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DUE DILIGENCE - AN APPROACH TO MITIGATING RISK IN RELATIONSHIPS WITH THIRD PARTIES

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ABSTRACT

The due diligence process, adopted previously to the relationship with third parties, is an inherent activity to integrity programmes. However, its effectiveness can be questionable, especially to mitigate the risk in third parties relationships and in the potential to cause financial and reputational damage to an organisation. Therefore, this article aims to propose an integrity risk classification with third parties, in order to allow companies to adopt adequate monitoring actions for those most exposed to possible irregularities during this relationship. Firstly, a literature review will be presented, associated with the regulatory framework, in order to show that the adoption of due diligence has become a common practice in compliance programmes, not associated with the results. In the second section, the research proposes to explore third-party integrity assessments which, for the most of it, can be due diligence questionnaires application and performing public data mining (background checks) to classify the integrity risk. In the end, based on a case study, the third section will present a quantitative approach to risk classification, according to the exposure level integrity risk to the company, the capacity monitoring and does not represent an excessive monitoring cost. The article will adopt the deductive method, in order to suggest new hypotheses. It is expected, with the methodology adopted and the results obtained, to contribute to scientific research, the compliance environment, corporate governance and risk management, as corporate mechanisms for the prevention and detection of fraud with third parties.

Keywords: Due Diligence, Third Parties, Compliance, Anti-Corruption

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- **INTRODUCTION AND OBJECTIVES**

The emergence of anti-corruption legislation and conventions on a global scale over the past 25 years has fostered the implementation of compliance programmes in the corporate environment, with a growing search for practices and mechanisms that not only prevent the occurrence of fraud and corruption, but also generate an environment of ethics and integrity in organisations.

In the Brazilian context, in addition to the creation of the anticorruption regulatory framework, the subsequent involvement of major Brazilian companies in corruption scandals unfolded in 79 operations conducted, between 2014 and 2021, by the Lava-Jato Operation (Federal Public Prosecutor's Office, 2021). According to a survey, the direct and indirect impacts of the investigations may have reached R$ 142.6 billion, only in 2015 - something around 2.5% of Brazilian GDP, involving a set of companies whose investments reached almost 5% of Brazilian GDP in that year (Costas, 2015).

In Brazil, Law No. 12.846 (2013), also known as the Brazilian Anticorruption Law, provides for the administrative and civil liability of legal entities for the practice of acts against the public administration. The law, as well as its regulating decree, Decree No. 8.420 (2015), address the application of sanctions in view of harmful acts committed by companies operating in the Brazilian territory, the adoption of integrity programme and the leniency agreement. According to Macedo (2021) there is an innovative aspect in the Brazilian Law, regarding the possibility of objective liability of companies for violations provided by the legislature, regardless of malice or fault on the part of organisations. That is, an organisation can be penalized beyond acts committed by itself (intention), as well as for acts committed by other organisations with which it relates, provided that in acts that indirectly benefit it (guilt).

Similarly, in compliance with the U.S. Foreign Corrupt Practices Act - FCPA, the U.S. Department of Justice evaluates the effectiveness of the compliance programme when the corporation is alleged to have committed an irregularity as a measure to determine the appropriate process, the fine and the compliance obligations to be included in the judicial decision.

In both the Brazilian and U.S. legal frameworks, among the aspects evaluated with respect to the effectiveness of the integrity programme is the adoption of due diligence for the selection and, according to the case, supervision of third parties, such as suppliers, service providers, intermediate agents and associates (USA, 2019) in order to mitigate the risk of objective liability assumed in relations with third parties who violate anti-corruption laws and regulations.

In light of the relevance of third-party due diligence in the context of integrity programmes, the objective of this paper is to discuss its application so as not to "plaster" relationships and to provide effectiveness in the process of preventing the occurrence of illicit acts.

Following a bibliographical approach to the theme, a case study will be conducted using a methodology to classify the integrity risk of third parties so that other organisations may be aware of selection and monitoring actions appropriate to those most exposed to objective liability during their relationship with such third parties.

