implies that $ec < sf$, $\frac{dx^*}{dm} < 0$.

Notice that the social optimal level of compliance depends on the monitoring ability of the firm and this is increasing in m , if and only if:

$$\frac{dx^{**}}{dm} > 0$$

$$\frac{1}{m^2} \left[1 - \log \frac{mz}{c} \right] > 0 \text{ if, and only if:}$$

$$m < \frac{ec}{z}$$

A 2 implies that $0 < ec < z$, $\frac{dx^{**}}{dm} < 0$.

Proposition 2.

Since A1 implies that: $sf < z$:

$$x^{**} = \frac{1}{m} \log \left[\frac{m \cdot z}{c} \right] > x^* = \frac{1}{m} \log \left[\frac{m \cdot sf}{c} \right]$$

Since $x^* < x^{**}$, from a social welfare perspective, firms would always underinvest in compliance. If the State sets x^{**} as the optimal investment in compliance, and associates a reduced sanction \bar{f} in case of compliance, firms would choose to comply with this standard, if and only if:

$$B_F(x^{**}) - C(x^{**}) \geq B_F(x^*) - C(x^*)$$

$$-s\bar{f} * e^{-mx^{**}} - cx^{**} \geq -sf * e^{-mx^*} - cx^*$$

$$\bar{f} \leq \frac{sf}{s} e^{m[x^{**}-x^*]} - \frac{e^{-mx^{**}}}{se^{-mx^{**}}} + \frac{c(x^* - x^{**})}{se^{-mx^{**}}}$$

$$\text{Since } x^{**} - x^* = \frac{1}{m} \log \left[\frac{z}{sf} \right]$$

Hence $x^* - x^{**} = \frac{1}{m} \log \left[\frac{sf}{z} \right]$, and one has

$$\bar{f} \leq \frac{sf}{s} e^{m[x^{**}-x^*]} - \frac{e^{-mx^{**}}}{se^{-mx^{**}}} + \frac{c(x^* - x^{**})}{se^{-mx^{**}}}$$

$$\bar{f} \leq \frac{z}{s} + \left\{ \frac{z}{s} \log \left[\frac{sf}{z} \right] \right\}$$

“[Q]uis custodiet ipsos custodes?”(Juvenal, Satire VI, lines 347–348)

4. The Certification of Intermediaries against Foreign Bribery: A Law and Economics Perspective

4.1. Introduction

In chapter III I have looked at the deterrence of corporate bribes paid by third parties, through the lenses of law and economics. In particular, the analysis has shown that in order to induce an efficient internalization of the social harm of corruption, vicarious corporate criminal liability needs to be extended beyond the realm of the employment relationship.⁶⁷⁹

In addition, I have argued that the investment in ABC programs looking at third parties is associated with higher information asymmetries than the ones raised by employees and I have looked at its impact on optimal deterrence. For the purpose of simplicity, the economic model has focused on the *ex-ante* measures of ABC programs and has shown that the more limited ability of firms to control their independent contractors leads to a lower net private and social benefit associated with anti-bribery measures.⁶⁸⁰

In this Chapter, I look at the role of third-party certification of ABC programs as a way through which companies can complement their investment in *ex-ante* ABC measures, in order to reduce the risk of corruption associated with their intermediaries. In particular, it is argued that ABC certification can serve as a signalling tool which can enable companies to distinguish between intermediaries with adequate and inadequate ABC programs in place. The ability of ABC certification to meaningfully differentiate between intermediaries, with adequate and inadequate ABC programs, depends on

⁶⁷⁹ See Chapter III.

⁶⁸⁰ See Chapter III.

different factors. This Chapter looks at these dimensions, from a law and economics perspective, in order to address the following questions:

- a. What is the signalling function of ABC certification from an economic perspective?
- b. Under which conditions, can this function be efficiently achieved?
- c. Are these conditions taken into account by the existing regulatory framework? If not, how can this be improved?
- d. How should ABC certification be incentivised by regulators?

This Chapter is structured as follows. In Section 4.2, the typologies of certifications regarding ABC programs are analysed. In particular, three main categories are identified: certification based on self-reporting of the certified party; certificate based on the review of documents (with and without interviews); certifications based on audits.⁶⁸¹ In section 4.3 the signalling function of ABC certification is discussed. In particular, this section looks at the conditions necessary to induce a separating equilibrium between intermediaries with an adequate investment in ABC programs and those failing to do so. Sections 4.4 and 4.5 focus on the incentives of certification companies and on the regulatory solutions to improve them. Section 4.6 looks at the existing provisions requiring companies to interact with ABC certified intermediaries and analyses them from a law and economics perspective.

4.2. ABC certification: typologies

The legislative framework addressing foreign corporate bribery extends the vicarious liability of corporations beyond the scope of the employment relationship, anytime bribes are paid “directly or through intermediaries”⁶⁸². In the absence of an accepted definition of intermediary in the context of foreign bribery, this term refers to “all parties who act as a conduit in international business transactions, e.g. agents, sales representatives,

⁶⁸¹ F. HEIMANN et al., *supra* n. 119.

⁶⁸² OECD, *supra* n. 36, Article 1(1).

consultants or consulting firms, suppliers, distributors, resellers, subcontractors, franchisees, joint venture partners, subsidiaries and other business partners including lawyers and accountants”⁶⁸³. These would include “[b]oth natural and legal persons, such as consulting firms and joint ventures”⁶⁸⁴ and this Chapter focuses on the latter.

The broad definition of intermediaries leads to significant regulatory costs on the private sector, especially when considering that Fortune 500 companies count, on average, over 75,000 suppliers⁶⁸⁵. As highlighted in Chapter III above, this burden is exacerbated by the information asymmetry between companies and their intermediaries.⁶⁸⁶ In order to reduce this gap, companies may complement their investment in *ex-ante* ABC measures with the certification of ABC programs adopted by their intermediaries. The adoption of this verification instrument is a relatively new phenomenon whose implications on the overall deterrence of foreign bribery needs to be further explored.⁶⁸⁷

In general terms, the certification of ABC programs can be defined as a public statement of the nature of a company’s investment in compliance programs. However, certifications vary in the scope and process of the review undertaken by certifying bodies.⁶⁸⁸ For instance, some certifications may refer to specific phases of ABC programs (e.g. due diligence, training programs), while others may look at *ex-ante* and *ex-post* activities.⁶⁸⁹ In some circumstances, certifications need to be reviewed on a regular basis, while in

⁶⁸³ OECD, *supra* n.11, p. 5.

⁶⁸⁴ *Ibid.*

⁶⁸⁵ F. ORLOWSKI, *Certifying Third-Party FCPA Compliance Under New SEC/DOJ Requirements*, Corporate Compliance Insights, 04.02.2020 <<https://www.corporatecomplianceinsights.com/third-party-fcpa-compliance>> accessed 18.07.2020. I. WEBB, ‘How Many Suppliers Do Businesses Have? How Many Should They Have?’ *Forbes*, 28.02.2018 <<https://www.forbes.com/sites/jwebb/2018/02/28/how-many-suppliers-do-businesses-have-how-many-should-they-have/#c521b8f9bb72>> accessed 18.07.2020.

⁶⁸⁶ Chapter III *supra*.

⁶⁸⁷ F. HEIMANN et al., *supra* n. 119.

⁶⁸⁸ *Ibid.*

⁶⁸⁹ *Ibid.*

others they have no expiration date.⁶⁹⁰ In addition, some certifications base their assessment on the specific risk assessed at the beginning of the review ('inherent risk'), while others benchmark their activity against best practices for the size and industry of the business entity analysed ('residual risk').⁶⁹¹

When looking at this instrument, at least, three main categories can be identified: certificates based on self-reporting; certificates based on the review of documents (with and without interviews); certifications based on audits.⁶⁹²

The first type of certification is represented by a statement signed by an officer of the intermediary, in which the company often responds to a questionnaire and provides information on the elements of the ABC program adopted.⁶⁹³ This form of assurance can be directly transmitted by intermediaries to their business partners, in order to show their commitment to comply with anti-bribery standards.⁶⁹⁴ The effectiveness of this typology heavily relies on the circumstance that self-reporting companies disclose truthful information. When this does not happen, intermediaries may be found in breach of contract, with possible consequences from a civil and criminal liability perspective.⁶⁹⁵

However, corruption is a hidden crime and it is hard for companies to verify the accuracy of the information disclosed by its intermediaries, especially if they are based in other jurisdictions with weak rule of law and low deterrence rate.⁶⁹⁶ For this reason, this study focuses on the role of third-party

⁶⁹⁰ Ibid.

⁶⁹¹ Ibid.

⁶⁹² Ibid.

⁶⁹³ Ibid.

⁶⁹⁴ US Department of Justice, FCPA: A Resource Guide to the US Foreign Corrupt Practices Act, *supra* n. 147, p. 62.

⁶⁹⁵ See, for instance, the following anti-corruption self-declaration <[https://ecoworld.my/wp-content/themes/ecoworld2019/downloads/anti-corruption-policy/Anti-Corruption%20Declaration_EWDG%20\[Final%2027%20Dec%202019\].pdf](https://ecoworld.my/wp-content/themes/ecoworld2019/downloads/anti-corruption-policy/Anti-Corruption%20Declaration_EWDG%20[Final%2027%20Dec%202019].pdf)> accessed 21.02.2021.

⁶⁹⁶ J. LAMBSDORFF, *supra* n. 28, p. 11.

certification bodies and self-declaration is outside the scope of my analysis. Third-party entities can receive self-declarations and supplement them with additional internet searches (such as reputational screening, media reports and criminal records verifications) and online training of the intermediary's employees, before transmitting the certification to the business partners interested in receiving this information.⁶⁹⁷

For example, since its establishment in 2007, TRACE International Inc. has carried out nearly 500,000 third parties' due diligence reviews worldwide.⁶⁹⁸ This type of activity, intended to supply 'pre-vetted' agents to corporations looking for business partners, is mainly conducted through online searches.⁶⁹⁹ Similarly, as of September 2016, the American Anti-corruption Institute (AACI), provides companies with an annual anticorruption certificate on the basis of the information collected through an online questionnaire.⁷⁰⁰

A more thorough analysis is conducted when certifications are based on the review of documents. In the first instance, this process focuses on anti-bribery measures adopted by intermediaries (e.g. codes of ethics and ethics committee/board minutes; policies regarding gifts; scope of trainings and training material; existence of a whistle-blower program and whistle-blowers' hotlines submissions and responses; contracts; internal audits and investigations report).⁷⁰¹ In addition, these certification schemes can be supplemented by interviews in which employees of the intermediary are surveyed about the nature of these activities.⁷⁰²

⁶⁹⁷ F. HEIMANN et al., *supra* n. 119.

⁶⁹⁸ Trace International, Get Certified – The Due Diligence Standard <<https://www.traceinternational.org/get-certified>> accessed 06.09.2020. Trace International, About Trace <<https://www.traceinternational.org/about-trace>> accessed 06.09.2020.

⁶⁹⁹ Trace Certification, The Due Diligence Standard <<https://www.traceinternational.org/get-certified>> accessed 06.09.2020.

⁷⁰⁰ The American Anti-Corruption Institute (AACI), Q&A: Organizations Anti-Corruption Certification Program <<https://theaaci.com/q-and-a-organizations-anti-corruption-certification-program.html>> assessed 20.07.2020.

⁷⁰¹ F. HEIMANN et al., *supra* n. 119.

⁷⁰² *Ibid.*

Finally, ABC certification can be the result of online documents reviews supported by interviews and audits (including on-site visits). These certification schemes cover both *ex-ante* and *ex-post* activities of ABC programs. For instance, the 2016 ISO 37001 for anti-bribery management systems, reflects international guidance documents on ABC programs and regulates both phases.⁷⁰³ Compliance with this standard can be certified by third party entities and ISO has issued an additional standard on this certification process, the ISO 17021-9 on the “auditing and certification of anti-bribery management systems”, which complements ISO 17021-1 on “conformity assessment requirements for bodies providing auditing and certification of management systems”.⁷⁰⁴

The certification based on ISO 17021-9 relies on audits (including on-site visits) and has to focus on the full spectrum of activities that need to be implemented under ISO 37001 (e.g. *ex-ante* due diligence; training activities; whistle-blowers programs and *ex-post* monitoring).⁷⁰⁵ These audits have to be conducted on the basis of the context in which the organization operates and, in addition, ISO 17021-9 clarifies the requirement of competence, impartiality and independence for auditors and the personnel involved in the certification process.⁷⁰⁶ Certification companies, adopting ISO 17021-9, can also be accredited by national accreditation bodies, which verify and monitor

⁷⁰³ ISO 37001: 2016, Anti-bribery management systems – Requirements with guidance for use. See note 117 *supra*.

⁷⁰⁴ ISO/IEC TS 17021-9:2016, Conformity Assessment Requirements for Bodies Providing Auditing and Certification of Management Systems. Part 9: Competence Requirements for Auditing and Certification of Anti-Bribery Management Systems. The standard can be purchased from <<https://www.iso.org/standard/70158.html>> accessed 21.02.2021. This standard complements ISO 17021-1 on the general ‘*audit and certification of management systems*’. See ISO/IEC 17021-1: 2015, ISO/IEC 17021-1: 2015, Conformity Assessment Requirements for Bodies Providing Auditing and Certification of Management Systems. Part 1: Requirements <<https://www.iso.org/standard/61651.html>> accessed 06.09.2020.

⁷⁰⁵ ISO/IEC TS 17021-9:2016, Conformity Assessment Requirements for Bodies Providing Auditing and Certification of Management Systems. Part 9: Competence Requirements for Auditing and Certification of Anti-Bribery Management Systems.

⁷⁰⁶ *Ibid*.

the compliance of certification bodies with these standards, on a continuous basis.⁷⁰⁷

The diversity of the scope and procedures necessary to develop anti-bribery certifications leads to uncertainty around the interpretation of the results of the certification process. The issuance of ISO 37001 and ISO 17021-9 aims, among other things, to facilitate this process by creating a level playing field.⁷⁰⁸ A full harmonization in this sphere has yet to be achieved but we are witnessing an increasing evolution towards this objective. For instance, one of the first companies providing certification of anti-bribery management systems as of 2006 (i.e. Ethic Intelligence), has decided to switch from its own certification standard to ISO 37001. Moreover, starting from 2019, its compliance with ISO 17021-9 has been officially recognized, through the accreditation issued by the U.S. and French national accreditation bodies.⁷⁰⁹

4.3. ABC Certification: the signalling function

According to the economic theory of corporate crime, firms are often the most cost-effective providers of many activities of prevention and policing.⁷¹⁰ Outside a simplified model, deterrence is costly and states have limited resources for law enforcement activities.⁷¹¹ Moreover, corporate crimes do not cause obvious harm and they are often hard to detect.⁷¹² For this reason, firms are regarded to be better positioned than the State to influence their own employees and to affect their overall expected net benefit to commit organizational crimes.⁷¹³ In the context of foreign corporate bribery, the

⁷⁰⁷ V. CHEREPANOVA, ISO 37001: Not all certifications are created equal, The FCPA Blog, 03.04.2019 <<https://fcpablog.com/2019/04/03/iso-37001-not-all-certifications-are-created-equal>> accessed 06.09.2020.

⁷⁰⁸ T. MCBRIEN, 'Developing a Management Standard to Prevent Bribery: ISO 37001 Offers a New Approach, 2012 – 2019' (2020) Princeton University <<https://successfulesocieties.princeton.edu/publications/developing-management-standard-prevent-bribery-iso-37001-offers-new-approach-2012-%E2%80%93-2019>> accessed 06.09.2020.

⁷⁰⁹ Ethic Intelligence, About us <<https://ethic-intelligence.com/pages/about-us>> accessed 20.07.2020.

⁷¹⁰ J. ARLEN, *supra* n. 48, p. 164. See on this Chapter III *supra*.

⁷¹¹ J. ARLEN, *supra* n. 48, p. 164.

⁷¹² *Ibid.*

⁷¹³ *Id.*: at least, when corporate crimes are not committed.

incentives of individual employees to pay bribes can significantly be reduced if companies adopt adequate ABC programs.⁷¹⁴ The preventive measures (e.g. due diligence; training measures) aim to reduce the *ex-ante* benefits and direct costs of crime to individuals. The monitoring measures (e.g. audits) are intended to increase the expected sanction for wrongdoers.⁷¹⁵

However, as discussed in Chapter III, when moving beyond the employment relationship, this benefit is significantly reduced. In these circumstances, the adoption of ABC programs by firms is associated with higher information asymmetries and with a reduced social net benefit of this investment.⁷¹⁶ The economic literature has shown that, when information asymmetries on the quality of goods traded exist, market failures emerge.⁷¹⁷ In the absence of a possibility to distinguish between high-quality and low-quality sellers, the uninformed agent would offer an average price. As discussed by Akerlof in his seminal paper on the market for used cars, sellers of high-quality products would not be sufficiently rewarded and, consequently, could be driven out of the market.⁷¹⁸

A similar outcome may emerge in the market of intermediaries. ABC programs are costly measures, composed of different elements (e.g. due diligence; training programs; tone at the top; codes of conduct; internal investigation mechanisms; analysis and remediation of misconducts).⁷¹⁹ The adequacy of ABC programs would depend on the sum of these activities⁷²⁰ and would benefit business partners of the intermediaries that have chosen this investment. In particular, the following advantages may emerge:

⁷¹⁴ See Chapter III, *supra*.

⁷¹⁵ *Ibid.*

⁷¹⁶ *Ibid.*

⁷¹⁷ G. AKERLOF, 'The Market for "Lemons": Quality Uncertainty and the Market Mechanism' (1970) 84(3) *The Quarterly Journal of Economics* 488, 500.

⁷¹⁸ *Ibid.*

⁷¹⁹ *Supra* n. 147, p. 58.

⁷²⁰ US Department of Justice, Justice Manual, 9-28.800 Corporate Compliance Programs, *supra* n. 188. U S Sentencing Commission, 2018 Guidelines Manual Annotated, *supra* n. 178, section 8B2.1, Effective Compliance and Ethics Programs.

- A lower probability of corruption and a consequently lower probability of being sanctioned, for bribery channelled, through intermediaries;
- A higher probability to receive a liability mitigation, in case corruption still takes place⁷²¹.

In a world of symmetric information, companies would be able to distinguish between intermediaries with adequate and inadequate adequate ABC programs and would be able to compensate them accordingly. The investment in ABC measures is, in fact, not an inexpensive choice for intermediaries. In particular, these programs can be associated with fix (e.g. adoption of technologies to run the due diligence and support internal reporting mechanisms) and variable (e.g. the number of hours spent by compliance officers in prevention and monitoring activities) costs.⁷²² The former are the result of a discrete choice (e.g. adoption/non-adoption of specific technologies), the latter represent continuous choice variables (e.g. working hours of compliance officers)⁷²³.

However, some elements of ABC programs (e.g. the adoption of codes of conduct) are more easily verifiable than others (e.g. corporate culture).⁷²⁴ This information asymmetry can lead to market failures. In particular, businesses may reward their business partners on the basis of an average value of the benefits deriving from an expected distribution of intermediaries with adequate and inadequate ABC programs. In this context, intermediaries with adequate ABC programs may not be sufficiently rewarded and may be driven out of the market.

⁷²¹ Supra n. 147, p. 57.