- **THEORETICAL FRAMEWORK**

According to Batisti and Kempfer (2016), the Brazilian Law aims to combat corruption and enable companies to be active agents in this mission. The law provides for punishment of enterprises, but provides that this punishment may be minimized if the enterprise adopts strategies to prevent corruption through integrity programmes - compliance. The preventive effectiveness of this law will depend on the adoption of integrity mechanisms that involve ethical, legal and administrative aspects, to point out objective paths in the face of the risk of corruption inherent to any organisation.

As pointed out by Macedo (2021), the Brazilian Law does not address how organisations should implement their integrity programmes. Decree 8.420 (2015), which regulates Law No. 12.846 (2013), provides in its Chapter IV on the "Integrity Programme" and presents in Article 42 the parameters that should be observed for purposes of evaluating the existence and application of that programme. One of the parameters set forth in Decree 8.420/2015 is the one dealing with periodic risk analysis: "V - periodic risk analysis to make necessary adjustments to the integrity programme". The legislature is consistent in demonstrating that risk analysis addressing integrity under Law 12.846/2013 is an indispensable factor for scaling up risk mitigation actions and constantly improving the integrity programme, in line with the legal provisions of other countries or organisations cited here.

According to the OECD (2013), enterprises should assess the risk of possible fraud and acts of corruption in the scope of their relationships with suppliers, as well as conduct regular monitoring of this type of third party. To this end, companies must make their anticorruption policies known and act in the development of compliance practices, minimally, to those suppliers with more relevant contracts.

The Office of the Comptroller General (2015) recommends that organisations adopt prior verifications (due diligence) when hiring third parties. The agency suggests the adoption

of measures to "gather information about the company that intends to be hired, as well as about its representatives, including partners and administrators, in order to make sure that there are no situations impeding hiring, as well as to determine the degree of risk of the contract, to perform the appropriate supervision."

Ferreira (2013) points out the existence of methodological differences during the corporate risk assessment process, with some corporations choosing to qualitatively prioritize certain risks prior to determining the level of exposure and vulnerability of each identified risk event. Similarly, prior to initiating the third-party risk assessment process, an internal definition of the scope to be submitted to the integrity risk assessment process in the relationship with such parties is required.

After this definition, in general, the data collection is the first step, which can occur by several techniques. Rosa and Castro (2019) state that the company that is performing the due diligence process must be sure about what information must be collected, as well as must inform the expectations of deadline and timeline. For example, instead of making redundant information requests, the target company should receive a listing of detailed information requests in advance to manage the process effectively and meet the reporting timeline.

Then, the veracity of such data is verified by conducting interviews or obtaining background check reports to identify any inconsistencies and allow for additional information to be obtained. The assessment itself consists of identifying red flags according to the nature of each organisation, which point to a qualitative metric of suggested risk (degree of integrity risk).

Finally, each assessment and its corresponding risk rating are taken to decision-making and, if approved, the organisation must initiate mitigation measures to address the potential integrity risk. The choice and quantity of actions to be taken will depend on the type and level of risk associated with the relationship. Suggested practices include the inclusion of different contractual clauses, ranging from confirmation of compliance with the Code of Conduct and other integrity guidelines of the contracting enterprise to the possibility of contract termination in the event of evidence of improper conduct by the third party; provision for review of the third party's integrity risk assessment; monitoring of payments and other expenditures with the third party; and training in integrity practices by the third party and professionals involved in contract management and monitoring (PACI, 2013).

The provision of rules for the hiring and contract enforcement with third parties and the existence of mechanisms for the interruption of irregularities or infractions detected are structural elements of a Compliance Programme, to be examined by an evaluator in light of Law no. 12.846/2013 (Veríssimo, 2017).

The concept of due diligence, however, is not limited to the third party filling out a questionnaire related to anti-corruption aspects. In the European Union (Smit, et al., 2020), the adoption of such practice is extended to the context of climate change, sustainability, child labour and agricultural issues, as well as the scope of due diligence is extended to the collection of public data of the analysed company, such as consulting sustainability reports, audits conducted through own employees or by hiring external companies.

Although due diligence forms are a good tool, they may not be capable, in isolation, of identifying integrity risk in relations with third parties. Faced with the possibility of a supplier misrepresenting the truth when filling out the data requested by due diligence forms, the risk identification/assessment process can be initiated with a detailed mapping of the supply chain and operations, as well as visits and even independent audits to the prospective supplier, which can lead to greater effectiveness in classifying the degree of risk and defining monitoring actions (Esoimeme, 2020).