⁷²² This investment may also be associated with the benefits of reducing the probability of corruption and increasing the probability of receiving a lower sanction. Intermediaries are, in fact, also responsible for corruption, FCPA, supra n. 32, section 78dd-1(a) and sections 78dd-2(a), 78dd-3(a).

⁷²³ See on this Chapter III, supra.

⁷²⁴ The effectiveness of compliance programmes depends on ‘*an organizational culture that encourages ethical conduct and a commitment to compliance with the law*’. Supra n. 147, p. 56.

In his seminal paper on the labour market, Spence has looked at the hypothesis in which high-quality sellers have the possibility to reveal their type through costly actions ('signals').⁷²⁵ In this section I argue that third-party certification of ABC programs may function as a signalling tool, which may enable intermediaries with adequate compliance programs in place to distinguish themselves from those with inadequate ones. In particular, I focus on certification schemes adopted by intermediaries represented by legal persons, such as consulting firms or joint venture partners.⁷²⁶

The signalling function of certification has already been addressed by the scholarly literature in different contexts, except from the anti-corruption domain. For instance, when looking at ISO 9000 on quality management standard, Anderson et al. (1999) have shown that "managers obtain certifications as a means of providing credible signals of quality assurance to external parties".⁷²⁷ In addition, Terlaak and King (2006)⁷²⁸, have argued that certified suppliers have a competitive advantage over non-certified ones. This competitive advantage (i.e. a faster growth rate) appears to be higher when "buyers have greater difficulty in acquiring information about suppliers".⁷²⁹

However, signals are meaningful, as long as they are observable and costly.⁷³⁰ In particular, their costs have to be negatively correlated with the unobservable quality they represent.⁷³¹ Moreover, in order to fully distinguish between high-quality and low-quality types ('separating equilibrium'),

⁷²⁵ M. SPENCE, 'Job Market Signaling' (1973) 87(3) *Quarterly Journal of Economics* 355, 374.

⁷²⁶ For further clarification on the definition of intermediaries in this context, see 4.2 supra.

⁷²⁷ S. ANDERSON, J.D. DALY and M.F. JOHNSON, 'Why Firms Seek ISO 9000 Certification: Regulatory Compliance or Competitive Advantage?' (1999) 8(1) *Production and Operations Management* 28, 43.

⁷²⁸ A. TERLAAK and A. KING, 'The Effect of Certification With the ISO 9000 Quality Management Standard: A Signaling Approach' (2006) 60(4) *Journal of Economic Behavior and Organization* 579, 602.

⁷²⁹ Ibid.

⁷³⁰ B.L. CONNELLY, S.T. CERTO, R.D. IRELAND AND C.R. REUTZEL, 'Signaling Theory: A Review and Assessment' (2011) 37(1) *Journal of Management* 39, 67.

⁷³¹ M. SPENCE, supra n. 725.

certification has to be strictly advantageous only for the former.⁷³² In *Table 5* below, I have summarized under which conditions the certification of ABC programs can be strictly advantageous for intermediaries with adequate anti-bribery measures in place. Let:

C_A = costs of certification for intermediaries with adequate ABC programs;

B_A = benefits of certification for intermediaries with adequate ABC programs;

C_I = costs of certification for intermediaries with inadequate ABC programs;

B_I = benefits of certification for intermediaries with inadequate ABC programs;

- Assumption 1: intermediaries, corporations, certification companies and the social planner are perfectly rational agents and they would opt for ABC certification as long as the costs of certification are offset by the benefits of certification;
- Assumption 2: whether intermediaries have adequate or inadequate ABC programs cannot be observed by outsiders;
- Assumption 3: certification is perfectly able to distinguish between intermediaries with adequate and inadequate investments in ABC programs. This assumption is relaxed in sections 4.4 and 4.5 below, where the regulatory measures to address errors and conflict of interests in the certification process are discussed;
- Assumption 4: the deterrence rate of foreign bribery is sufficiently high to induce companies to always prefer intermediaries with adequate ABC programs over intermediaries with inadequate ABC programs.

⁷³² A. TERLAAK and A. KING, *supra* n. 728.

Table 5. ABC Certification for Intermediaries: Separating Equilibrium

Certification for intermediaries with adequate ABC programs		Certification for intermediaries with inadequate ABC programs	
$C_A < B_A$		$C_I > B_I$	
Costs of certification (C_A)	Benefits of certification (B_A)	Costs of certification (C_I)	Benefits of certification (B_I)
Direct costs of applying for certification (i.e. auditing costs and costs associated with due diligence activities).	Greater capacity of attracting business partners because the certification is granted.	<ul style="list-style-type: none"> • Direct costs of applying for certification (i.e. auditing costs and costs associated with due diligence activities). • Costs of contract termination, if certification of ABC program is denied because of their inadequacy. 	None. The certification would be denied.

The costs of certification can run from a few thousand dollars to several hundred thousand, depending on the nature/size of the business activity, the context in which they operate and the type and scope of the certification process.⁷³³ Intermediaries with an adequate ABC program in place, after undergoing a thorough verification process, would be able to obtain the certification of their compliance programs and the associated benefit of being preferred as business partners over their non-certified competitors.⁷³⁴ Given Assumption 4, ABC certification is always associated with this benefit.

On the other hand, when intermediaries with inadequate ABC programs in place apply for ABC certification, they would only face its costs, without the associated benefits. Under Assumption 3, certification companies would, after conducting due diligence and auditing activities, be able to verify their inadequate investment and would not issue the certification. In addition, if the certification is denied, intermediaries may be exposed to the costs of contract

⁷³³ F. HEIMANN et al., *supra* n.110.

⁷³⁴ A. TERLAAK and A. KING, *supra* n. 728.

termination. This could, for instance, be the case if they have signed up to the ICC Rules.⁷³⁵

According to these rules, companies may include specific ABC provisions in their contracts with intermediaries and business partners. Among other things, these may include clauses “allowing [firms] [...] to suspend or terminate the relationship, if it has a unilateral good faith concern that a Business Partner has acted in violation of applicable anti-corruption law”.⁷³⁶ Even though ABC certification is not a specific requirement of the ICC Rules, the underlying adequate investment in ABC programs necessary to obtain the certification, is also mandated by these contractual provisions. Consequently, some companies may add ABC certification to their contract with intermediaries⁷³⁷ and may ask for contract termination, in case of failure.

A separating equilibrium takes place if the net benefit of certification is positive only for high types:

$$C_A < B_A \text{ and}$$

$$C_I > B_I$$

Under Assumptions 1, 2, 3 and 4 above, it is reasonable to infer that these conditions are always satisfied.⁷³⁸

4.4. Semi-separating equilibrium with imperfect certification mechanisms

The informative power of signals may be partially reduced (but not entirely eliminated⁷³⁹) when some types of senders choose the same message and

⁷³⁵ International Chamber of Commerce, supra n. 104.

⁷³⁶ Id., p. 7.

⁷³⁷ The use of certification in a third-party relationship is also recommended by the US Department of Justice, FCPA: A Resource Guide to the US Foreign Corrupt Practices Act, supra n. 147, p. 62.

⁷³⁸ The hypothesis in which the costs of certification overcome its benefits, even for intermediaries with adequate ABC programmes in place is addressed in Appendix 2 infra.

⁷³⁹ The hypotheses in which the informative power of signals can be entirely eliminated (‘pooling equilibria’) do not appear to be relevant for the market of certification of ABC programmes. For a technical discussion, see Appendix 2 hereinafter.

other types choose different messages ('semi-separating equilibrium').⁷⁴⁰ In the context of ABC certification, this hypothesis could occur when all intermediaries with adequate ABC programs choose to have an ABC certification, while only some agents with lower levels of investment in anti-bribery measures would be able to do so.⁷⁴¹

This hypothesis is possible if I relax Assumption 3 discussed above and assume that the certification process is imperfect and may not, always, be able to distinguish between intermediaries with adequate and inadequate ABC measures. The imperfect ability of certification companies to distinguish between these two categories may depend on two different factors: (i) on the one hand, certification companies may not have full access to the information necessary to assess the adequacy of the investment in ABC programs. This condition would expose the certification process to errors and mistakes. (ii) On the other hand, certification companies may have conflicting interests in the evaluation of the adequacy of ABC measures. Let:

q = probability for intermediaries with inadequate ABC programs to obtain a certification, with $q < 1$;

$1 - q$ = probability for intermediaries with inadequate ABC programs to fail to obtain a certification;

s = probability for intermediaries with adequate ABC programs to obtain a certification, with $s = 1$.

⁷⁴⁰ M. SPENCE, *supra* n. 725.

⁷⁴¹ M. BACHARACH and D. GAMBETTA, 'Trust in signs' in K. COOK (ed.) *Trust and Social Structure*, Russell Sage Foundation, 2001.

A semi-separating equilibrium would emerge if the following payoffs are satisfied:

- (i) the net utility of ABC certification is always positive for intermediaries with adequate ABC programs: $s(B_A - C_A) > 0$;
- (ii) the net utility of ABC certification is positive, with a probability (q) and negative, with probability ($1 - q$), for intermediaries with a suboptimal investment in ABC programs: $q(B_I - C_I) > 0$; and $(1 - q)(B_I - C_I) < 0$, respectively.

It is reasonable to infer that certification mechanisms based on self-declarations of intermediaries, exclusively complemented by online searches, appear to be more likely subject to errors than those complemented by in-person audits. They may often entail a lower investment in screening and monitoring activities, higher risks of relying on erroneous information and conflict of interests. An example of this failure is represented by the controversial case regarding UNAOIL, a Monaco based oil consultancy company.⁷⁴²

In October 2019, the former CEO and chief operations officer (COO) of this intermediary have pleaded guilty for conspiring to violate the FCPA, facilitating bribes on behalf of companies in foreign countries in order to secure contracts in the oil and gas sector.⁷⁴³ The guilty plea clarifies how the defendants, from 2006 until 2016, “made false statements over international wires to the United States to obtain necessary compliance certifications,

⁷⁴² This information was published in the aftermath of a media investigation carried out by the Huffington Post and its Australian partner, Fairfax Media, on 30.03.2016. In particular, see R. BAKER, Unaoil and Trace, How the Ahsanis Fooled the World, *The Age*, 2016 <<https://www.theage.com.au/interactive/2016/the-bribe-factory/day-2/trace.html>> accessed 05.09.2020. The information that Unaoil was Trace certified was, subsequently, confirmed by Trace on 31 March. See on this point, A. WRAGE, Unaoil vs. The Compliance Community, *Trace International*, 31.03.2016 <<https://www.traceinternational.org/blog/779>> accessed 05.09.2020.

⁷⁴³ US Department of Justice Office of Public Affairs, Oil Executives Plead Guilty for Roles in Bribery Scheme Involving Foreign Officials, 30.10.2019 <<https://www.justice.gov/opa/pr/oil-executives-plead-guilty-roles-bribery-scheme-involving-foreign-officials>> accessed 28.07.2020.

caused false certifications to be made in official proceedings and took efforts to conceal the discovery of incriminating information by law enforcement in the United States and elsewhere.”⁷⁴⁴ In particular, these false communications aimed to frustrate due diligence efforts, exercised by the US-based certification company, Trace International.⁷⁴⁵

This episode has raised concerns on the effectiveness of certification mechanisms, in general.⁷⁴⁶ However, as discussed in section 4.2 above, these tools can be based on different models and those exclusively, or primarily, relying on the information communicated by certified parties are less likely to represent meaningful signals, because of the lower investment in the verification process. The market-based and regulatory incentives necessary to address these risks will be discussed in Section 4.4.1 below.

4.4.1. Efficient incentives for certification companies

Certification entities provide an external verification mechanism “*to screen out or at least to grade or rate the persons or entities*”.⁷⁴⁷ Consequently, they can be regarded as gatekeepers⁷⁴⁸ and, for the purpose of this study, they will also be referred to as notification bodies.⁷⁴⁹ In particular, they act as repeat players, lending their reputational capital to assure market players as to the quality of their signals (like credit rating agencies and auditors).⁷⁵⁰

⁷⁴⁴ *US v. Cyrus Allen Ahsani*: Docket N. 19-CR-00147 and *US v. Saman Ahsani*: Docket N. 19-CR-00147 <<https://www.justice.gov/criminal-fraud/related-enforcement-actions/a>> accessed 28.07.2020.

⁷⁴⁵ T. FOX, The Ahsani’s Information – The Fraudulently Obtained Certifications, FCPA Compliance Report, 07.11.2019 <<http://fcpacompliancereport.com/2019/11/21920>> accessed 28.07.2020.

⁷⁴⁶ See, for instance, B. WAITE, Bill Waite on Unaoil: Certification vs. Investigation, 13.04.2016, The FCPA Blog <<http://www.fcpablog.com/blog/2016/4/13/bill-waite-on-unaoil-certification-versus-investigation.html>> accessed 28.07.2020.

⁷⁴⁷ J. COFFEE, *Gatekeepers: The Professions and Corporate Governance*, Oxford University Press, 2006, p. 10.

⁷⁴⁸ J. COFFEE, *supra* n. 747, p. 10. R. KRAAKMAN, Gatekeepers: ‘The Anatomy of a Third-Party Enforcement Strategy’ (1986) 2(1) *Journal of Law, Economics and Organization*, p. 56.

⁷⁴⁹ J. GALLAND, ‘Big Third-Party. Certifiers and the Construction of Transnational Regulation’ (2017) 670(1) *The Annals of the American Academy of Political Science* 263, 279.

⁷⁵⁰ J. COFFEE, *supra* n. 747, p. 2.

For a long time, scholars have assumed that the **reputational capital** would have been sufficient to, efficiently, shape gatekeepers' incentives.⁷⁵¹ This was based on the idea that their performance would have been aimed at avoiding reputational sanctions, imposed through the reaction of the market.⁷⁵² Since reputational capital gets built over time, this asset may become a barrier to entry.⁷⁵³ Consequently, more concentrated markets have appeared more suitable to favour gatekeepers' activities.

Since the certification of ABC management systems is a relatively recent phenomenon, I will look at the market structure of notification bodies issuing other forms of certification (e.g. health and safety and social auditing). In particular, since the 1980s, the importance of certification bodies increased worldwide, with the surge of transnational trade and the proliferation of international standards.⁷⁵⁴ In this context, scholars have noticed that the structure of certification bodies became international, with a progressive expansion of notification bodies in big multinational enterprises⁷⁵⁵. In particular, these entities grew in two different ways: (i) on the one hand, notification bodies expanded globally, by creating subsidiaries and merging with local notification bodies; (ii) on the other hand, notification bodies specialised in different sectors, diversifying their certification portfolio.⁷⁵⁶

The expansion of certification bodies has also been accompanied by a reduction in the number of notification bodies, with an increase in their size and the number of their subsidiaries.⁷⁵⁷ This trend towards a more concentrated market of notification bodies can be explained by the existence of economies of scale and economies of scope. In the first case, the average

⁷⁵¹ Id., p. 317.

⁷⁵² Id., p. 284.

⁷⁵³ Id., p. 3.

⁷⁵⁴ J. GALLAND, *supra* n. 749.

⁷⁵⁵ Ibid.

⁷⁵⁶ Id., p. 271.

⁷⁵⁷ Ibid.

total cost of production of a specific good decreases, as the level of production of that good rises.⁷⁵⁸ In the second case, the average total cost of production of a company decreases, as there is an increasing variety in the goods produced.⁷⁵⁹ In both circumstances, these industries are expected to be more concentrated than others in which costs do not fall as rapidly as output expands.⁷⁶⁰

However, the impact of competition on gatekeepers is subject to a trade-off.⁷⁶¹ In more concentrated markets, companies face fewer competitors and may be better able to resist pressure from their clients. In addition, the risks of collusion may be greater.⁷⁶² The severe episodes of market failures in the market of gatekeepers, during the 2000s⁷⁶³, have shown these drawbacks and have paved the way towards greater regulatory interventions, especially in highly concentrated markets.⁷⁶⁴ In particular, the informative value of the information provided by gatekeepers depends on two factors: (i) the independence of gatekeepers; and (ii) their obligations to third parties.⁷⁶⁵ The former can be granted through *ex-ante* regulatory measures and the latter through *ex-post* deterrence. These two instruments should be regarded as complementary, in order to strike a balance between legal certainty and professional discretion.⁷⁶⁶

In the sections below, I will look at the measures adopted in the market of auditors, in the United States, and at the ways in which they can be implemented in the context of ABC certification.⁷⁶⁷ Namely, the following

⁷⁵⁸ J. PANZAR and R. WILLIG, 'Economies of Scale in Multi-Output Production' (1977) 91(3) *The Quarterly Journal of Economics* 481, 493.

⁷⁵⁹ J. PANZAR and R. WILLIG, 'Economies of Scope' (1981) 71(2) *The American Economic Review* 268, 272.

⁷⁶⁰ G. STIGLER, 'The Economies of Scale' (1958) 1 *Journal of Law and Economics* 54, 71.

⁷⁶¹ J. COFFEE, *supra* n. 747, p. 318.

⁷⁶² *Id.*, p. 3.

⁷⁶³ Among others, Enrons and World-Com's scandals became iconic. J. COFFEE, *supra* n. 747, p. 15.

⁷⁶⁴ J. COFFEE, *supra* n. 747, p. 298.

⁷⁶⁵ *Id.*, p. 118.

⁷⁶⁶ *Id.*, p. 371.

⁷⁶⁷ *Id.*, pp. 333-361.

have been considered: regulation of the independence of auditors, including the prohibition of non-audit services and audit firm rotation; supervision by independent bodies; liability of auditors.⁷⁶⁸ I have chosen to focus on the US because it is the only jurisdiction, among those analysed in Chapter II, that has explicitly recognised third-party certification of ABC programs adopted by intermediaries.

The professional nature of auditors (vis-à-vis bookkeepers) hinges upon their independence from their clients.⁷⁶⁹ An important threat to this characteristic can be represented by the joint supply of audit and non-audit services.⁷⁷⁰ Indirect payments, deriving from the provision of **consulting activities** may, in fact, increase the opportunity of capture for gatekeepers.⁷⁷¹ In order to limit this risk, two alternative solutions can apply. On the one hand, gatekeepers may be required to be transparent about the types of services provided to the verified party.⁷⁷² On the other hand, a more effective solution can be represented by the prohibition of consulting services to screened parties.⁷⁷³ In the 1980s and 1990s, the auditing profession saw a change in the organizational culture with a rise in the provision of consulting services.⁷⁷⁴ For instance, Arthur Andersen was the first auditing firm to provide consulting services and, by 1984, its consulting revenues exceeded auditing revenues.⁷⁷⁵

Following the Enron scandal, the Sarbanes-Oxley Act (SOX), has required

⁷⁶⁸ J. LANGLI and M. WILLEKENS, 'The economics of auditor regulation' in A. SASSON (ed.), *At the Forefront, Looking Ahead: Research-Based Answers to Contemporary Uncertainties of Management*, Scandinavian University Press 2018.

⁷⁶⁹ J. COFFEE, *supra* n. 747, pp. 111.

⁷⁷⁰ J. LANGLI and M. WILLEKENS, *supra* n. 768, p. 166.

⁷⁷¹ See, for instance, on audit firms, M. DEFOND, K. RAGHUNANDAN and K.R. SUBRAMANYAM, 'Do Non-Audit Services Impair Auditor Independence? Evidence from Going Concern Audit Opinions' (2002) 40(4) *Journal of Accounting Research* 1247, 1274.

⁷⁷² However, it is important to note that some psychologists have found that the disclosure of conflict of interests is associated with 'perverse' effects. See D. CAIN, 'The Dirt on Coming Clean: Perverse Effects of Disclosing Conflicts of Interest' (2005) 34(1) *Journal of Legal Studies* 1, 25.

⁷⁷³ J. COFFEE, *supra* n. 747, p. 336.

⁷⁷⁴ *Id.*, p. 170.

⁷⁷⁵ *Id.*, p. 27. See also S. A. ZEFF, 'How the US Accounting Profession Got Where It Is Today?' (2003) 17(4) *Accounting Horizons* 267, 286.

the SEC to amend the existing provisions on auditor independence.⁷⁷⁶ These rules include a combination of mandated disclosures and prohibitions. In the first instance, the list of non-audit services, that auditing companies are forbidden from providing to their audited clients, has been expanded.⁷⁷⁷ In addition, Section 206 of the SOX clarified that the independence of an audit firm can be jeopardised if a person who was a member of its ‘audit engagement team’⁷⁷⁸ is employed by the audited company.⁷⁷⁹ In order to comply with the SOX, the SEC has introduced a one-year ‘cooling off’ period, before a member of the ‘audit engagement team’ can work for the audited party.⁷⁸⁰ The violation of these prohibitions could lead to the disqualification of the audit firm.

When looking at the market of ABC certification, it is important to clarify that not all certification companies are equal.⁷⁸¹ In particular, companies issuing ISO 37001 certification can choose to comply with ISO 17021-9 on the “auditing and certification of anti-bribery management system”.⁷⁸² As discussed in Section 4.2 above, this standard complements ISO 17021-1 (on conformity assessment requirements for auditing and certification of management systems)⁷⁸³ and represents the first attempt to regulate this

⁷⁷⁶ Consistently with section 208 of the Sarbanes-Oxley Act, on 22.01.2003, the SEC adopted the new rules. See Securities and Exchange Commission, Release No. 33-8183 -Strengthening the Commission's Requirements Regarding Auditor Independence <<http://www.sec.gov/rules/final/33-8183.htm>> accessed 29.12.2020.

⁷⁷⁷ Securities and Exchange Commission, Release No. 33-8183, supra n. 776, B. Scope of Services Provided by Auditors.

⁷⁷⁸ According to the Securities and Exchange Commission, Release No. 33-8183, supra n. 776: *‘the term audit engagement team means all partners (or person in an equivalent position) and professional employees participating in an audit, review, or attestation engagement of an audit client. Included within the audit engagement team would be partners and all other persons who consult with other members of the engagement team during the audit, review, or attestation engagement regarding technical or industry-specific issues, transactions, or events.’*

⁷⁷⁹ US, Sarbanes-Oxley Act of 2002, section 208.

⁷⁸⁰ Securities and Exchange Commission, Release No. 33-8183, supra n. 776, A. Conflicts of Interest Resulting from Employment Relationships.

⁷⁸¹ V. CHEREPANOVA, supra n.707.

⁷⁸² ISO/IEC TS 17021-9:2016, Conformity Assessment Requirements for Bodies Providing Auditing and Certification of Management Systems. Part 9: Competence Requirements for Auditing and Certification of Anti-Bribery Management Systems.

⁷⁸³ ISO 17021-1: 2015, Conformity assessment - Requirements for bodies providing audit and certification of management systems. section 5.2.5. ISO 17021-1: 2015.

process, setting out the requirements (competence, impartiality, independence and resources) for auditors and the personnel involved in the certification of anti-bribery management systems.⁷⁸⁴

When addressing the threats to the impartiality of conformity assessment activities, ISO 17021-1⁷⁸⁵ clarifies that “[the] certification body and any part of the same legal entity and any entity under the organizational control of the certification body [...] shall not offer or provide management system consultancy”.⁷⁸⁶ If consulting entities want to focus on conformity assessment activities, they shall not be able to certify management systems for a minimum of two years following the end of the consultancy.⁷⁸⁷ In addition, certification bodies are prohibited from using personnel who has provided consulting services to the certified party, before two years from the end of the consultancy.⁷⁸⁸

However, compliance with these standards is only the result of a voluntary decision. Consequently, some notification bodies (e.g. Trace International), in addition to the certification, offer compliance support and training to its members.⁷⁸⁹ For this reason, the risks of conflict of interests deriving from the provision of consulting services are still very high and the introduction of a generalised prohibition, with ‘cooling off’ periods, across certification bodies appears desirable.

The independence of gatekeepers can additionally, be affected by **their payment structure**. When controlled entities are also responsible for

⁷⁸⁴ ISO/IEC TS 17021-9:2016, Conformity Assessment Requirements for Bodies Providing Auditing and Certification of Management Systems. Part 9: Competence Requirements for Auditing and Certification of Anti-Bribery Management Systems.

⁷⁸⁵ ISO 17021-1: 2015, Conformity assessment - Requirements for bodies providing audit and certification of management systems. section 5.2.5. ISO 17021-1: 2015, section 5.2.7.

⁷⁸⁶ ISO 17021-1: 2015, Conformity assessment - Requirements for bodies providing audit and certification of management systems. section 5.2.5. ISO 17021-1: 2015, section 5.2.7.

⁷⁸⁷ ISO 17021-1: 2015, section 5.2.7.

⁷⁸⁸ ISO 17021-1: 2015, section 5.2.10.

⁷⁸⁹ See Trace International, Resource Center, ‘*The Resource Center also contains checklists and guidance for building and maintaining an effective anti-bribery compliance program*’ <<https://www.traceinternational.org/resource-center>> accessed 28.07.2020.

remunerating gatekeepers, the independence of their activity can importantly be affected. A possible strategy to address this challenge can be represented by the change in the business model. For instance, until 1970, credit rating agencies were directly paid by the investors who were relying on their rating ('investor-pays' model), rather than by the rated parties ('issuer-pays' model).⁷⁹⁰ Even though under the first scheme, credit rating agencies are subject to greater scrutiny⁷⁹¹, the practical implementation of this model is limited by the risk of free riding. Given the nature of the information produced by gatekeepers, it is difficult to exclude non-paying parties. This would erode the marginal profitability of gatekeepers and would jeopardise their existence in the market.⁷⁹²

The negative consequences of the issuer-pays model have also been addressed by the SOX, with the introduction of a rule mandating issuers to disclose the fees paid to their independent auditors and with the obligation to describe the corresponding services provided by them.⁷⁹³ Moreover, conflict of interests can be exacerbated by the existence of a long-term and exclusive relationship between auditors and their clients. This was, for instance, the case of Arthur Andersen and Enron, where Enron's audit fees alone accounted for 27 percent of the audit fees of Arthur Andersen's Houston office.⁷⁹⁴

The SOX has addressed this risk, providing that the lead auditors or partners in an auditing firm shall not be responsible of reviewing the audit of an issuer for more than 5 consecutive fiscal years.⁷⁹⁵ The SEC rules implementing the

⁷⁹⁰ D. BONGAERTS, 'Alternatives for Issuer-Paid Credit Rating Agencies' (2014) *European Central Bank Working Paper Series*, n. 1703, <<https://www.ecb.europa.eu/pub/pdf/scpwps/ecbwp1703.pdf>> accessed 05.09.2020. A. LUCCHETTI, Big Credit-Rating Firms Agree to Reforms, *The Wall Street Journal*, 2008 <<https://www.wsj.com/articles/SB121268203224348921>> accessed 05.09.2020. P. BOLTON, X. FREIXAS and J. SHAPIRO, 'The Credit Ratings Game' (2012) 67(1) *The Journal of Finance* 85,111.

⁷⁹¹ J. COFFEE, supra n. 747, pp. 333-361.

⁷⁹² This was the problem with the 'investor pays' model and was one of the main reasons for moving to the 'issuer pays' model. See J. COFFEE, 'Ratings Reform: The Good, the Bad and the Ugly' (2011) 1(1) *Harvard Business Law Review* 231, 278.

⁷⁹³ Securities and Exchange Commission, Release No. 33-8183, supra n. 776, E. Compensation.

⁷⁹⁴ J. COFFEE, supra n. 747, p. 29.

⁷⁹⁵ US, Sarbanes-Oxley Act of 2002, section 203.

SOX have expanded its scope, mandating a ‘cooling off’ period of 5 years, before they could return to that engagement.⁷⁹⁶ The more extreme measure of mandating the auditing firm rotation⁷⁹⁷, has been subject to further consideration.⁷⁹⁸ This choice was based on existing concerns regarding the possible increase in the auditing costs associated with the rotation of the entire auditing firm (e.g. start-up costs for the auditor and the client), vis-à-vis partner rotation.⁷⁹⁹

The challenges of the issuer-pays model are also evident in the context of the certification of ABC programs. Similarly to auditing firms, certification bodies are remunerated by those who are subject to the verification activity.⁸⁰⁰ However, alternative payment structures do not seem to be desirable because the risk of free riding appears to be relevant, when certification attests third-party intermediaries. In fact, since these agents can perform consulting services for more clients⁸⁰¹ at the same time, the exclusion of non-paying companies is exposed to great challenges and inefficiencies.

The risks associated with the ‘issuer-pays model’, in the context of ABC certification, are also recognised by ISO 17021-1 where it is stated that “the source of revenue for a certification body is its client paying for certification, and that this is a potential threat to impartiality”.⁸⁰² In order to ensure trust in the verification process and outcome, this standard clarifies that “conformity assessment activities shall be undertaken impartially”⁸⁰³ and sets out the

⁷⁹⁶ Securities and Exchange Commission, Release No. 33-8183, supra n. 776, C. Partner Rotation.

⁷⁹⁷ Adopted by the EU in 2014 with the Directive 2014/56/EU of the European Parliament and of the Council of 16 April 2014 amending Directive 2006/43/EC on statutory audits of annual accounts and consolidated accounts <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32014L0056>> accessed 30.12.2020.

⁷⁹⁸ Consistently with section 7 of the Sarbanes-Oxley Act.

⁷⁹⁹ B. ARRUNADA and C. PAZ-ARES, Mandatory Rotation of Company Auditors: A Critical Examination (1997) 17(1) *International Review of Law and Economics* 31, 61.

⁸⁰⁰ See, for instance, Bureau Veritas UK regarding the certification of compliance with ISO 37001 <<https://www.bureauveritas.com/home/about-us/our-business/certification/management-systems/anti-bribery/anti-bribery>> accessed 28.07.2020.

⁸⁰¹ Trace Certification, The Due Diligence Standard <<https://www.traceinternational.org/get-certified>> accessed 05.09.2020.

⁸⁰² ISO 17021-1: 2015, section 5.2.7.

⁸⁰³ ISO 17021-1: 2015, section 5.2.1.

necessary steps to achieve this standard. In particular, it is stated that conformity assessment bodies shall be responsible for the impartiality of their activities, starting from their top management.⁸⁰⁴ In addition, certification bodies are expected to conduct a risk assessment on the potential threats to impartiality and have to demonstrate, in consultation with interested stakeholders, the ways in which these threats have been eliminated or minimized.⁸⁰⁵

The standards set out by ISO 17021-1 and ISO 17021-9 appear insufficient to address the conflict of interests associated with the payment structure of ABC certification companies. In the first instance, apart from the need to conduct a risk assessment, they do not clarify the practical steps certification companies shall carry out to ensure impartiality. The introduction of a periodic mandatory rotation of managers in charge of the certification process, together with a mandated disclosure of the fees perceived by the certified party, would be an important step in the right direction. In addition, differently from ISO 1702-1 and ISO 17021-9, these provisions shall be mandatory and shall apply to all certification bodies.

The strength of the measures regarding gatekeepers' independence hinges upon the possibility to sanction those who fail to comply with these standards. Since its origin, the existence of licensing procedures have been regarded as prerequisites to the auditing profession.⁸⁰⁶ In particular, the introduction of an independent authority, with the power to control the admission and the expulsion of its members has proven to be of paramount importance.⁸⁰⁷ Before the Enron scandal, the adherence of auditors to professional standards was monitored through a peer review system.⁸⁰⁸ However, this system has been inadequate and the SOX has introduced the Public Company Accounting

⁸⁰⁴ ISO 17021-1: 2015, section 5.2.2.

⁸⁰⁵ ISO 17021-1: 2015, section 5.2.3.

⁸⁰⁶ J. COFFEE, *supra* n. 747, p. 114.

⁸⁰⁷ *Id.*, p. 118.

⁸⁰⁸ C. LENNOX and J. PITTMAN, Auditing the Auditors: Evidence on the Recent Reforms to the External Monitoring of Audit Firms' (2010) 49 *Journal of Accounting and Economics* 84, 103.

Oversight Board (PCAOB), an independent audit regulator in charge of periodic inspections of listed firms.⁸⁰⁹

The PCAOB is a non-profit organisation, with the primary duties to register public accounting firms that prepare audit report for issuers, brokers and dealers; to verify the quality of the auditing activity, in particular, with regard to their independence; to inspect, investigate and sanction possible violations of these standards.⁸¹⁰ According to the SOX, the PCAOB shall “assess and collect a registration fee and an annual fee from each registered public accounting firm, in amounts that are sufficient to recover the costs of processing and reviewing applications and annual reports”.⁸¹¹ Compliance with this standard and with other provisions regulating the registration process is monitored by the SEC, who has oversight and enforcement authority over the PCAOB.⁸¹²

Similarly, the introduction of a licensing scheme and an independent supervision⁸¹³ can represent a fundamental instrument to improve the performance of ABC certification companies. To date, the only example in this context is represented by the accreditation process available for companies certifying ISO 37001 and choosing to undergo the accreditation process. Accreditation can be defined as “the external validation of organizations offering conformity assessment services”, such as certifications.⁸¹⁴ Their function is to add a “top-layer quality assurance by assessing the competence and impartiality of the conformity assessment bodies”, with specific standards (such as ISO 17021-1 and ISO 17021-9 for the certification of anti-bribery management process).⁸¹⁵

⁸⁰⁹ J. LANGLI and M. WILLEKENS, *supra* n. 768, p. 169.

⁸¹⁰ US, Sarbanes-Oxley Act of 2002, section 101.

⁸¹¹ US, Sarbanes-Oxley Act of 2002, section 102 (f).

⁸¹² US, Sarbanes-Oxley Act of 2002, section 107.

⁸¹³ J. COFFEE, *supra* n. 747, p. 306.

⁸¹⁴ M. FRENZ and R. LAMBERT, ‘The Economics of Accreditation’ (2013) 9(2) *NCSLI Measure* 42, 50.

⁸¹⁵ *Ibid.*

Accreditation bodies are standalone companies, based in national jurisdictions.⁸¹⁶ Most of the existing accreditation entities are also members of the International Accreditation Forum (IAF).⁸¹⁷ The purpose of the IAF is twofold. On the one hand, it aims to ensure that its accreditation body members only accredit bodies that are competent to do the work and are not subject to conflict of interest.⁸¹⁸ In addition, it aims to facilitate mutual recognition of accredited certificates across the world, through Multilateral Recognition Arrangements (MLAs).⁸¹⁹ In Europe accreditation bodies have been regulated by Regulation 765/2008⁸²⁰, providing a uniform framework across Member States. According to this Regulation “[e]ach Member State shall appoint a single national accreditation body” and these bodies shall be independent and non-profit organisation.⁸²¹ In the United States, there is no single accreditation body but, out of the four currently registered with IAF, only two accredit management systems certification bodies complying with ISO 17021-1.⁸²² These two accreditation bodies, American National Accreditation Board (ANAB) and International Accreditation Service (IAS), are both non-profit organisations.⁸²³

When certification companies choose to undergo the accreditation process, their compliance with the standards set out by ISO 17021-1 and ISO 17021-9 is verified by the competent accreditation body, before they can be accredited ABC certification companies. In addition, they are subject to a

⁸¹⁶ V. CHEREPANOVA, *supra* n.707.

⁸¹⁷ International Accreditation Forum, Members and Signatories <https://www.iaf.nu/articles/IAF_MEMBERS_SIGNATORIES/4> accessed 29.07.2020.

⁸¹⁸ International Accreditation Forum, About us <<https://www.iaf.nu/articles/About/2>> accessed 29.07.2020.

⁸¹⁹ International Accreditation Forum, Multilateral Recognition Arrangement Documents (ML Series) <https://www.iaf.nu/articles/MRA_Documents/39> accessed 29.07.2020.

⁸²⁰ Regulation No 765/ 2008 of the European Parliament and of the Council of 9 July 2008 setting out the requirements for accreditation and market surveillance relating to the marketing of products and repealing Regulation (EEC) No 339/93.

⁸²¹ *Id.*, Article 4.

⁸²² See IAF Members and Signatories <https://www.iaf.nu/articles/IAF_MEM_USA__all/112> accessed 31.12.2020.

⁸²³ See International Accreditation Service (IAS), About us <<https://www.iasonline.org/about-ias>> accessed 31.12.2020 and ANAB FAQs <<https://anab.ansi.org/about-anab/faq#R1>> accessed 31.12.2020.

periodic surveillance to check maintenance of the requirements of competence and impendence. Their license needs be renewed periodically (at least, every 5 years)⁸²⁴ and failure to comply with these standards would lead to the loss of the license of accredited certification body. This is consistent with the economic literature according to which an excessive restriction of the market for gatekeepers could increase collusion and reduce the incentives to achieve full disclosure.⁸²⁵ In order to avoid this risk, regulatory licenses need to be granted periodically.⁸²⁶ This would permit to allow new entrants in the market and to oust those who have failed to maintain the required standards.⁸²⁷

However, the accreditation process is based on a voluntary decision of certification companies who have decided to adhere to ISO 17021-1 and ISO 17021-9. Moreover, differently from the PCAOB, accreditation bodies are regulated by private standards and compliance with these principles is not subject to the independent supervision of a third party, but to a peer review process.⁸²⁸ Consequently, ABC certification could greatly benefit from the introduction of an independent body supervising certification companies. This body can be represented by the existing accreditation companies, as long as the accreditation process is mandated to all certification companies and, as long as their activity is subject to public regulation and oversight.

⁸²⁴ ISO/IEC 17011:2017 Conformity assessment – Requirements for accreditation bodies accrediting conformity assessment bodies, section 7.9 (Accreditation Cycle) <<https://www.iso.org/standard/67198.html#:~:text=ISO%2FIEC%2017011%3A2017%20specific,es,and%20accrediting%20conformity%20assessment%20bodies>> accessed 29.07.2020. For instance, in Italy the accreditation cycle is four years. See, Italian Accreditation Body (ACCREDIA), The Path to Accreditation <<https://www.accredia.it/en/accreditation/the-path-to-accreditation>> accessed 29.07. 2020.

⁸²⁵ R. CANTOR and F. PACKER, 'Multiple Ratings and Credit Rating Standards: Differences of Opinion in the Credit Rating Industry' (1996) *Federal Reserve Bank of New York Staff Reports* n. 3. A. LIZZERI, 'Information Revelation and Certification Intermediaries' (1999) 30(2) *The RAND Journal of Economics* 214, 231.

⁸²⁶ J. COFFEE, *supra* n. 747, p. 306.

⁸²⁷ *Ibid.*

⁸²⁸ Regulation No 765/ 2008 of the European Parliament and of the Council, *supra* n. 820, Article 10. International Accreditation Forum, The Evaluation Process <https://www.iaf.nu/articles/The_Evaluation_Process/30> accessed 31.12.2020.