In addition, the implementation of the due diligence tool should avoid simplistic results, based on a single score. Comparatively, anti-corruption criteria for decision making only regarding the choice of countries or markets for investment should be used with caution (Doig, 2011). Similarly, the quantitative approach suggested by third-party due diligence results should be contextualised, in-depth and evaluate trends.

Research conducted during third-party due diligence processes has proven insufficient to prevent movement of illicit money, especially when multiple countries are involved. This is because there is difficulty in reaching information on the actual beneficiaries of companies that use tax havens for suspicious transactions (Naheem, 2018). Similarly, it is difficult to identify Politically Exposed Persons (PEP) and map their financial transactions through due diligence (Johnson, 2008).

It can be noticed that the adoption of due diligence with third parties has become a desired practice in the corporate environment, but belongs to paths that are still unknown and limited. In a survey of executives conducted by KPMG (2020), third-party risk management was cited as a strategic priority by 77% of respondents. In addition, 74% of those pointed out that their organisations need more consistent actions in this sector, while 59% stated that their companies have already suffered sanctions for risks caused by third parties. In this survey, half of the companies do not have enough internal resources to manage all the third-party risks they face (KPMG, 2020).

As a means of limiting the scope of third-party integrity risk management adopted by companies, ISO 37001 (2016) recommends that in order to have an effective anti-bribery

management system, a company should implement due diligence procedures prior to the hiring of third parties and transfers and promotion of internal personnel that represent a bribery risk above a low threshold. The standard, the first internationally recognised anti-bribery standard, uses this same minimum risk threshold as a criterion for implementing the other procedures to prevent bribery from occurring (ISO, 2016).

The Global Pact (2016) also encourages cooperation among contracting companies, through collective actions, to provide the necessary conditions for more honest business. By adopting common standards and practices and monitoring compliance, companies improve leverage in the fight against corruption and contribute to market efficiency, as suppliers will not encounter conflicting requirements. Moreover, with collective actions during procurement processes, suppliers can minimise and contain companies tempted to act corruptly for short-term gain or quick profit.

The Corruption Risk Assessment Guide (UNGP, 2013) highlights the importance in having well-defined responsibilities and leadership in corruption risk assessments, which should include support from governance bodies such as senior executives on the board of directors and the audit committee. Without this high-level support, the implementation of the response plan may stall, as certain functions and individuals may not give the required importance and attention to the items in the response plan. In addition, it may be beneficial for the corruption risk assessor to liaise with various stakeholders, because implementing the steps in the response plan can benefit them individually and as a group.

- **METHODOLOGY**

The present research focuses on the assessment of integrity risk in the relationship with suppliers so as to identify weaknesses within organisations that might lead to the occurrence of fraud and acts of corruption based on an experience conducted by the authors at a utilities company listed on the Brazilian stock exchange.

To achieve the proposed objectives, the selected research design was the case study since this is a methodological research approach used when one seeks to understand, investigate or report on complex events and contexts (Yin, 2001).

According to Yin (2001), the choice of the case study method is intended to:

- Explain causal links in real-life interventions that are too complex for experimental strategies or those used in surveys;
- Describe an intervention and the real-life context in which it occurred;

- Illustrate certain topics within an evaluation, sometimes descriptively;
- Explore situations where the intervention being evaluated does not have a simple and clear set of outcomes.

Research has a pragmatic nature and is a formal and systematic process of development of the scientific method (GIL, 1999). According to Oliveira et al. (2006), both qualitative and quantitative research have advantages and disadvantages, the choice of which method to follow must be based on the objectives and research question proposed in the research.

One opted for the hypothetical-deductive perspective that emphasizes universal laws of cause and effect in an explanatory model in which reality consists of a world of objectively defined facts (ALI; BIRLEY, 1999).

According to Yin (2001), there are many useful and important techniques, and they should be used to arrange the evidence in some order before actually carrying out the analysis. Furthermore, preliminary manipulations of data such as these are a way to overcome the problem of research becoming stagnant, mentioned above. At the same time, manipulations should be carried out with extreme care to avoid biased results. The most important aspect is to have an overall analytical strategy first. The ultimate goal of this is to treat evidence in a fair way, produce irrefutable analytical conclusions and eliminate alternative interpretations.