In conclusion, similarly to other gatekeepers, ABC certification companies appear to be potentially subject to conflict of interests and reputational incentives are not sufficient to achieve their independence. ISO 17021-1, ISO 17021-9 and the accreditation process available to certification companies who have chosen to issue ISO 37001 certifications, represent a first step towards a more adequate framework in the context of ABC certification. However, as discussed in this section, these measures need to be improved. This is especially necessary if, as discussed in Section 4.6 below, certification is officially recognized by regulators, in the context of the enforcement of foreign corporate bribery.

4.5. Efficient incentives for certification companies: liability measures

In order to induce certification bodies to conduct their conformity assessment activities in an efficient and ethical manner, the requirements discussed in Section 4.4 above shall be used in combination with liability measures.⁸²⁹ However, the certification of ABC programs is a relatively recent and unregulated phenomenon. In this section, I will look at the ways in which these liability standards have been implemented to regulate financial audits in the United States and I will consider how similar measures could be extended to certification bodies of ABC programs. In this jurisdiction, auditors can be subject to contractual, tort and criminal liability and these are regulated by common law and statutory law.⁸³⁰

In the first instance, a contractual liability may emerge between auditors and audited parties for breach of contract.⁸³¹ For example, an engagement letter is regarded as a written contract between the Certified Public Accountant (CPA) and the client.⁸³² This engagement letter (or any other suitable form of written

⁸²⁹ J. COFFEE, *supra* n. 747, p. 298.

⁸³⁰ F.I. LESSAMBO, *The International Corporate Governance System: Audit Roles and Board Oversight*, Palgrave Macmillan UK 2014, p. 264.

⁸³¹ *Ibid.*

⁸³² *Id.*, p. 264.

agreement) is the base of a suit and shall include the following terms: the objective and scope of the audit; the responsibility of the auditor and of management; a statement that clarifies the inherent limitations of internal control and the unavoidable risk that material misstatements may go undetected; the financial reporting framework; the expected content of the reports to be issued.⁸³³

In the context of the certification of ABC programs, a **contractual liability** may emerge between the certification body and the certified party. The terms of this relationship would be defined by the contracts subscribed by these parties and may vary across certification bodies. However, ISO 17021-1 sheds some light on these aspects and clarifies the objectives and scope of the certification process; the structural, resource, information, process and management system requirements of certification entities.⁸³⁴ In addition, this standard explicitly states that “[t]he certification body shall be responsible for, and shall retain authority for, its decisions relating to certification”⁸³⁵ and that certification cannot be “a guarantee that of 100 % conformity with requirements”.⁸³⁶ This is also consistent with the FCPA Guidance document, published by the DOJ and SEC, according to which “no compliance program can ever prevent all criminal activity by a corporation’s employees”.⁸³⁷

Auditors can also be exposed to **tort law actions** for the damages caused by a wrong audit. In this circumstance, the plaintiff has to prove a breach of duty that was the proximate cause of a damage.⁸³⁸

⁸³³ Ibid.

⁸³⁴ ISO 17021-1: 2015.

⁸³⁵ ISO 17021-1: 2015, section 5.1.3.

⁸³⁶ ISO 17021-1: 2015, section 4.4.2, Note.

⁸³⁷ US Department of Justice, FCPA: A Resource Guide to the US Foreign Corrupt Practices Act, *supra* n. 147, p. 57.

⁸³⁸ F.I. LESSAMBO, *supra* n. 846, p. 264.

Since they act as experts⁸³⁹, auditors owe a duty of professional care to their clients and aggrieved parties.⁸⁴⁰ The damages caused by auditors' misstatements are regarded as pure economic losses, rather than personal injury or property damage.⁸⁴¹ This dimension has important implications for the identification of the standard of care applicable because the causal link between auditors' negligent behaviour and the damage is harder to prove.

In the United States, the common law regarding an auditors' duty of care is not uniform among the states. In particular, four different standards have been adopted: privity; near-privity standard; restatement rule; and the reasonable foreseeability rule.⁸⁴² The privity standard is based on the consideration that auditors only owe a duty of care to those who are in privity of contract with them.⁸⁴³ Third parties were excluded from this possibility and the only available option for them was litigation for fraud, which was difficult to prove because necessitated the intent to deceive.⁸⁴⁴

The near-privity standard was applied for the first time in 1931 with the landmark *Ultramares* decision⁸⁴⁵ and further developed in the *Credit Alliance* case in New York State⁸⁴⁶. According to this doctrine, auditors owe a duty of care to those parties with whom they have an acknowledged relationship. In particular, the following elements must be proven: (i) the auditor must have been aware that the financial statement was to be used for a specific purpose by known parties; (ii) the known parties were meant to rely on the financial

⁸³⁹ H.B. SCHÄFER, 'Efficient Third Party Liability of Auditors in Tort Law and in Contract Law' (2004) 12 Supreme Court Economic Review 181, 208.

⁸⁴⁰ F.I. LESSAMBO, *supra* n. 830, p. 264.

⁸⁴¹ T. VAN HO and C. TERWINDT, 'Assessing the Duty of Care for Social Auditors' (2019) 27(2) *European Review of Private Law* 379, 401.

⁸⁴² J. CHUNG, J. FARRAR, P. PURI and L. THORNE, 'Auditor Liability to Third Parties After Sarbanes-Oxley: An International Comparison of Regulatory and Legal Reforms' (2010) 9(1) *Journal of International Accounting, Auditing and Taxation* 67, 78.

⁸⁴³ V. E. SCHWARTZ, K. KELLY and D. F. PARTLETT, *Prosser, Wade and Schwartz's Torts, Cases and Materials*, Foundation Press, 2020.

⁸⁴⁴ J. CHUNG *et al.*, *supra* n. 842.

⁸⁴⁵ *Ultramares v. Touche* (1931), 255 NY 170. This standard was later clarified in *Credit Alliance v. Arthur Andersen & Co.* (1985). 65 N.Y.2d 536, 493 N.Y.S.2d 435, 483 N.E.2d 110.

⁸⁴⁶ *Credit Alliance Corporation v. Arthur Andersen & Co.* (1985), 483 NE 2d 110.

statements; and (iii) there must be a conduct of the auditor showing its understanding of the third party's reliance on the financial statements.⁸⁴⁷

The foreseen doctrine was then broadened to include intended identifiable and unidentifiable beneficiaries ('restatement rule').⁸⁴⁸ Under the restatement rule, auditors are liable for their misstatement if they have damaged members of a limited group of known persons.⁸⁴⁹ In particular, they owe a duty of care if they know that: (i) the information they provide to recipients was intended to specific (or a limited group) of beneficiaries; and (ii) the information provided is intended to influence the beneficiaries in a transaction.⁸⁵⁰ Finally, the reasonable foreseeability rule was introduced in 1983, in order to further expand auditors' liability to third parties.⁸⁵¹ Under this standard, auditors owe a duty of care to those who have justifiably relied upon the incorrect financial statement.

When looking at anti-bribery management systems, business entities engaging with certified intermediaries can be regarded as third parties to certification companies. Apart from few exceptions in which they are in privity of contract with them (e.g. when they require *ex-ante* due diligence of intermediaries), the contractual relationship is between the certified party and the certification body. However, business entities often rely on the ABC certification attributed to their intermediaries and may be damaged by the negligent behaviour of certification bodies.

For instance, if a certified intermediary did not have adequate ABC measures in place at the time of the certification, business entities engaging with them are more likely to be exposed to the risks of corruption. In particular, they

⁸⁴⁷ C. BAKER, D. PRENTICE, 'The Origins of Auditor Liability to Third Parties Under United States Common Law' (2008) 13 (2) *Accounting History* 163, 182.

⁸⁴⁸ Restatement (Second) of Torts. Restatement (Second) of Torts, section 552.

⁸⁴⁹ F.I. LESSAMBO, *supra* n. 830, p. 271.

⁸⁵⁰ *Ibid.*

⁸⁵¹ *Rhode Island Hospital Trust National Bank v. Swartz, Bresenoff, Yavner & Jacobs* (1972), 455 F 2d 847, 851. *Rosenblum v. Adler* (1983), 93 NY 324.

could be subject to reputational, civil and criminal sanctions. In this context these entities would be entitled to compensation if the following elements are proven: the damage, the negligence of the certification body; the causal link between the negligence of the certification body and the damage; the circumstance that the certification body owes a duty of care to the business entity engaging with certified intermediaries.

This last condition can be more easily satisfied under the restatement rule or the foreseeability rule. Apart from few exceptions⁸⁵², business entities engaging with certified intermediaries, are not in an acknowledged relationship with certification bodies. However, it is reasonable to assume that they represent a known or foreseeable category of beneficiaries of ABC certification who would rely on the information provided through this instrument and could, consequentially, be damaged by any misstatements.

As far as the identification of the standard of care is concerned, an important distinction shall be drawn between the obligation to apply the normally required diligence (i.e. rule of negligence) and the obligation to produce a specific, contractually agreed, result (i.e. strict liability).⁸⁵³ These obligations may vary across the different stages of gatekeepers' activities. In particular, when certification bodies verify the information provided by the requesting entity⁸⁵⁴ (i.e. pre-issuance stage) and carry out ongoing monitoring and surveillance activities (i.e. post-issuance stage), they are expected to act according to the normal diligence of professionals in this field (i.e. *standard of care*).⁸⁵⁵ On the contrary, a strict liability applies to the condition of impartiality in the issuance of the certification.⁸⁵⁶

⁸⁵² For instance, when they are in a privity of contract with a certification body because they directly purchase the *ex ante* due diligence of intermediaries they want to engage with.

⁸⁵³ F.I. LESSAMBO, *supra* n. 830, p. 209.

⁸⁵⁴ Note that 'requesting entity' refers to entities requesting the certification.

⁸⁵⁵ J. DE BRUYNE, 'A Conceptual and Comparative Analysis of the Obligations of Third-Party Certifiers' (2018) 42(2) *Ohio Northern University Law Review* 210.

⁸⁵⁶ *Id.*, p. 211.

This distinction is also relevant for the certification of anti-bribery management systems. In particular, ISO 17021-1 confirms that the certification body is subject to strict liability only if it fails to guarantee the impartiality of its conformity assessment activities⁸⁵⁷, while it is subject to the rule of negligence if fails to base its decision on “sufficient evidence of conformity”.⁸⁵⁸ On the other hand, “[t]he certified client, and not the certification body, has the responsibility for consistently achieving the intended results” and is, therefore, strictly liable for failing to comply with specific standards.⁸⁵⁹

Finally, auditors can be criminally liable for defective disclosure in a client’s financial statement. In the United States, **criminal liability** may be imposed on accountants on the basis of several federal statutes and state law provisions. In particular, the criminal provisions of the Exchange Act⁸⁶⁰ and the Securities Act of 1933 (Securities Act)⁸⁶¹, “make it a felony for any person to violate wilfully any of the securities laws or regulations, to make wilful misstatements or omissions in any document filed in accordance with the securities laws and regulations or, if in connection with an application for membership or association, the rules of a self-regulatory organization”.⁸⁶²

In addition, specific provisions on the criminalization of auditors have been introduced with the SOX.⁸⁶³ This bill was enacted in the aftermath of the Enron scandal in which the accounting firm, Arthur Andersen, was indicted for witness tampering of its “employees, with intent to cause them to withhold documents from, and alter documents for use in, official proceedings, namely: regulatory and criminal proceedings and investigations.”⁸⁶⁴ This indictment

⁸⁵⁷ ISO 1702101:2015, section 5.2.1.

⁸⁵⁸ ISO 17021-1: 2015, section 4.4.2.

⁸⁵⁹ ISO 17021-1: 2015, section 4.4.1.

⁸⁶⁰ FCPA, *supra* n. 32, section 78ff.

⁸⁶¹ See Securities Act of 1933 section 24. FCPA, *supra* n. 32, section 77.

⁸⁶² E. TALLEY, ‘Cataclysmic Liability Risk Among Big Four Auditors’ (2006) 7 *Columbia Law Review* 106.

⁸⁶³ US, Sarbanes-Oxley Act of 2002: conference report (to accompany HR 3763).

⁸⁶⁴ *Arthur Andersen, LLP v. United States*, 544 US 696, 702 (2005).

was initially confirmed by the federal court in the Southern District of Texas and by the Fifth Circuit but it was reversed by the Supreme Court in 2005 for erroneous jury instructions.⁸⁶⁵ Even though the trial could have been retried under different jury instructions, Arthur Andersen largely ceased to exist in 2002, three years before the judgment of the Supreme Court.⁸⁶⁶

In response to this scandal, the SOX introduced the responsibility for auditors to maintain all audit or review workpapers for a period of five years. The knowing and wilful violation of this requirement can be punished with a maximum prison sentence of ten years.⁸⁶⁷ In addition, the maximum sentence for securities fraud was increased up to a maximum of twenty-five years of prison⁸⁶⁸ and the retaliation against whistle-blowers has been criminalized with a maximum of ten years of imprisonment⁸⁶⁹.

The criminal liability of ABC certification bodies may be similarly subject to a combination of common law and statutory law provisions. In the first instance, certification bodies who have knowingly and wilfully issued an inaccurate certification, may be indicted for fraud and for aiding and abetting the violation of the FCPA.⁸⁷⁰ However, criminal proceedings are subject to a higher standard of proof represented by the need to prove the *mens rea*. In this context, the introduction of ad hoc statutory provisions specifically addressing the responsibility of certification bodies could lead to higher deterrence.

On a final note, it is important to clarify that the effective application of liability measures may be affected by the ability of firms to pay financial compensation. In particular, as highlighted by the economic literature, the

⁸⁶⁵ E. TALLEY, *supra* n. 862.

⁸⁶⁶ *Ibid.*

⁸⁶⁷ US, Sarbanes-Oxley Act of 2002, section 802.

⁸⁶⁸ US, Sarbanes-Oxley Act of 2002, section 806.

⁸⁶⁹ US, Sarbanes-Oxley Act of 2002, section 1107.

⁸⁷⁰ US Department of Justice, FCPA: A Resource Guide to the US Foreign Corrupt Practices Act, *supra* n. 147, p. 35.

market of gatekeepers could collapse under the burden of excessive liability claims.⁸⁷¹ One possible way to avoid market failures, is represented by the introduction of a ‘maximum damage cap’.⁸⁷² This has been regarded to be especially necessary in the market of credit rating agencies (CRAs), considering that more business entities may rely on inaccurate ratings and may, therefore, be entitled to compensation.⁸⁷³

The market of certification of anti-bribery management systems is not immune from these risks, especially when intermediaries are addressed.⁸⁷⁴ Since these agents can provide their services to more clients, at the same time, the erroneous certification of their anti-bribery measures may have a domino effect and may severely affect the financial assets of gatekeepers. The only instrument to address this risk is currently defined by ISO 17021-1⁸⁷⁵, where under section 5.3 (Liability and financing), requires that “*the certification body shall be able to demonstrate that it has evaluated the risks arising from its certification activities and that it has adequate arrangements (e.g. insurance or reserves) to cover liabilities arising from its operations in each of its fields of activities and the geographic areas in which it operates.*”⁸⁷⁶ Notice that this requirement, not only, aims to reduce the risk of excessive liability in order to assure the internalization of the social costs of erroneous certification but, in addition, to provide sufficient resources to be invested in monitoring activities.⁸⁷⁷

⁸⁷¹ J. BARNETT, ‘Intermediaries Revisited: Is Efficient Certification Consistent with Profit Maximization?’ (2012) 37(3) *The Journal of Corporation Law* 479. J. COFFEE, *supra* n. 747, p. 304.

⁸⁷² A. PACCES and A. ROMANO, ‘A Strict Liability Regime for Credit Rating Agencies’ (2015) *American Business Law Journal*.

⁸⁷³ J. COFFEE, *supra* n. 792, p. 253.

⁸⁷⁴ See section 4.4 *supra*.

⁸⁷⁵ Note that this standard should be applied together with ISO 17021-9.

⁸⁷⁶ ISO 17021-1:2015, section 5.3.

⁸⁷⁷ The importance of capital requirements in reducing the risks of erroneous certification has also been discussed by J. COFFEE, *supra* n. 747, p. 302.

4.6. The impact of ABC certification on efficient sanctioning mechanisms of corporate bribery

Notwithstanding the positive role played by certification bodies in the reduction of information asymmetries between business entities and their intermediaries, their proliferation was met with scepticism and mixed reactions. In particular, two main concerns emerged: (i) the certification of ABC programs could be used as a ‘box ticking’ exercise⁸⁷⁸; and (ii) the adoption of ABC certification could result in full immunity from prosecution.⁸⁷⁹ The combination of these two effects could lead to the risk of moral hazard and would significantly reduce the overall deterrence of foreign bribery.

Moral hazard emerges when “there is imperfect information concerning the actions of those who purchase insurance, because those actions cannot be perfectly monitored”.⁸⁸⁰ Because of this information asymmetry, insurance contracts cannot provide for all the actions to be undertaken by the insured party.⁸⁸¹ Under these circumstances the latter does not bear the full consequences of his behaviour and does not have sufficient incentives to reduce the risks for which he is insured.⁸⁸²

A full exemption from corporate criminal liability attributed to companies engaging with certified third-party intermediaries, could be compared to a form of insurance. As discussed in Section 4.2 above, not all ABC certifications are equally reliable and law enforcement authorities cannot fully observe the effort exerted by companies in screening and selecting more

⁸⁷⁸ J. MURPHY, Will ISO 37001 Become a Box-Checking Formality? 27.11.2018, The FCPA Blog <<https://fcpablog.com/2018/11/27/will-iso-37001-become-a-box-checking-formality>> accessed 05.09.2020.

⁸⁷⁹ K. GRANT-HART and D. TREVLEY, The Top Five Myths About ISO 37001, The FCPA Blog, 14.02.2017 <<https://fcpablog.com/2017/2/14/the-top-five-myths-about-iso-37001-exposed>> accessed 31.08.2020.

⁸⁸⁰ J. STIGLITZ, ‘The Pure Theory of Moral Hazard’ (1983) 8(26) *The Geneva Papers on Risk and Insurance*, p. 5.

⁸⁸¹ Ibid.

⁸⁸² Ibid.

accurate and trustworthy certified intermediaries. In this context, firms would not bear the full consequences of engaging with certified intermediaries entailing a higher risk of corruption, and moral hazard may emerge.

The negative impact of moral hazard can, partially, be mitigated if the following two measures are adopted: (i) on the one hand, a cap is set on the amount insurable; and (ii) on the other hand, actions are taken to reduce the information asymmetry regarding the desirable conduct of the insured party (e.g. monitoring and auditing).⁸⁸³ Under these circumstances, the insured party would, partially, bear the consequences of his actions and would have fewer opportunities to act in a risky manner. Similar solutions are adopted in the insurance market, with co-insurance clauses, deductible provisions and quantity restrictions⁸⁸⁴, and in the context of medical insurance with inspections.⁸⁸⁵

Analogous measures can be adopted in the context of the deterrence of transnational corporate bribery. In the first instance, it is important to clarify that the adoption of ABC certification, or the interaction with certified intermediaries, is not associated with a full immunity from prosecution in any of the jurisdictions analysed in this study.⁸⁸⁶ Alternatively, in the United States, the interaction with certified intermediaries can be taken into account by law enforcement authorities in the assessment of the effectiveness of the ABC programs adopted by companies, subject to criminal proceedings. In particular, as anticipated in the introduction, the DOJ and SEC FCPA Guidelines clarify that the DOJ and SEC, would consider “whether the company has informed third parties of the company’s compliance program and commitment to ethical and lawful business practices and, where

⁸⁸³ J. STIGLITZ, *supra* n. 880. B. HÖLMSTROM, ‘Moral Hazard and Observability’ (1979) 10(1) *The Bell Journal of Economics* 74, 91.

⁸⁸⁴ J. STIGLITZ, *supra* n. 880, p. 31.

⁸⁸⁵ K. ARROW, ‘Uncertainty and the welfare economics of medical care’ in A. FINKELSTEIN et al., (eds.), *Moral Hazard in Health Insurance*, Columbia University Press 1963, p. 110.

⁸⁸⁶ See Chapter II, *supra*.

appropriate, **whether it has sought assurances from third parties, through certifications and otherwise, of reciprocal commitments**".⁸⁸⁷

The standard set out in this guidance document, not only, appears consistent with the intent to reduce the risk of moral hazard but it is also aligned with the principles of optimal corporate criminal liability, defined by the economic literature. As shown by Arlen, the goals and requirements of corporate criminal liability are different from those of individual liability.⁸⁸⁸ Since corporations are often the most cost-effective providers of many forms of prevention and policing⁸⁸⁹, a socially desirable liability system needs to induce optimal prevention and policing.⁸⁹⁰

As discussed in Chapter II, one of the most suitable ways to achieve this objective is represented by a multi-tiered duty-based liability. Under this regime, firms are subject to three duties (i.e. *ex-ante* monitoring; self-reporting of detecting wrongs and full cooperation with enforcement authorities). If companies meet one goal (e.g. *ex-ante* monitoring) but fail to achieve the others, are only entitled to a partial liability mitigation.⁸⁹¹ Under this framework, they will have the right incentives to internalize the social costs of crime and to adopt the different steps of the prevention and policing processes.⁸⁹²

The choice of business entities to interact with ABC certified intermediaries can be regarded as an investment in *ex-ante* and *ex-post* monitoring. The certification process is, in fact, primarily represented by on-line and on-site due diligence activities and by the verification of intermediaries' compliance with anti-bribery management standards. Consequently, a full immunity from

⁸⁸⁷ US Department of Justice, FCPA: A Resource Guide to the US Foreign Corrupt Practices Act, *supra* n. 147, p. 62.

⁸⁸⁸ J. ARLEN, *supra* n. 48, p. 184.

⁸⁸⁹ *Id.*, p. 164.

⁸⁹⁰ *Id.*, p. 164.

⁸⁹¹ *Id.*, p. 165.

⁸⁹² *Id.*, p. 165.

prosecution would not create the adequate incentives for companies to invest in self-reporting and cooperation because these steps would not be accompanied by additional rewards.

In addition, the risk of moral hazard can be reduced if information asymmetries regarding the behaviour of insured parties are lowered, through control mechanisms.⁸⁹³ In the context of ABC certification, this objective could be achieved through the promotion of the *ex-ante* and *ex-post* measures, discussed in Sections 4.4 and 4.5 above. As discussed, reputational incentives are not sufficient to induce an efficient behaviour of certified intermediaries. Consequently, additional regulatory incentives are necessary, from the restriction of the entry into the market of certification bodies and the clarification of standards of quality and independence of the certification process, to the liability towards affected third parties.

Certifications based on ISO 37001 appear to be better suited to satisfy these criteria. This is especially true if certification companies using this standard also choose to base their certification process on ISO 17021-1 and ISO 17021-9 and to get accredited by independent bodies.⁸⁹⁴ However, as discussed in Section 4.4 more steps need to be taken. In the first instance, the standards set out by ISO 17021-1 and ISO 17021-9 can be improved, with the introduction of additional requirements of independence (e.g. partner rotation). In addition, these requirements of independence and accountability should apply beyond ISO standards to all certification companies and the compliance with these principles should be mandatory, rather than voluntary.

With the objective to reduce the information asymmetry related to the certification process, it appears desirable that the DOJ Guidelines on the FCPA, explicitly clarify the standards of independence and accountability defined in this study. This is particularly necessary when considering that

⁸⁹³ B. HÖLMSTROM, *supra* n. 883.

⁸⁹⁴ See section 4.4, *supra*.

these Guidelines, for the purpose of attributing a liability mitigation, refer to “whether the company has informed third parties of the company’s compliance program and commitment to ethical and lawful business practices and, where appropriate, **whether it has sought assurances from third parties, through certifications and otherwise, of reciprocal commitments**”.⁸⁹⁵

4.7. Conclusions

In this Chapter I have looked at the certification of ABC program as a tool complementing the *ex-ante* ABC measures adopted by firms, in order to reduce the information asymmetry regarding third-party intermediaries they engage with. However, not all certifications are equal and these mechanisms can vary from instruments based on self-declaration of the certified party to those based on documents review and on-site audits by notification bodies.

These differences may have important implications for the ability of certification companies to distinguish between intermediaries with adequate and inadequate ABC measures in place. In fact, certifications are meaningful signals, as long as their cost is negatively correlated to the quality they represent. In the context of ABC certification, this condition is satisfied if intermediaries with inadequate ABC programs in place face higher expected costs of certification than those who have adopted adequate anti-bribery measures. In order for this signal to perfectly distinguish between these two categories of intermediaries (i.e. separating equilibrium), the net benefit of certification has to be negative for intermediaries with low investments in anti-bribery compliance.

Even if certification can never be regarded as an insurance that companies are immune from the risk of corruption, in Sections 4.4 and 4.5, I have looked at the conditions necessary to induce a semi-separating equilibrium in which the

⁸⁹⁵ US Department of Justice, FCPA: A Resource Guide to the US Foreign Corrupt Practices Act, *supra* n. 147.

majority of certified intermediaries have an adequate investment in anti-bribery measures. As market-based incentives (e.g. reputational sanctions) do not appear sufficient to achieve this objective, I have looked at regulatory incentives. In particular, I have looked at the identification of standards of quality, independence and professionalism of those in charge of the certification process; at the liability mechanisms to hold notified companies accountable for their negligent or intentional misconduct and at ways to restrict and monitor the access to this market.

The analysis developed in this Chapter hinges upon the literature on gatekeepers and expands its application to the certification of anti-bribery programs. In doing so, I have looked at the peculiarities of ABC certifications, and I have considered whether the existing market-based and regulatory measures available are consistent with efficiency considerations. The analysis has shown that ISO 17021-1 and ISO 17021-9 represent an important first step towards a more adequate framework. However, more work needs to be done in this direction. In the first instance, the standards of independence can be strengthened, for instance, with mandatory rota systems. In addition, States should identify independent bodies in charge of the oversight and enforcement of these principles. Finally, compliance with these standards and its verification by independent bodies shall be mandated to all certification entities. In this context, the US DOJ FCPA Guidelines should be amended to restrict the potential benefits attributed to business entities interacting with certified intermediaries⁸⁹⁶, to those who satisfy these criteria.

⁸⁹⁶ Ibid.

Appendix 2. Pooling Equilibria

The informative power of signals is eliminated when different types choose the same action (**pooling equilibrium**).⁸⁹⁷ In the context of the certification of ABC programs adopted by intermediaries, this outcome could take place in the following circumstances:

(i) The costs of certification of ABC programs is low for intermediaries with inadequate anti-bribery measures.

This outcome would occur if the costs of ABC certification for intermediaries with inadequate ABC programs are low and, consequently, their net benefit is positive for them, as well as for intermediaries with adequate programs in place ($C_A < B_A$) and ($C_I < B_I$). The costs of certification are more likely to be reduced for intermediaries with inadequate ABC programs, when they rely on the self-declaration of these agents.⁸⁹⁸ However, this market equilibrium is not sustainable in the long run. As firms learn that certification has no informative power, they will not reward agents with this signal and the market for certification will cease to exist.⁸⁹⁹

(ii) The benefit of certification of ABC programs is low for intermediaries with adequate anti-bribery measures.

This outcome is likely to emerge if the expected sanction of companies paying bribes through their intermediaries is not sufficiently criminalised. In this context, corporate entities would not have sufficient incentives to pay more for intermediaries with adequate ABC measures and the net benefit of certification would be low both, for intermediaries with adequate ABC programs and for those with an inadequate investment in anti-bribery measures ($C_A > B_A$) and

⁸⁹⁷ For a review of the different market equilibria in signaling games, see M. BACHARACH and D. GAMBETTA, *supra* n. 741.

⁸⁹⁸ See section 4.2 *supra*.

⁸⁹⁹ B.L. CONNELLY et al., *supra* n. 730.

$$(C_I > B_I).$$

The two pooling equilibria discussed above refer to two extreme situations in which the market for certification would cease to exist. Since I do not observe these conditions in the market of certification for ABC programs adopted by intermediaries, I can exclude these hypotheses.

5. Conclusions

This study aims to identify the optimal legal framework to address foreign corporate bribery in which intermediaries are involved. The analysis has been conducted from a positive and normative perspective. In the first instance, a comparative analysis of the legislative measures adopted to address foreign corporate bribery committed by intermediaries has been undertaken in Chapter II. To this end, two international conventions (the OECD Convention and UNCAC) and three national legislations (the FCPA, the UKBA and the Italian Legislative Decree n. 231/2001) have been analysed. In the second instance, through the lenses of the economic analysis of corporate crime, the following research questions have been explored:

- (i) Assuming the goal of social welfare maximization, should corporations be held vicariously liable for crimes committed by the intermediaries?
- (ii) Is there a difference in effectiveness between ABC program addressing employees and those addressing intermediaries? And if so - may this difference justify, from a welfare maximization point of view, a variation between the structure of the corporate liability regime applicable to employee misconduct and the one applicable to misconduct of third parties?
- (i) What is the role that certifications of ABC programs adopted by third parties may play in improving the efficiency of ABC enforcement policies?

The different research questions will be discussed in section 5.1, 5.2 and 5.3 below. Finally, the contribution, limitations of this study and possible extensions for future research will be introduced in Section 5.4.

5.1. Assuming the goal of social welfare maximization, should corporations be held vicariously liable for crimes committed by the intermediaries?

Chapter III looks at the economic rationale to extend vicarious corporate criminal liability, for international bribery, beyond the scope of the employment relationship. Notwithstanding the important role played by intermediaries in foreign bribery, the economic literature on vicarious liability for corruption has exclusively focused on employees.⁹⁰⁰ My analysis hinges upon the economic literature on vicarious civil liability for third parties and extends its key findings to the context of criminal offenses.⁹⁰¹

In particular, it is argued that if companies do not face any consequences for the criminal conduct of their intermediaries, they would not have sufficient incentives to prevent and deter this crime. Companies would, in fact, not internalise its social negative consequences and would be incentivised to externalise illegal activities (including bribery). This could induce corporate organizations to strategically delegate certain activities to independent contractors, as suggested by theoretical and experimental studies. In particular, the latter have proven that principals may be interested in employing external agents in order to incentivize the implementation of immoral actions that they would, otherwise, be reluctant to undertake.⁹⁰²

It is concluded that, in order to avoid these harmful consequences, companies should be vicariously liable for the conduct of intermediaries, not only for tortious liability but also for criminal offenses. The comparative analysis conducted in Chapter II has shown that, even though all the legislative measures analysed appear consistent with this result, procedural differences

⁹⁰⁰ To the best of my knowledge, the only exception is represented by J. LAMBSDORFF, *supra* n. 28. In this paper, Lambsdorff considers the risk of 'paper-based' compliance, when attributing a liability mitigation for third-parties' offences.

⁹⁰¹ J. ARLEN and W.B. MCLEOD, *supra* n. 39.

⁹⁰² J. HAMMAN et al, *supra* n. 545. R. KRAAKMAN, *supra* n. 463, p. 251. He refers to the possibility to extend the liability of corporations for the conduct of independent contractors as a form of 'piercing a horizontal veil'.

can make a difference in the effectiveness of these measures. In particular, in the UKBA, corporations are criminally liable when they fail to prevent bribes paid by any “associated person”.⁹⁰³ On the contrary, in the Italian legal system, corporate liability for independent contractors is not expressively covered and should be deducted by courts, every time complicity is proven.⁹⁰⁴ Finally, according to the FCPA, the *mens rea* of corporations can be inferred when they are aware of the criminal conduct of their agents.⁹⁰⁵ When intermediaries are addressed, this standard is satisfied even when courts prove a ‘deliberate ignorance’ of firms, in case of ineffective ABC programs.⁹⁰⁶

5.2. Is there a difference in effectiveness between ABC program addressing employees and those addressing intermediaries? And if so - may this difference justify, from a welfare maximization point of view, a variation between the structure of the corporate liability regime applicable to employee misconduct and the one applicable to misconduct of third parties?

The economic literature has identified two main objectives of corporate criminal liability: (i) the internalisation of the social harm of crime; and (ii) the promotion of corporate self-prevention and self-enforcement activities.⁹⁰⁷ The analysis in Chapter III has shown that the ability of firms to efficiently achieve these objectives depends on whether crimes have been committed by employees or intermediaries.

In particular, the ability of firms to prevent and detect corporate crime, hinges upon the assumption that companies are often better placed than the State to

⁹⁰³ UKBA, *supra* n. 34, Article 7.

⁹⁰⁴ OECD, *supra* n. 455, p. 96.

⁹⁰⁵ US Department of Justice, FCPA: A Resource Guide to the US Foreign Corrupt Practices Act, *supra* n. 147, p. 22; see also FCPA, *supra* n. 32, section 78dd-1(f)(2) (defining the term ‘knowing’ in the FCPA).

⁹⁰⁶ US Department of Justice, FCPA A Resource Guide to the US Foreign Corrupt Practices Act, *supra* n. 147, p. 22. OECD, *supra* n. 455, p. 100.

⁹⁰⁷ J. ARLEN, *supra* n. 48.

monitor their own agents.⁹⁰⁸ However, this may not be the case for third parties. It is, in fact, reasonable to assume that companies have a more limited ability to control and monitor external agents with whom they are not in a long-term and more stable relationship. As highlighted by the UNODC Guidelines⁹⁰⁹, this difference can have an impact on the “level of influence on partners to comply with anti-corruption policies and procedures”.⁹¹⁰

In Chapter III, I have looked at the impact of this more limited ability of firms to control their third parties (compared to their employees) on optimal deterrence. In particular, through a simplified economic model, the following results emerged. In the first instance, optimal investments in ABC programs are a decreasing function of a firm’s degree of control over its agents.⁹¹¹ In other words, the more limited ability of firms to control third parties needs to be compensated by a greater investment in ABC programs. It is important to notice that, for the purpose of simplicity, the analysis has exclusively focused on the *ex-ante* activities of ABC programs.

The comparative analysis conducted in Chapter II has shown that the need to exercise greater effort in ABC programs, when dealing with third-party agents is explicitly mentioned only by the UNCAC and by the UKBA. In the other jurisdictions, companies are expected to invest in third party due diligence but the investment in ABC programs is not based on the ability of firms to control these agents.⁹¹² Moreover, Proposition 4 has shown that the same liability mitigation should be associated with the ABC investment in employees and intermediaries. The UKBA and the UNCAC are consistent with this finding. Even though they explicitly require greater investments in ABC programs when intermediaries are involved,⁹¹³ the liability mitigation

⁹⁰⁸ J. ARLEN and R. KRAAKMAN, *supra* n. 477.

⁹⁰⁹ UNODC, *supra* n. 374.

⁹¹⁰ *Ibid.*

⁹¹¹ See Proposition 1 *supra*.

⁹¹² See section 3.6.2 *supra*.

⁹¹³ *Ibid.*

applicable in case of effective ABC programs, does not distinguish between employees and intermediaries.

The result of Proposition 4 suggests that the net private and social benefits of firms' investment in ABC programs addressing intermediaries, is lower than the net private and social benefits of ABC programs addressing employees. The greater challenges associated with the implementation of ABC programs with regard to third-party intermediaries is supported by empirical findings. In a report based on a global survey of 659 respondents around the world, companies declared that one of the greatest compliance challenges is represented by the regulation of third-party intermediaries.⁹¹⁴ However, despite the importance of the issue, more than one third of the respondents have recognised to have insufficiently complied with the standards required. Policy makers have recently raised concerns regarding the risks of an insufficient implementation of ABC programs dealing with this aspect.⁹¹⁵

5.3. What is the role that certifications of ABC programs adopted by third parties may play in improving the efficiency of ABC enforcement policies?

In Chapter IV I look at the certification of ABC programs adopted by intermediaries as a way to complement the investment in *ex-ante* ABC measures and to reduce the information asymmetry between corporations and their third parties. This instrument is meant to complement the monitoring and verification activity conducted by firms, in order to enable them to identify intermediaries with adequate ABC programs in place ('signalling' function).

However, as the economic literature has shown, signals are relevant as long as their cost is negatively correlated to the quality they represent. In chapter IV I have looked at the conditions under which the certification of ABC

⁹¹⁴ KPMG, Anti-Bribery and Corruption: Rising to the Challenge in the Age of Globalization, 2015.

⁹¹⁵ OECD Report, 2014.

programs adopted by intermediaries represent meaningful signals. In the first instance, I have identified three different types of certificates: (i) certificates based on self-reporting: self-declaration (also in the form of questionnaire) by the intermediary; (ii) certificate based on the review of documents (with and without interviews); and (iii) certifications based on audits: *ex-ante* and *ex-post* phases of ABC programs. Given the greater monitoring and screening activity required, the third typology appears more appropriate to distinguish between effective and ineffective ABC programs.

In addition, I have looked at the conditions necessary to avoid that certification bodies are exposed to conflict of interests and errors. In particular, the *ex-ante* regulatory measures and *ex-post* sanctioning regimes have been discussed. When looking at these hypotheses a comparison with the measures adopted by the US to regulate auditors has been introduced. The analysis has shown that, even though certification bodies issuing ISO 37001 and complying with ISO 17021-1 and ISO 17021-9 appear better suited to promote the independence of certification bodies, more steps need to be taken. In particular, additional rules addressing the risks of conflict of interests (e.g. rota system) could be introduced. Moreover, these rules should be mandatory for all certification bodies and compliance with these standards should be subject to the scrutiny of a third-party independent body.

The introduction of these standards is, not only, necessary to improve the quality of the activity undertaken by certification bodies. This is, in fact, also necessary to reduce the risks of moral hazard. These risks may emerge in legislations in which the interaction with certified intermediaries is associated with a regulatory benefit. This is the case of the US FCPA and SEC Guidelines, where they allow for a liability mitigation when “[...] the company has informed third parties of the company’s compliance program and commitment to ethical and lawful business practices and [...] **it has sought assurances from third parties, through certifications and**

otherwise, of reciprocal commitments".⁹¹⁶ This study suggests that, when the certification of ABC programs is explicitly recognised as a possible condition to obtain a liability mitigation, this should be associated with the requirements of independence and accountability introduced in Chapter IV.

5.4. Contribution, limitations and future research

This study aims to identify the legislative framework for optimal deterrence of international corporate bribery, when intermediaries are involved. My analysis has shown that, in order to favour the internalisation of the social harm of crime, the vicarious liability of companies should be extended beyond the employment relationship. In addition, I have shown that the investment in ABC programs should be higher for intermediaries, given the more limited ability of firms to control these agents.