According to Gil (1995), case studies do not accept a rigid script for their delimitation, but it is possible to define four phases that show their description: (a) delimitation of the case-unit; (b) data collection; (c) selection, analysis and interpretation of data; (d) preparation of the report.

The unit chosen for the present case study is the degree of integrity risk in supplier relationships. Data were collected by means of a quantitative data collection procedure. Data selection considered the objectives of the research, its limits and the set of references to assess which data would be useful or not for the chosen analysis plan. Analysis categories derived from the theoretical framework presented were used. For the preparation of the reports, it was specified how data was collected; which theory was the basis for their categorization and the demonstration of the validity and reliability of the data obtained.

It is understood that if the case studies presented are eminently quantitative in nature (use of quantitative methods for data collection), triangulation would not be part of the research protocol (CESAR; ANTUNES; VIDAL, 2010).

The data used for the research was obtained between November 2021 and March 2022, part of it extracted from the company's own website and another part obtained internally. In

addition to quantitative data, percentages and graphs were generated and presented in the following section.

- **ANALYSIS OF THE COLLECTED DATA**

The case study was conducted in a corporation with shares at B3 (Brazilian Stock Exchange), belonging to a group of companies that operate in the Brazilian energy sector and with a Compliance Programme recognised by institutions specialized in the theme.

Among the initiatives set forth in the Compliance Programme of the analysed company, there is the adoption of diligences prior to the promotion process of employees, as well as the appointment of representatives in governance bodies in the company itself, in affiliates, subsidiaries and other companies in which they hold equity interests. In addition, the due diligence process is also applied before signing legal instruments with suppliers and business partners, as well as for donations, agreements, sponsorships, social projects and partnership in research, development and innovation (R&D+I) projects.

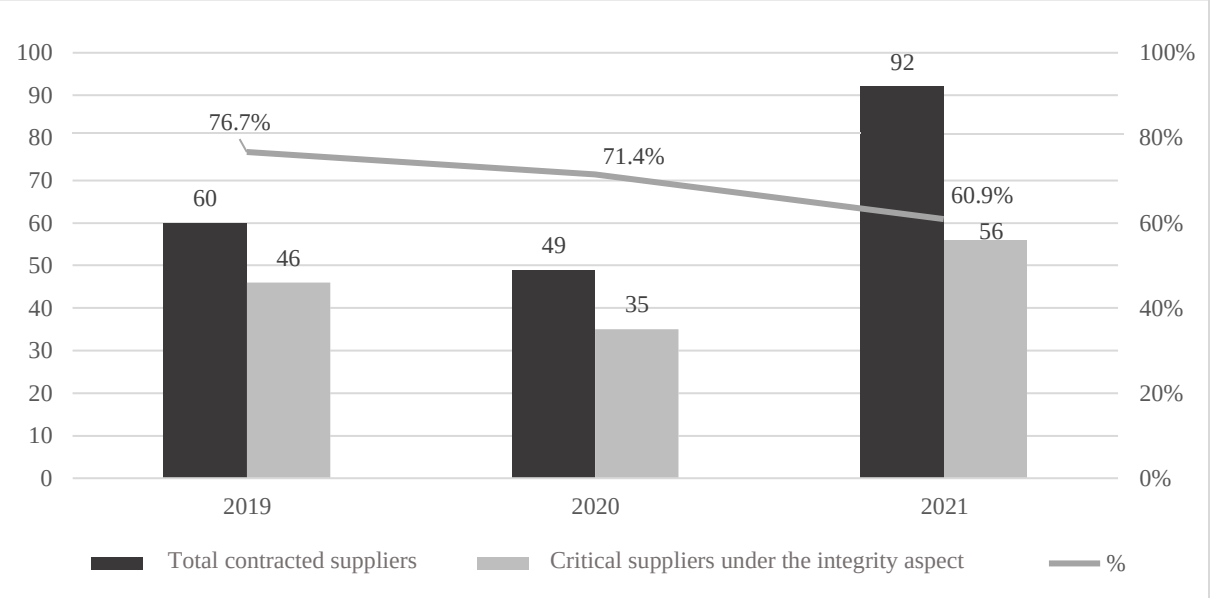
For the purposes of this article, the steps taken with the third-party supplier were observed, from the measures involved during negotiation to the monitoring actions planned during the contract enforcement, depending on the risk classification obtained for the third party. The set of such initiatives, called integrity assessment, was created in 2018 and aims to identify, analyse, classify the integrity risk and monitor the supplier.