Moreover, I have argued that the certification of ABC programs adopted by intermediaries can increase the monitoring ability of firms to verify the adequate investment in ABC measures adopted by their third parties. This instrument can be a meaningful signal, if the cost of certification is negatively correlated to the quality they represent and, as long as certification companies are subject to standards of professionalism and independence. Finally, I have identified the standards of independence and professionalism for third-party certification entities and I have argued that they are necessary to limit the risk of moral hazard, especially when ABC certification is associated with a liability mitigation. When looking at these results, the limitations discussed below shall be considered.

The comparative legal analysis focuses on two international conventions (e.g. the OECD Convention and UNCAC) and on three national legislations (the FCPA, the UKBA and the Italian Legislative Decree n. 231/2001). A future extension of this study could look at the ways in which the OECD Convention

⁹¹⁶ US Department of Justice, FCPA: A Resource Guide to the US Foreign Corrupt Practices Act, *supra* n. 147.

and the UNCAC have been implemented in other jurisdictions. The legislative framework provided by these acts is, in fact, sufficiently flexible to allow signatory parties to adapt their provisions to the diverse legal contexts in which they are implemented (e.g. principle of functional equivalence).⁹¹⁷ This analysis could, not only, identify important differences in the ways in which these provisions have been transposed in national legislations, but also regarding the ways in which they have been enforced.

In addition, the analysis could expand its scope, to cover the demand side, along the supply side of bribery. From an international perspective, this dimension is exclusively regulated by the UNCAC under article 16, (2), stating that: “[e]ach State Party shall consider adopting such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally, the solicitation or acceptance by a foreign public official or an official of a public international organization, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties”.⁹¹⁸ In the context of foreign bribery, a recent OECD study has looked at the criminalisation of public officials involved in corrupt payments. The study has shown that “[e]nforcement actions do take place on the demand side, but public officials are known to have been sanctioned in only one fifth of the 55 schemes covered by the survey”.⁹¹⁹ Intermediaries are often based in host countries and, directly, interact with public officials. A future extension of this study could include the criminalisation of public officials, in the assessment of optimal deterrence of bribes paid by intermediaries.

⁹¹⁷ OECD, *supra* n. 75.

⁹¹⁸ UNCAC, *supra* n. 37, Article 16 (2).

⁹¹⁹ OECD, *Foreign Bribery Enforcement: What Happens to the Public Officials on the Receiving End?* 2018 <<http://www.oecd.org/corruption/foreign-bribery-enforcement-what-happens-to-the-public-officials-on-the-receiving-end.htm>> accessed 24.01.2021.

In addition, a future study may expand the scope of the economic model, discussed in Chapter III. In particular, the model could expand its analysis in order to cover small facilitating payments and corruption in which thinly capitalised and small and medium sized enterprises are involved. Assumption 3 in the economic model introduced in Chapter III, in fact, restrict this analysis to the hypothesis in which corporate assets are relatively larger than the expected social harm from crime. This restriction allows to exclude grand corruption violations committed by small and medium size enterprises and has important implications for the definition of the regulatory incentives necessary to induce compliance with the socially optimal level of effort in prevention. In particular, if firms' assets are too low (i.e. Assumption 3 does not hold), the liability mitigation introduced with Proposition 2 is not a sufficient instrument to align private and public incentives. In this circumstance, corporations would comply with the socially optimal standard of anti-bribery measures, exclusively when their investment is associated with rewards.⁹²⁰

Starting from 2012, a similar incentive applies to small and medium size enterprises based in Italy.⁹²¹ Under this regime, firms' compliance with anti-bribery standards is verified by the Italian Competition Authority and if a certain threshold is met, the following benefits can be attributed: a higher ranking for public procurement procedures and a facilitated access to credit.⁹²² However, this hypothesis falls outside the scope of this study and may be further investigated in a future extension of this work.

⁹²⁰ In particular, if $A < \frac{z}{se}$, the full internalisation of the social harm of crime can be obtained by setting $f = A$, in the case of non-compliance and a suitable $\bar{f} < 0$, in the case of compliance with x^{**} .

⁹²¹ For general information, see Rating di Legalità ('Legality Rating') <<http://www.agcm.it/competenze/rating-di-legalita>> accessed 21.02.2021.

⁹²² See Delibera AGCM del 15 Maggio 2018, n. 27165 - Regolamento attuativo in materia di rating di legalità (Decision of the Italian Antitrust Authority implementing legality rating) <<http://www.agcm.it/chi-siamo/normativa/dettaglio?id=79070abd-3c85-4a2f-a350-e60ade4153ed&parent=Rating%20di%20legalit%C3%A0&parentUrl=/chi-siamo/normativa/rating-di-legalit>> accessed 21.02.2021.

In addition, future research should consider the hypothesis in which the investment in ABC programs has an impact, not only, on *ex-ante* prevention but also on *ex-post* deterrence. As highlighted by Arlen and Kraakman (1997) and by Oded (2011),⁹²³ *ex-post* ABC measures may create a trade-off between the objective of inducing a full internalization of the social harm of crime and the one of favouring corporate investment in self-enforcement measures. In order to balance these objectives, a composite or compound liability regime, with mitigated sanctions should apply. Notice that the mitigation introduced by these models differ from the one introduced by Proposition 2 in Chapter III. As discussed in Assumption 1, corporate assets are assumed to be lower than the social harm of crime discounted by the probability of detection.⁹²⁴

Under this framework, if penalties were equivalent to corporate assets, they would not be sufficient to induce a full internalization of the externalities of crime. The liability mitigation analysed in the model discussed in Chapter III is, therefore, a necessary instrument to achieve full deterrence. In particular, the reduction of the sanction allows to compensate firms for complying with the socially optimal level of firms' effort in prevention and aligns private and social incentives.⁹²⁵ A future extension of this study may verify the impact of agency costs on *ex-post* compliance measures.⁹²⁶ It would be interesting to see how this additional element could impact the optimal standard of investment in ABC programs (Proposition 1) and the desirable liability mitigation (Proposition 4).

The existing legislation on foreign corporate bribery has a very broad definition of third-party intermediaries, including consulting firms, distributors, resellers, subcontractors, franchisees, joint venture partners and

⁹²³ J. ARLEN and R. KRAAKMAN, *supra* n. 477. S. ODED, *supra* n. 485.

⁹²⁴ See Assumption 1.

⁹²⁵ Under this regime, corporations would face two different payoffs. On the one hand, if they do not comply with the socially optimal standard of prevention, they would pay up to their assets. On the other hand, if they comply with the socially efficient standard, a more lenient penalty applies.

⁹²⁶ J. ARLEN, *supra* n. 496. Note that, even when considering *ex post* policing, a liability mitigation may not be necessary when the 'potentially perverse' effect of this activity is overcome by *ex ante* prevention.

subsidiaries.⁹²⁷ As highlighted by the UNODC Guidelines⁹²⁸, companies exercise different levels of controls over these agents. In particular, they appear to have a more limited ability to control ‘unrelated intermediaries’⁹²⁹: agents, intermediaries, contractors and suppliers. On the opposite, firms appear better able to control their ‘related intermediaries’⁹³⁰: subsidiaries, joint venture partners and affiliates.⁹³¹ The economic model discussed in Chapter III has shown that the desirable (socially and privately) investment in ABC programs is an inverse function of the level of control. A future extension of this study could distinguish between these different typologies of intermediaries and verify whether the analysis developed in Chapter III and IV still holds for both categories.

⁹²⁷ OECD Report 2009, *supra* n. 11.

⁹²⁸ UNODC, *supra* n. 374.

⁹²⁹ OECD, *supra* n. 455, p. 91.

⁹³⁰ *Id.*, p. 79.

⁹³¹ UNODC, *supra* n. 374.

BIBLIOGRAPHY

G. T. ABED and S. GUPTA, 'Governance, Corruption & Economic Performance', International Monetary Fund, 2002.

J. ABOWD, 'Does Performance-Based Managerial Compensation Affect Corporate Performance?' (1990) 43(3) *Industrial and Labor Relations Review* 52, 73.

S.R. ACKERMAN, *Anti-Corruption Policy: Can International Actors Play a Constructive Role?*, Carolina Academic Press, 2013.

J. AHN, A.K. KHANDELWAL and S.-J. WEI, 'The Role of Intermediaries in Facilitating Trade' 2010 *NBER Working Paper*, <https://www.nber.org/system/files/working_papers/w15706/w15706.pdf>.

G. AKERLOF, 'The Market for "Lemons": Quality Uncertainty and the Market Mechanism' (1970) 84(3), *The Quarterly Journal of Economics* 488, 500.

P. ALLDRIDGE, 'The UK Bribery Act: The Caffeinated Younger Sibling of the FCPA' (2012) 73(5) *Ohio State Law Journal* 1181,1216.

D. AMANN, 'Harmonic Convergence? Constitutional Criminal Procedure in an International Context' (2000) 75(3) *Indiana Law Journal* 809, 873.

S. ANDERSON, J.D. DALY and M.F. JOHNSON, 'Why firms seek ISO 9000 certification: Regulatory compliance or competitive advantage?' (1999) 8(1) *Production and Operations Management* 28,43.

G. APOLLON, 'FCPA Compliance Should Not 'Cost an Arm and a Leg': Assessing the Potential for Enhanced Cost-Efficiency and Effectiveness for an Anti-Corruption Compliance Program with the Implementation of an Enterprise Legal Risk Management Framework' (2017) 5(2) *Penn State Journal of Law and International Affairs* 486,537.

AREL, *Presentazione della 'Proposta di modifica D.Lgs. 231/2001 in materia di responsabilità amministrativa degli enti*, 27.09.2010 <<http://www.arel.it/attivita/convegni/presentazione-della-proposta-di-modifica-d-lgs-2312001-in-materia-di-responsabilita-amministrativa-degli-enti>>.

A. ARGANDOÑA, 'Corruption and Companies: The Use of Facilitating Payments' (2005) 60 *Journal of Business Ethics* 251, 264.

J. ARLEN, 'The Potentially Perverse Effect of Corporate Criminal Liability' (1994) 23(2) *Journal of Legal Studies* 833,867.

J. ARLEN, *Research Handbook on the Economics of Torts*, Edward Elgar, 2014.

J. ARLEN and R. KRAAKMAN, 'Controlling Corporate Misconduct: An Analysis of Corporate Criminal Liability Regimes'(1997) 72(4) *New York University Law Review* 687,779.

J. ARMOUR, C. MAYER and A. POLO, 'Regulatory sanctions and reputational damage in financial markets'(2016) 52(4) *Journal of Finance and Quantitative Analysis* 1429,1448.

M. ARNONE and L. S. BORLINI, *Corruption, Economic Analysis and International Law*, Edward Elgar, 2014.

B. ARRUÑADA, C. PAZ-ARES, 'Mandatory rotation of company auditors: A critical examination'(1997) 17(1) *International Review of Law and Economics* 31, 61.

B. ASSUMMA, 'Il ruolo delle linee guida e della best practice nella costruzione del modello di organizzazione e di gestione e nel giudizio di idoneità di esso' (2010) 4 *Rivista* 231 191, 200.

C. BAKER, D. PRENTICE, 'The origins of auditor liability to third parties under United States common law'(2008) 13(2) *Accounting History* 163, 182.

R. BAKER, *Unaoil and Trace, How the Ahsanis Fooled the World*, The Age, 2016 <<https://www.theage.com.au/interactive/2016/the-bribe-factory/day-2/trace.html>>.

J. BARNETT, 'Intermediaries Revisited: Is Efficient Certification Consistent with Profit Maximization?'(2012) 37(3) *The Journal of Corporation Law* 475, 528.

M.C. BASSIOUNI, *International Criminal Law, Multilateral and Enforcement Mechanisms*, Martinus Nijhoff Publishers, 2008.

G. BAYAR, 'The role of intermediaries in corruption'(2005) 122 *Public Choice* 277, 298.

G. S. BECKER, 'Crime and Punishment: An Economic Approach' (1968) 76(2) *The Journal of Political Economy* 169, 217.

R. BEDI, 'India's Bizarre Arms Procurement Policy'(2000) 42 *Economic and Political Weekly* 3716.

C. BINHAM, 'SFO Chief Warns of New Global Reach', *Financial Times*, 23.05.2011 <<https://www.ft.com/content/8c056ce2-8562-11e0-ae32-00144feabdc0>>.

B. BOCKAERT, G. DE GEEST and C. NAGEL, *Encyclopedia of Law and Economics*, First Edition, Edward Elgar 2000.

N. BOISTER, *An Introduction to Transnational Criminal Law*, Oxford University Press, 2012.

P. BOLTON, X. FREIXAS and J. SHAPIRO, 'The Credit Ratings Game'(2012) 67(1) *The Journal of Finance* 85,111.

D. BONGAERTS, 'Alternatives for Issuer-Paid Credit Rating Agencies' (2014) *European Central Bank Working Paper Series*, n. 1703.

E. BURGER and M. HOLLAND, 'Why the Private Sector is Likely to Lead the Next Stage in the Global Fight Against Corruption'(2006) 30(1) *Fordham International Law Review* 45, 74.

P. BURLA, E. CIERI and I. MACCANI, *La responsabilità da reato della società*, Il Sole 24 Ore, 2009.

D. CAIN, 'The Dirt on Coming Clean: Perverse Effects of Disclosing Conflicts of Interest'(2005) 34(1) *Journal of Legal Studies* 1,25.

J. CAMPOS D. LIEN and S. PRADHAN, 'The impact of corruption on investment: Predictability matters'(1999) 27(6) *World development* 1059, 1067.

R. CANTOR and F. PACKER, 'Multiple Ratings and Credit Rating Standards: Differences of Opinion in the Credit Rating Industry' (1996) *Federal Reserve Bank of New York Staff Reports* n. 3.

H. CASSIN, *Goldman Sachs reaches \$3.3 billion resolution of Malaysia FCPA violations*, The FCPA Blog Post, 22.10.2020 <<https://fcpablog.com/2020/10/22/goldman-sachs-reaches-3-3-billion-resolution-of-malaysia-fcpa-violations/>>.

H. CASSIN, *Wall Street bank earns top spot on FCPA Blog top ten list*, The FCPA Blog Post, 26.10.2020 <<https://fcpablog.com/2020/10/26/wall-street-bank-earns-top-spot-on-fcpa-blog-top-ten-list/>>.

V. CHEREPANOVA, *ISO 37001: Not all certifications are created equal*, The FCPA Blog, 03.04.2019 <<https://fcpablog.com/2019/04/03/iso-37001-not-all-certifications-are-created-equal>>.

J. CHUNG, J. FARRAR, P. PURI and L. THORNE, 'Auditor liability to third parties after Sarbanes-Oxley: An international comparison of regulatory and

legal reforms'(2010) 9(1) *Journal of International Accounting, Auditing and Taxation* 67,78.

J. COFFEE, *Gatekeepers: The Professions and Corporate Governance*, Oxford University Press, 2006.

J. COFFEE, 'Rating Reforms: the Good, the bad and the ugly'(2011) 1(1) *Harvard Business Law Review* 231, 278.

B.L. CONNELLY, S. T. CERTO, R. D. IRELAND and C. R. REUTZEL, 'Signaling Theory: a Review and Assessment' (2011) 37(1) *Journal of Management* 39, 67.

Consiglio Nazionale dei Dottori Commercialisti e degli Esperti Contabili et al., 'Principi consolidati per la redazione dei modelli organizzativi e l'attività dell'organismo di vigilanza e prospettive di revisione del d.lgs. 8 giugno 2001, n. 231' <https://www.commercialisti.it/visualizzatore-articolo?_articleId=1237669>.

K. COOK, *Trust and Social Structure*, Russell Sage Foundation, 2001.

E. DAVEY, *Enough to Educate 17 Million Children: The True Cost of Brazil's Car Wash Scandal*, Global Witness, 23.03.2018 <<https://www.globalwitness.org/en/blog/enough-educate-17-million-children-true-cost-brazils-car-wash-scandal>>.

J. DE BRUYNE, 'A Conceptual and Comparative Analysis of the Obligations of Third-Party Certifiers'(2018) 42(2) *Ohio Northern University Law Review* 203, 261.

M. DEFOND K. RAGHUNANDAN and K.R. SUBRAMANYAM, 'Do Non-Audit Services Impair Auditor Independence? Evidence from Going Concern Audit Opinions'(2002) 40(4) *Journal of Accounting Research* 1247, 1274.

D. DELLA PORTA and A. VANNUCCI, *Corrupt Exchanges: Actors, Resources and Mechanisms of Political Corruption*, Routledge, 1999.

C. DE MAGLIE, 'Models of Corporate Criminal Liability in Comparative Law'(2005) 4(3) *Washington University Global Studies Law Review* 547, 566.

M. DRUGOV, J. HAMMAN and D. Serra, 'Intermediaries in Corruption: an experiment'(2014) 17 *Experimental economics* 78, 99.

M. D. DUBBER and T. HÖRNLE, *Oxford Handbook of Criminal Law*, Oxford University Press, 2014.

A. DYCK, A. MORSE and L. ZINGALES, 'Who Blows the Whistle on Corporate Fraud?' (2010) 65(6) *The Journal of Finance* 2213, 2253.

Financial Action Task Force, *The Misuse of Corporate Vehicles, Including Trust and Company Service Providers*, 2001.

A. FINKELSTEIN et al., *Moral Hazard in Health Insurance*, Columbia University Press, 1963.

O. FJELDSTAD, 'Fighting Fiscal Corruption: Lessons from the Tanzania Revenue Authority' (2003) 23 *Public Administration and Development* 165, 175.

L. FORD, *United Kingdom – Global bribery offenses guide*, DLA Piper Publications, 4.12. 2019

<<https://www.dlapiper.com/en/us/insights/publications/2019/09/bribery-offenses-guide/united-kingdom/>>.

T. FOX, *The Ahsani's Information – The Fraudulently Obtained Certifications*, FCPA Compliance Report, 07.11.2019
<<http://fcpacompliancereport.com/2019/11/21920>> .

M. FRENZ and R. LAMBERT, 'The Economics of Accreditation' (2013) 9(2) *NCSLI Measure* 42, 50.

J. GALLAND, 'Big Third-Party. Certifiers and the Construction of Transnational Regulation' (2017) 670(1) *The Annals of the American Academy of Political Science* 263, 279.

N. GAROUPA, *Criminal Law and Economics*, Edward Elgar Publishing, 2009.

S. GENTLE, 'The Bribery Act 2010: (2) The Corporate Offence,' (2011) *Criminal Law Review* 101, 110.

B. GERHART and G. MILKOVICH, 'Organizational Differences in Managerial Compensation and Financial Performance' (1990) 33(4) *The Academy of Management Journal* 663, 691.

R. GIBBONS and J. ROBERTS, *The Handbook of Organizational Economics*, Princeton University Press 2012.

G. GORDON, *The Criminal Law of Scotland*, 3rd ed., The Scottish Universities Law Institute, 2001.

J. N. GORDON and W-G. RINGE, *The Oxford Handbook of Corporate Law and Governance*, Oxford University Press, 2015.

K. GRANT-HART and D. TREVLEY, *The Top Five Myths About ISO 37001*, The FCPA Blog, 14.02.2017 <<https://fcpablog.com/2017/2/14/the-top-five-myths-about-iso-37001-exposed>>.

M. GREENBERG, 'Transforming Compliance: Emerging Paradigms for Boards, Management, Compliance Officers, and Government' (2014) *Rand Corporation* <https://www.rand.org/content/dam/rand/pubs/conf_proceedings/CF300/CF322/RAND_CF322.pdf>.

A. GREIF, 'Contract Enforceability and Economic Institutions in Early Trade: The Maghribi Traders' Coalition (1993) 83(3) *American Economic Review* 525, 548.

J. HAMMAN, G. LOEWENSTEIN and R.A. WEBER, 'Self-Interest through Delegation: An Additional Rationale for the Principal-Agent Relationship' (2010) 100(4) *The American Economic Review* 1826, 1846.

A. HAREL and K. N. HYLTON, *Research Handbook on the Economics of Criminal Law*, Edward Elgar Publishing, 2012.

K. HASKER and C. OKTEN, 'Intermediaries and Corruption' (2008) 67(1) *Journal of Economic Behaviour and Organization* 103, 115.

F. HEIMANN, C.J. DUMAS and S. SHAH, *Verification of Anti-Corruption Compliance Programs*, Transparency International USA, 2014, <https://www.transparency.nl/wp-content/uploads/2016/12/TI-USA_2014_verificationreportfinal.pdf>.

J. HINES, 'Forbidden Payment: Foreign Bribery and American Business After 1977' (1995) *NBER Working Paper* n. 5266.

B. HÖLMSTROM, 'Moral Hazard and Observability' (1979) 10(1) *The Bell Journal of Economics* 74, 91.

D.M. HOWARD, C.A. KRAUSE and W. GIBSON, *Private Commercial Bribery: The Next Wave Of Anti-Corruption Enforcement?*, Lexology, 14.04.2010 <http://www.lexology.com/library/detail.aspx?g=9975ef8f-95c0-4a5a-8c45-27c4e800f338>.

Human Rights International Corner et al., *Italian Legislative Decree n. 231/2001: A model for Mandatory Human Rights Due Diligence Legislation?* November 2019 <<https://it.humanrightsic.com/post/italian-legislative-decree-no-231-2001>>.

International Bar Association, *Report of the Task Force on Extra-territorial Jurisdiction*, 2009 <

<https://www.ibanet.org/Article/NewDetail.aspx?ArticleUid=597d4fcc-2589-499f-9d9b-0e392d045cd1>>.

International Chamber of Commerce, *Memorandum to the OECD Working Group on Bribery in International Business Transactions, Recommendations by the ICC on further provisions to be adopted to prevent and prohibit private-to-private corruption*, 2006.

International Chamber of Commerce, *ICC Guidelines on Agents, Intermediaries and Other Third Parties*, 2010.

International Chamber of Commerce, *ICC Rules on Combating Corruption*, 2011.

International Chamber of Commerce, *Anti-Corruption Clause*, 2012.

International Monetary Fund, *Corruption: Costs and Mitigating Strategies*, Staff Discussion Note, May 2016.

D. ISAAK, 'FCPA Compliance: Navigating the Minefield of Intermediaries' (2008) 17 *Currents International Trade Law Journal* 22.

M. JENSEN and W. MECKLING, 'Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure' (1976) 3(4) *Journal of Financial Economics* 305, 360.

A. JOSHI, 'Britain's Fight Against the 'Silver Lance' A Radical Overhaul of the UK's Bribery Laws' (2009) 33 *The Champion* 36, 37.

L. KAPLOW and S. SHAPELL, 'Optimal Law Enforcement with Self-Reporting of Behavior' (1994) 102(3) *Journal of Political Economy* 583, 606.

J. KARPOFF, D. SCOTT LEE and G.S. MARTIN, 'Foreign Bribery: Incentives and Enforcement', 2017, unpublished working paper <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1573222>.

M. KELLY, *Walmart FCPA Costs: \$820 Million and Counting*, 04.12.2016, Radical Compliance, <<http://www.radicalcompliance.com/2016/12/04/walmart-fcpa-costs-820-million-counting>>.

D.W. KENNEDY and D. DANIELSEN, *Busting Bribery: Sustaining the Global Momentum of the Foreign Corrupt Practices Act*, September 2011, Open Society Foundations, <<https://www.opensocietyfoundations.org/publications/busting-bribery-sustaining-global-momentum-foreign-corrupt-practices-act>>.

M. KOEHLER, 'Foreign Corrupt Practices Act Ripples'(2014) 3(3) *American University Business Law Review* 391, 451.

M. KOEHLER, *The Hidden Employee Cost of FCPA Scrutiny and Enforcement*, 17.04.2017. FCPA Professor blog
<<http://fcpprofessor.com/hidden-employee-costs-fcpa-scrutiny-enforcement>> .

KPMG, *Anti-Bribery and Corruption: rising to the challenge in the age of globalization*, 2015 <
<https://home.kpmg/xx/en/home/insights/2015/09/rising-to-the-challenge.html>>.

R. KRAAKMAN, 'Corporate Liability Strategies and the Costs of Legal Control'(1984) 93(5) *Yale Law Journal* 857, 898.

R. KRAAKMAN, 'Gatekeepers: The Anatomy of a Third-Party Enforcement Strategy'(1986) 2(1) *Journal of Law, Economics and Organization* 53, 104.

K. KRAWIEC, 'Cosmetic Compliance and the Failure of Negotiated Governance'(2003) 81(2) *Washington University Law Quarterly* 487, 544.

M. KUBICIEL, 'Core Criminal Law Provisions in the United Nations Convention Against Corruption'(2009) 9(1) *International Criminal Law Review* 139, 155.

J. LAMBSDORFF, *The new institutional economics of corruption*, Routledge, 2004.

J. LAMBSDORFF, *The new institutional economics of corruption and reform: Theory, policy, and evidence*, Cambridge University Press, 2007.

J. LAMBSDORFF, 'Corrupt intermediaries in international business transactions: between make, buy and reform'(2011) 35(3) *European Journal of Law and Economics* 1, 18.

W. LAUFER, 'Corporate Liability, Risk Shifting, and the Paradox of Compliance'(1999) 52(5) *Vanderbilt Law Review* 1341, 1420.

C. LENNOX and J. PITTMAN, 'Auditing the auditors: Evidence on the recent reforms to the external monitoring of audit firms'(2010) 49 *Journal of Accounting and Economics* 84, 103.

F. I. LESSAMBO, *The International Corporate Governance System: Audit Roles and Board Oversight*, Palgrave Macmillan UK, 2014.

A. LIZZERI, 'Information revelation and certification intermediaries'(1999) 30(2) *The RAND Journal of Economics* 214, 231.

A. LUCCHETTI, *Big Credit-Rating Firms Agree to Reforms*, The Wall Street Journal, 2008 <<https://www.wsj.com/articles/SB121268203224348921>>.

S. LUCIANO, 'La 231 verso la riforma bipartisan. Responsabilità oggettiva da correggere anche per la sinistra' *ItaliaOggi*, 30.09.2010 <<https://www.italiaoggi.it/archivio/la-231-verso-la-riforma-bipartisan-1679501>>.

J. MACEY, 'Agency Theory and the Criminal Liability of Corporations'(1991) 21(6) *Boston University Law Review* 242, 252.

M. S. MADDEN, *Exploring Tort Law*, Cambridge University Press, 2005.

S. MANACORDA, F. CENTONZE and G. FORTI, *Preventing Corporate Corruption: The Anti-Bribery Compliance Model*, Springer, 2014.

A. MAZZONI, 'Gruppi Multinazionali, Regole di Responsabilità e Applicazione del D. Lgs. 231/2001 a Fattispecie Internazionali di Gruppo'(2011) 1(2) *Jus* 227, 247.

T. MCBRIEN, 'Developing a Management Standard to Prevent Bribery: ISO 37001 Offers a New Approach 2012 – 2019'(2020) *Princeton University* <<https://successfulties.princeton.edu/publications/developing-management-standard-prevent-bribery-iso-37001-offers-new-approach-2012-%E2%80%93-2019>>.

R. MESSICK, *ISO 37001 and the Federal Sentencing Guidelines Compared*, 13.09.2017, The Global Anticorruption Blog <<https://globalanticorruptionblog.com/2017/09/13/iso-37001-and-the-federal-sentencing-guidelines-compared>>.

V. MONGILLO, *Corporate Criminal Liability and Compliance Programs*, Jovene Editore 2012.

J. MURPHY, *Will ISO 37001 Become a Box-Checking Formality?*, The FCPA Blog, 27.11.2018, <<https://fcpablog.com/2018/11/27/will-iso-37001-become-a-box-checking-formality>>.

P. NICHOLS, 'Are Facilitating Payments Legal?'(2014) 54(1) *Virginia Journal of International Law* 127, 156.

S. ODED, 'Inducing Corporate Compliance: A Compound Corporate Liability Regime'(2011) 31(4) *International Review of Law and Economics* 272, 283.

OECD, *No Longer Business as Usual: Fighting Bribery and Corruption*, 2000.

OECD, *Behind the Corporate Veil: Using Corporate Entities for Illicit Purposes*, 2001.

OECD, *United States: Phase 2 - Report on Application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 1997 Recommendation on Combating Bribery in International Business Transactions*, 2002 <<https://www.oecd.org/daf/anti-bribery/anti-briberyconvention/1962084.pdf>> .

OECD, *Italy: Phase 2 - Report on the Application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 1997 Recommendation on Combating Bribery in International Business Transactions*, 2004, <<http://www.oecd.org/daf/anti-bribery/anti-briberyconvention/33995536.pdf>>.

OECD, *UK: Phase 2 - Report on the Application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 1997 Recommendation on Combating Bribery in International Business Transactions*, 2005 <<https://www.oecd.org/daf/anti-bribery/anti-briberyconvention/34599062.pdf>>.

OECD, *UK: Phase 2bis - Report on the Application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 1997 Recommendation on Combating Bribery in International Business Transactions*, 2008 <<http://www.oecd.org/daf/anti-bribery/anti-briberyconvention/41515077.pdf>>.

OECD, *Working Group on Bribery: Annual Report*, 2008, <<https://www.oecd.org/daf/anti-bribery/44033641.pdf>>.

OECD, *Recommendation for Further Combating Bribery of Foreign Public Officials in International Business Transactions*, November 2009.

OECD, *Typologies on the role of intermediaries in international business transactions*, October 2009.

OECD, *Good Practice Guidance on Internal Controls, Ethics and Compliance*, February 2010.

OECD, *United States: Phase 3 - Report on Implementing the OECD Anti-Bribery Convention in the United States*, October 2010
<http://www.oecd.org/unitedstates/UnitedStatesphase3reportEN.pdf>.

OECD, *United States: Follow-Up to Phase 3 - Report & Recommendations*, December 2012
<<http://www.oecd.org/daf/anti-bribery/UnitedStatesphase3writtenfollowupreportEN.pdf>>.

OECD, *Foreign Bribery Report: An analysis of the crime of bribery of foreign public officials*, 2014.

OECD, *Italy: Follow Up to the Phase 3 - Report and Recommendations*, 2014
<<http://www.oecd.org/daf/anti-bribery/ItalyP3WrittenFollowUpReportEN.pdf>>.

OECD, *The Liability of Legal Persons for Foreign Bribery: A Stocktaking Report*, 2016.

OECD, *The Detection of Foreign Bribery*, 2017.

OECD, *Foreign Bribery Enforcement: What Happens to the Public Officials on the Receiving End?*, 2018.

OECD, *Enforcement of the Anti-Bribery Convention, Investigations, Proceedings, and Sanctions*, 2019.

OECD, UNODC and WORLD BANK, *Anti-Corruption Ethics and Compliance Handbook for Business*, 2013.

O'KEEFE, 'Universal Jurisdiction – Clarifying the Basic Concept' (2004) 2(3) *Journal of International Criminal Justice* 735, 760.

F. ORLOWSKI, *Certifying Third-Party FCPA Compliance Under New SEC/DOJ Requirements*, Corporate Compliance Insights, 04.02.2020
<<https://www.corporatecomplianceinsights.com/third-party-fcpa-compliance>> .

A. PACCES and A. ROMANO, 'A Strict Liability Regime for Credit Rating Agencies' (2015) *American Business Law Journal* 673, 720.

J. PANZAR and R. WILLIG, 'Economies of Scale in Multi-Output Production' (1977) 91(3) *The Quarterly Journal of Economics* 481, 493.

J. PANZAR and R. WILLIG, 'Economies of Scope' (1981) 71(2) *The American Economic Review* 268, 272.

V. PASSAS and D. VLASSIS, *The United Nations Convention Against Corruption as a way of life*, ISPAC, 2007.

M. PENG and A. YORK, 'Behind intermediary performance in export trade: Transactions, agents, and resources' (2001) 32 *Journal of International Business Studies* 327, 346.

M. PIETH and R. IVORY, *Corporate Criminal Liability, Emergence, Convergence and Risk*, Ius Gentium: Comparative Perspective on Law and Justice, 2011.

M. PIETH, L. LOW and P.J.CULLEN, *The OECD Convention on Bribery: A Commentary*, Cambridge University Press, 2007.

D. J. PLAINE, 'The OECD Guidelines for Multinational Enterprises' (1977) 11 (2) *International Lawyer* 339.

M. POLINSKY and M. SHAVELL, 'Should Employees Be Subject to Fines and Imprisonment Given the Existence of Corporate Liability?' (1993) 13(3) *International Review of Law and Economics* 239, 257.

M. POLINSKY and S. SHAVELL, 'Should Liability Be Based on the Harm to the Victim or the Gain to the Injurer?' (1994) 10(2) *Journal of Law, Economics and Organization* 427, 437.

A. PRESUTTI et al., *La responsabilità degli enti*, Cedam, 2008.

J.E. RAUCH and J. WATSON, 'Network Intermediaries in International Trade' (2004) 13(1) *Journal of Economics & Management Strategy* 69, 93.

M. RYZNOR and S. KORKOR, 'Anti-Bribery Legislation in the United States and the United Kingdom: A Comparative Analysis of Scope and Sentencing' (2011) 76(2) *Missouri Law Review* 415, 453.

A. SASSON, *At the Forefront, Looking Ahead: Research-Based Answers to Contemporary Uncertainties of Management*, Scandinavian University Press, 2018.

H.B. SCHÄFER, 'Efficient Third Party Liability of Auditors in Tort Law and in Contract Law' (2004) 12 *Supreme Court Economic Review* 181, 208.

V. E. SCHWARTZ, K. KELLY and D. F. PARTLETT, *Prosser, Wade and Schwartz's Torts, Cases and Materials*, Foundation Press, 2020.

Searle Civil Justice Institute, 'The Foreign Corrupt Practices Act: An Empirical Examination of Enforcement Trends: Preliminary Report', George Mason University School of Law, Law & Economics Center, September 2012 <https://masonlec.org/site/rte_uploads/files/FINAL%20FCPA%20REPORT%20PDF.pdf>.

Searle Civil Justice Institute, 'The Foreign Corrupt Practices Act: Economic Impact on Targeted Firms', George Mason University School of Law, Law and Economics Center, June 2014 <[https://masonlec.org/site/rte_uploads/files/FCPA%20II%20Final%20\(6.4\).pdf](https://masonlec.org/site/rte_uploads/files/FCPA%20II%20Final%20(6.4).pdf)>.

P. SHAUGHNESSY and S. TUNG, *The Powers and Duties of an Arbitrator: Liber Amicorum*, Wolters Kluwer 2017.

- S. SHAVELL, 'The Judgement Proof Problem' (1986) 6(1) *International Review of Law and Economics* 45, 58.
- S. SHAVELL, 'A Note on Marginal Deterrence'(1992) 12(3) *International Review of Law and Economics* 345, 355.
- S. SHAVELL, *Foundations of Economic Analysis of Law*, Harvard University Press, 2004.
- M. SPENCE, 'Job Market Signaling' (1973) 87(3) *The Quarterly Journal of Economics* 355, 374.
- M. SPENCE and R. ZECKHAUSER, 'Insurance Information and Individual Action' (1971) 61(2) *American Economic Review* 380, 387.
- M. STEPHENSON, *The FCPA's 'Facilitating Payments' Exception: Mostly Harmless*, The Global Anti-Corruption Blog, 06.17.2014 <<https://globalanticorruptionblog.com/2014/06/17/the-fcpas-facilitating-payments-exception-mostly-harmless/>> .
http://www.jonesday.com/oecd_calls>.
- G. STIGLER, 'The Economies of Scale'(1958) 1 *Journal of Law and Economics* 54, 71.
- J. STIGLITZ, 'The pure theory of moral hazard' (1983) 8(26) *The Geneva Papers on Risk and Insurance* 4, 33.
- A. SYKES, 'The Economics of Vicarious Liability'(1984) 93 *Yale Law Journal* 1231, 1280.
- A. SYKES, 'The Boundaries of Vicarious Liability: An Economic Analysis of the Scope of Employment Rule and Related Legal Doctrines'(1988) 101(3) *Harvard Law Review* 563, 609.
- E. TALLEY, 'Cataclysmic Liability Risk Among Big Four Auditors'(2006) 7 *Columbia Law Review*, 106.
- A. TERLAACK and A. KING, 'The effect of certification with the ISO 9000 Quality Management Standard: A signaling approach'(2006) 60(4) *Journal of Economic Behavior & Organization* 579, 602.
- S. TIBBS D. L. HARRELL and R. E. SHRIEVES, 'Do Shareholders Benefit from Corporate Misconduct? A Long-Run Analysis'(2011) 8(3) *Journal of Empirical Legal Studies* 449, 476.
- W. TIMMENY, 'An Overview of the FCPA'(1982) 9(2) *Syracuse Journal of International Law and Commerce* 235, 244.

Transparency International, *The impact of corruption on growth and inequality*, 2014.

Transparency International, *The Bribery Act Adequate Procedure Guidance*, March 2012.

Transparency International, *Managing Third Party Risk: Only as Strong as Your Weakest Link*, 2016.

Transparency International, *Exporting Corruption 2020*.

UK Ministry of Justice, *The Bribery Act 2010, Guidance about procedures which relevant commercial organisations can put into place to prevent persons associated with them from bribing (section 9 of the Bribery Act 2010)*, March 2011, 8
<<http://www.justice.gov.uk/downloads/legislation/bribery-act-2010-guidance.pdf>>.

UN Interregional Crime and Justice Research Institute, 'How Many Can Fit Here? Corruption: One Man's Gain Is Everyone's Loss', *Freedom from Fear*, n. 4, 05.02.2014 <<https://shop.un.org/zh/node/68593>>.

United Nations Office on Drugs and Crime, *Legislative Guide for the Implementation of the United Nations Convention against Corruption*, Second Revised Edition 2012,
<https://www.unodc.org/documents/treaties/UNCAC/Publications/LegislativeGuide/UNCAC_Legislative_Guide_E.pdf>.

United Nations Office on Drugs And Crime, *An Anti-Corruption Ethics and Compliance Programme for Business: A Practical Guide*, 2013.

US Chamber of Commerce, *Restoring Balance: Proposed Amendments to the Foreign Corrupt Practices Act*, 26.10.2010
<https://www.uschamber.com/restoring-balance-proposed-amendments-foreign-corrupt-practices-act>.

US Department of Justice, *Justice Manual*, 2018 <<https://www.justice.gov/jm/justice-manual>>.

US Department of Justice Criminal Division, *Evaluation of Corporate Compliance Programs*, June 2020 <<https://www.justice.gov/criminal-fraud/page/file/937501/download>> .

US Department of Justice Criminal Division and US Securities and Exchange Commission Enforcement Division, *FCPA: A Resource Guide to the US Foreign Corrupt Practices Act*, 2nd ed., July 2020
<<https://www.justice.gov/criminal-fraud/file/1292051/download>>.

US Sentencing Commission, *2018 Guidelines Manual Annotated* <<https://www.ussc.gov/guidelines/2018-guidelines-manual-annotated>> .

T. VAN Ho and C. TERWINDT, 'Assessing the Duty of Care for Social Auditors' (2019) 27(2) *European Review of Private Law* 379, 401.

B. WAITE, *Bill Waite on Unaoil: Certification vs. Investigation*, The FCPA Blog, 13.04.2016, <<http://www.fcpablog.com/blog/2016/4/13/bill-waite-on-unaoil-certification-versus-investigation.html>>.

F. WARIN, C. FALCONER, and M. DIAMANT, 'The British Are Coming!: Britain Changes Its Law on Foreign Bribery and Joins the International Fight Against Corruption' (2010) 46(1) *Texas International Law Journal* 1, 72.

I. WEBB, *How Many Suppliers Do Businesses Have? How Many Should They Have?*, Forbes, 28.02.2018 <<https://www.forbes.com/sites/jwebb/2018/02/28/how-many-suppliers-do-businesses-have-how-many-should-they-have/#c521b8f9bb72>>.

P. WEBB, 'The United Nations Convention against Corruption: Global Achievement or Missed Opportunity?' (2005) 8(1) *Journal of International Economic Law* 191, 229.

A. WEBSTER, 'Could a Company be Debarred Following a Conviction for Failure to Prevent Bribery?' (2016) 7 *Criminal Law Review* 485, 488.

S-T. WEI, 'How Taxing is Corruption on International Investors?' (2000) 82(1) *The Review of Statistics and Economics* 1, 11.

A. WEISSMANN and A. SMITH, *Restoring the Balance – Proposed Amendments to the Foreign Corrupt Practices Act*, U.S. Chamber Institute for Legal Reforms, 2010 <https://jenner.com/system/assets/publications/216/original/Restoring_Balance_Proposed_Amendments_to_the_Foreign_Corrupt_Practices_Act.pdf?1318951410t>.

A. D. WESTBROOK, 'Enthusiastic Enforcement, Informal Legislation: The Unruly Expansion of the Foreign Corrupt Practices Act' (2011) 45(2) *Georgia Law Review* 489, 577.

O. E. WILLIAMSON, 'The Theory of the Firm as Governance Structure: from Choice to Contract' (2002) 16(3) *The Journal of Economic Perspectives* 171, 195.

World Bank, *Helping Countries Combat Corruption: The Role of the World Bank*, 1997.

A. WRAGE, *Unaoil vs. The Compliance Community*, Trace International, 31.03.2016 <<https://www.traceinternational.org/blog/779>> .

D. ZARIN, *Doing Business Under the Foreign Corrupt Practices Act (Second Edition)*, 2013, Practising Law Institute.

S. A. ZEFF, 'How the U.S. Accounting Profession Got Where It Is Today?' (2003) 17(4) *Accounting Horizons* 267, 286.

L. ZURAWICKI and M. HABIB, 'Corruption and foreign direct investment: what have we learned?' (2010) 9(7) *International Business & Economic Research Journal* 1, 9.

SUMMARY

Corruption, defined as “the abuse of entrusted power for private gain”⁹³² has a very broad scope, which includes bribery, trading in influence, abuse of functions, and various acts of corruption in the private sector. This study focuses on bribery, defined as “the offering, promising, giving, accepting or soliciting of an advantage as an inducement for an action which is illegal, unethical or a breach of trust”⁹³³. When looking at the data on the enforcement of this cross-border corporate crime, a relevant trend stands out. In three out of four cases, corrupt transactions took place through third-party intermediaries, defined as a person “who is put in contact with or in between two or more trading parties”⁹³⁴.

Notwithstanding these statistics, the law and economics literature has paid little attention to measure how the presence of third-party intermediaries in international business transactions affects the efficiency of the liability regimes imposed on corporate entities. This study aims to fill this gap in order to identify the legislative framework for optimal deterrence of international corporate bribery, when intermediaries are involved. The analysis is conducted from a positive and normative perspective. In the first instance, a comparative analysis of the legislative measures adopted to address foreign corporate bribery committed by intermediaries is undertaken. To this end, two international conventions (the OECD Convention and the United Nations Convention against Corruption) and three national legislations (the Foreign Corrupt Practices Act, the UK Bribery Act and the Italian Legislative Decree n. 231/2001) are analysed. In the second instance, through the lenses of the economic analysis of corporate crime, the following research questions are explored:

⁹³² Transparency International, ‘What is corruption?’, <<https://www.transparency.org/en/what-is-corruption>>, accessed 28.07.2021.

⁹³³ Transparency International UK, What is bribery?, <<https://www.antibriberyguidance.org/guidance/5-what-bribery/guidance>>, accessed 28.07.2021.

⁹³⁴ OECD, Typologies on the Role of Intermediaries in International Business Transactions, October 2009, p. 5 <<https://www.oecd.org/daf/anti-bribery/43879503.pdf>> accessed 09.01.2021.

- (i) Assuming the goal of social welfare maximization, should corporations be held vicariously liable for crimes committed by the intermediaries?
- (ii) Is there a difference in effectiveness between anti-bribery compliance (ABC) program addressing employees and those addressing intermediaries? And if so - may this difference justify, from a welfare maximization point of view, a variation between the structure of the corporate liability regime applicable to employee misconduct and the one applicable to misconduct of third parties?
- (iii) What is the role that certifications of ABC programs adopted by third parties may play in improving the efficiency of ABC enforcement policies?

This analysis has shown that, in order to favour the internalisation of the social harm of crime, the vicarious liability of companies should be extended beyond the employment relationship. If the application of vicarious liability is restricted to the 'master-servant' relationship, companies may be incentivised to strategically delegate illegal actions. Consistently with this result, all the legislative measures analysed in this study appear to have extended the scope of corporate criminal liability beyond corporate employees.

In addition, it is argued that companies face higher information asymmetries when investing in ABC programs addressing intermediaries. Considering this difference, my model has shown that companies' investment in ABC programs should be higher for intermediaries, given the more limited ability of firms to control these agents. Moreover, this greater effort does not need to be compensated (for instance, through a greater liability mitigation) and the private and social net benefits of the investment in ABC programs addressing intermediaries are lower than the ones deriving from the investment regarding employees. Out of the five legislations analysed, these results are reflected

only in two cases: the United Nations Convention against Corruption and the UK Bribery Act. However, when looking at the policy implications of the model, it is necessary to consider that the analysis has exclusively focused on the preventive actions (*ex-ante*) of ABC programs. The impact of the different monitoring ability of firms over their independent contractors on the *ex-post* activities of ABC programs may be explored in a future extension of this study.

Finally, I have looked at the certification of ABC programs adopted by intermediaries as a tool through which companies can distinguish between intermediaries with adequate and inadequate anti-bribery measures in place. In other words, certifications of ABC programs adopted by intermediaries can compensate the lower monitoring ability firms have over these agents. Through a theoretical analysis, I have shown that this instrument can be a meaningful signal, if the cost of certification is negatively correlated to the quality they represent and, as long as certification companies are subject to standards of professionalism and independence. Finally, I have argued that these standards are also necessary to limit the risk of moral hazard, especially when ABC certification is associated with a liability mitigation. Out of the five laws considered, the US Foreign Corrupt Practices Act is the only one explicitly recognizing the value of ABC certification of third parties for the purpose of the attribution of a liability mitigation. I argue that a similar standard can be extended in other jurisdictions, as long as stronger safeguards with regard to the independence and accountability of certification bodies are introduced.

SAMENVATTING

Corruptie, gedefinieerd als “het misbruik van toevertrouwde bevoegdheden voor persoonlijk gewin”⁹³⁵ kent zeer uiteenlopende aspecten, waaronder omkoping, ongeoorloofde beïnvloeding, ambtsmisbruik en verschillende vormen van corruptie in de particuliere sector. Dit onderzoek richt zich op omkoping, gedefinieerd als “het aanbieden, beloven, geven, accepteren of vragen om een voordeel als stimulans voor een handeling die illegaal en onethisch is, of een vertrouwensbreuk oplevert.”⁹³⁶ Kijkend naar de gegevens betreffende de handhaving van deze grensoverschrijdende bedrijfscriminaliteit valt een relevante trend op. In drie van de vier gevallen vonden corrupte transacties plaats via tussenpersonen, gedefinieerd als een persoon “die in contact is gebracht met of tussen twee of meer handelspartners”⁹³⁷.

Ondanks deze cijfers heeft de Law and Economics literatuur weinig aandacht besteed aan het meten van hoe de aanwezigheid van tussenpersonen in internationale zakelijke transacties van invloed is op de efficiëntie van de aansprakelijkheidsregelingen opgelegd aan vennootschappen. Dit onderzoek probeert deze kloof te dichten teneinde het juridisch kader te bepalen voor optimale afschrikking van internationale bedrijfsomkoping, waarbij tussenpersonen zijn betrokken. De analyse wordt uitgevoerd vanuit een positief en normatief perspectief. In eerste instantie wordt een vergelijkende analyse gemaakt van de juridische maatregelen genomen voor het aanpakken van buitenlandse bedrijfsomkoping gepleegd door tussenpersonen. Hiertoe zijn twee internationale verdragen (het OESO-verdrag en het VN-verdrag tegen corruptie) en drie nationale wetten (de Foreign Corrupt Practices Act [Amerikaanse wet op buitenlandse corrupte praktijken], de Britse Bribery Act [anti-omkopingswet] en het Italiaanse wetsbesluit [Legislative Decree n.

⁹³⁵ Transparency International, ‘Wat is corruptie?’, <<https://www.transparency.org/en/what-is-corruption>>, toegang op 28.07.2021.

⁹³⁶ Transparency International UK, Wat is omkoping?, <<https://www.antibriberyguidance.org/guidance/5-what-bribery/guidance>>, toegang op 28.07.2021.

⁹³⁷ OESO, typologieën inzake de rol van tussenpersonen in internationale zakelijke transacties, oktober 2009, blz. 5 <<https://www.oecd.org/daf/anti-bribery/43879503.pdf>> toegang op 09.01.2021.

231/2001]) geanalyseerd. In tweede instantie zijn, via de lens van de economische analyse van bedrijfscriminaliteit, de volgende onderzoeksvragen onderzocht:

- (i) Uitgaande van het doel van maximalisering van sociale zekerheid, moeten rechtspersonen aansprakelijk worden geacht voor misdaden gepleegd door tussenpersonen?
- (ii) Is er een verschil in effectiviteit tussen de naleving van een anti-omkoping-programma (ABC) gericht op werknemers en gericht op tussenpersonen? En zo ja – kan dit verschil, vanuit het standpunt van maximalisering van welvaart, een afwijking rechtvaardigen tussen de structuur van de aansprakelijkheidsregelingen van rechtspersonen van toepassing op ambtsmisdriven van werknemers en de regelingen van toepassing op ambtsmisdriven van derden?
- (iii) Wat is de rol die certificering van ABC-programma's overgenomen door derden kan spelen bij verbetering van de efficiëntie van het ABC-handhavingsbeleid?

Deze analyse heeft aangetoond dat voor bevorderen van het internaliseren van de sociale schade van criminaliteit, de aansprakelijkheid voor de handelingen van derden van bedrijven verder moet reiken dan alleen de 'werkgever-werknemer'-relatie. Als de toepassing van aansprakelijkheid voor de handelingen van derden wordt beperkt tot de 'werkgever-werknemer'-relatie, kunnen bedrijven worden geprikkeld tot het strategisch delegeren van illegale handelingen. Overeenkomstig dit gegeven lijken alle in dit onderzoek geanalyseerde juridische maatregelen de omvang van strafrechtelijke aansprakelijkheid van ondernemingen verder te laten reiken dan bedrijfsmedewerkers.

Bovendien wordt aangevoerd dat bedrijven geconfronteerd worden met een grotere informatieasymmetrie bij investering in ABC-programma's gericht

op tussenpersonen. Gelet op dit verschil, laat mijn model zien dat de investering van bedrijven in ABC-programma's groter moet zijn voor tussenpersonen, vanwege de beperktere mogelijkheid voor bedrijven om deze tussenpersonen te controleren. Daarnaast hoeft deze grotere inspanning niet gecompenseerd te worden (bijvoorbeeld via een grotere aansprakelijkheidsvermindering) en de particuliere en sociale netto voordelen van de investering in ABC-programma's gericht op tussenpersonen zijn minder dan de voordelen voortvloeiend uit de investering met betrekking tot werknemers. Van de vijf geanalyseerde wetten zijn deze resultaten slechts in twee gevallen te zien: het VN-verdrag tegen corruptie en de Britse anti-omkopingswet. Als we echter kijken naar de beleidsimplicaties van het model, moeten we er rekening mee houden dat de analyse zich exclusief richt op de preventieve effecten (*ex ante*) van ABC-programma's. De impact van het verschillende monitoringsvermogen van bedrijven betreffende hun onafhankelijke contractanten op de *ex post* effecten van ABC-programma's kunnen worden onderzocht in een toekomstige aanvulling op dit onderzoek.

Tot slot heb ik gekeken naar de certificering van ABC-programma's overgenomen door tussenpersonen als instrument waarmee bedrijven een onderscheid kunnen maken tussen tussenpersonen die beschikken over adequate en niet-adequate anti-omkopingsmaatregelen. Met andere woorden, certificering van ABC-programma's overgenomen door tussenpersonen kan het lagere monitoringsvermogen dat bedrijven over deze tussenpersonen hebben, compenseren. Via een theoretische analyse heb ik laten zien dat dit instrument een waardevol signaal kan zijn, als de kosten van certificering negatief samenhangen met de kwaliteit die zij vertegenwoordigen en, zo lang als certificeringsbedrijven onderworpen zijn aan normen van professionaliteit en onafhankelijkheid. Tot slot heb ik gesteld dat deze normen ook noodzakelijk zijn om het risico op moreel wangedrag te beperken, met name indien ABC-certificering verbonden wordt aan aansprakelijkheidsvermindering. Van de vijf onderzochte wetten is de Amerikaanse wet op corrupte praktijken in het buitenland de enige die

expliciet de waarde erkent van ABC-certificering van derden ten behoeve van de toekenning van aansprakelijkheidsvermindering. Ik bepleit dat een zelfde norm ingevoerd kan worden in andere jurisdicties, mits strengere waarborgen met betrekking tot onafhankelijkheid en verantwoordelijkheid van certificerende instanties worden ingevoerd.

Curriculum vitae
Maria Pia Sacco

sacco.mariapia@gmail.com

Short bio	
I am Senior Legal Advisor at the International Bar Association (IBA) Legal Policy and Research Unit (LPRU), where I lead the IBA's work on anti-corruption, business and human rights and sustainability. My work at the IBA has benefited from my academic experience. In particular, my Ph.D. thesis on "The Role of Intermediaries in International Corporate Bribery" has greatly contributed to my understanding of the different incentives companies face when promoting ethical standards throughout their global value chains. I did my undergraduate studies in Law at L.U.I.S.S. Guido Carli in Rome. I have an L.L.M. in Law and Economics from Bologna and Hamburg Universities and the Indira Gandhi Institute of Development Research.	
Education	
Ph.D. European Doctorate in Law and Economics (EDLE): Rotterdam and Hamburg Universities. Thesis title: "The Role of Intermediaries in International Corporate Bribery"	November 2021
LL.M. in Law and Economics (EMLE). Bologna University, Hamburg University, Indira Gandhi Institute of Development Research (Mumbai). Final grade: 8.28/10. Thesis Title: "Preferential Trade Agreements and Human Rights Objectives: Analysis of the European Union Policy"	2010-2011
Five year's master degree in Law (Final Grade 110/110 cum laude). L.U.I.S.S. Guido Carli University, Rome.	2003-2009
Erasmus Program Scholarship, Tilburg University.	Fall 2007
Work experience	
International Bar Association (London) - Legal Policy and Research Unit – Senior Legal Advisor.	2019-ongoing
Economisti Associati Srl (Bologna), Researcher.	2016 - 2017
Central Bank of Italy (Rome) – Tax Policy Analysis Department (Rome) – Researcher.	2011-2012
Dalla Vedova Law Firm (Rome), Junior Associate.	2009 -2010
Prizes and awards	
Central Bank of Italy, Donato Menichella research award.	2010
Others	
Queen Mary University School of Law (London), LL.M. in Transnational Governance. Guest Lecturer on "Business and Human Rights".	2019-ongoing
Human Rights International Corner (HRIC), Board Member.	2020-ongoing
Test Of English as a Foreign Language (TOEFL) certificate.	2010

ERASMUS UNIVERSITY ROTTERDAM PHD PORTFOLIO

Maria Pia Sacco

Description	Organizer	EC
Required		
EDLE - EDLE Bologna Securities and Company Law (2012)	Bologna	2.00
EDLE - EDLE Bologna Introduction to Math (2012)		2.00
EDLE - EDLE Bologna Introduction to Statistics (2012)		3.00
EDLE - EDLE BOLOGNA European Competition Law and Intellectual Property Rights (2013)		4.00
EDLE - EDLE BOLOGNA Game Theory and the Law (2013)		4.00
EDLE - EDLE BOLOGNA Modelling European Private Law (2013)		4.00
EDLE - EDLE BOLOGNA Experimental Economics (2013)		4.00
EDLE - EDLE BOLOGNA Law Enforcement and Behavioural Economics (2013)		4.00
EDLE - EDLE BOLOGNA Workshop Presentation Skills (2013)		0.00
EDLE - EDLE BOLOGNA attendance EDLE 3rd year presentations (2013)		0.00
EDLE - EDLE BOLOGNA present final research proposal (2013)		0.00
EDLE - EDLE HAMBURG Introduction to Empirical Methods (2013)		0.00
EDLE - EDLE HAMBURG Introductory course on the German Legal system (2013)		2.00
EDLE - EDLE HAMBURG International Summer School (2013)		6.00
EDLE - EDLE HAMBURG presentation introduction chapter (2013)		0.00
EDLE - EDLE EUR ESL Poster Presentation (2014)		0.00
EDLE - EDLE EUR ESL attending Joint Seminar 'The Future of Law and Economics' (2014)		0.00
EDLE - EDLE EUR ESL Written feedback on peer content chapter - 2 (2014)		0.00
EDLE - EDLE EUR ESL Written feedback on peer content chapter - 1 (2014)		0.00
EDLE - EDLE EUR ESL Topical Seminar Scientific Misconduct (2014)		0.00

EDLE - EDLE EUR ESL attendance EDLE Seminar Series (2014)	0.00
EDLE - EDLE EUR ESL attendance BACT Seminar Series (2014)	0.00
EDLE - EDLE EUR ESL Two presentations of a content chapter at EDLE seminars (2014)	0.00
EDLE - EDLE EUR ESL Workshop Poster Presentation (2014)	0.00
EDLE - EDLE EUR ESL Academic Writing skills for PhD students (2014)	4.00
EDLE - EDLE EUR ESL Seminar Series Empirical Legal Studies (2014)	2.00
EDLE - EDLE EUR ESL Advanced Empirical Methods: Research Design (2014)	0.00
EDLE - EDLE EUR ESL Topical Seminar Publication Strategy (2014)	0.00
EDLE - EDLE BOLOGNA presentation of a content chapter (2015)	0.00
EDLE - EDLE EUR ESL presentation of a content chapter in the Joint Seminar 'The Future of Law and Economics' (2015)	0.00
	----- +
Total EC	41.00