Given the extensive supply chain of the company analysed, the integrity assessment process for suppliers is conducted only for those who, according to internal methodology, appear to be most exposed to integrity risks, whether due to illegal acts that may directly involve the contract in question or other relationships conducted in the marketplace that could cause damage to the contracting company's image.

The decision, therefore, to conduct an integrity evaluation with the supplier in the contracting process occurs when at least one of the following criteria is met: contract involving a financial amount for which the company's Board of Directors is responsible for approval, contracting a public official and contracting a service classified internally as having a high integrity risk.

To fit into the latter criterion, the contracting should provide for financial services, legal services, consulting services in general, information technology and software development services, outsourcing of continuous services with allocated labour, advertising, engineering works and services or the activities of people with the power to represent the contracting company (customs brokers, auctioneers and lawyers).

In analysing the data obtained in the case study, set out in the following graph, among the hirings conducted in the years 2019, 2020 and 2021, approximately 76.7%, 71.4% and 60.9% of the suppliers contracted respectively in the years analysed were subject to the integrity assessment for belonging to at least one of the criteria described. The results show that the company prefers to analyse its supply chain to learn about and monitor the integrity risk of only a group of suppliers that meet criteria reflecting greater exposure to the occurrence of illicit acts.



Graph 1: Evolution of critical contracting under the integrity aspect
Source: Authors

Companies in the contracting process that meet at least one of the criteria described above are then subjected to an integrity assessment. The process begins with the third party completing a due diligence form to ascertain the relationships of the legal entity and its administrators with public agencies and agents and with employees of the contracting company; the existence of any history of accusations or convictions of the third party in cases related to fraud and corruption; and the existence of a compliance programme with a channel for complaints, code of ethics and other measures aimed at preventing the occurrence of illicit acts by the third party.

Based on the responses obtained in the due diligence form, the integrity of the supplier is analysed and, if relevant alert points are identified, a complementary analysis is conducted

through research in a proprietary background check tool, where public data, such as certificates, legal and civil proceedings, family relationships and shareholdings are verified.

Based on the history obtained, among the companies that participated in the first stage of the integrity assessment process, i.e., those that completed the due diligence form, approximately 26% presented relevant alert points that justified the complementary analysis. Despite the possibility that the questionnaire may contain incorrect information, either due to omission or carelessness in its completion by suppliers in the contracting process, the method used, by subjecting only a group of suppliers to an in-depth analysis, directs the efforts to be adopted by the contracting company.

The result of these analyses generates a classification of the supplier's integrity risk based on a standardized dosimetry, ranging from low, medium, high or very high.

Finally, in accordance with the supplier's degree of risk, an action plan is defined with activities to prevent the occurrence of fraud and corruption in the relationship with the contracting enterprise, as well as to monitor its external performance so as not to cause damage to its image.

Among the planned actions, selected depending on the degree of risk obtained in the analysis of the supplier, are the obligation to undergo training in compliance by the contract managers and inspectors, the inclusion of the supplier in the awareness raising activities offered by the company and the auditing of contracts to verify conformity in payments and in the provision of services. In addition, the integrity clauses to be included in contracts are chosen depending on the risk classification. These include a commitment by the supplier to know and comply with the guidelines established in the company's Compliance Programme, the obligation to complete a due diligence form and any additional information that may be requested, the possibility of terminating the contract in the event of evidence of irregularities and even the possibility of auditing the supplier, with access to the books, records and accounting of assets.

- **RESULTS AND CONCLUSIONS**

The limitations of the methodologies presented for due diligence with third parties show that the prevention of fraud and corruption by the organisations cannot be summarized by simplistic and automatic processes. At the same time, as part of the corporate context that seeks the balance between the financial and the adoption of good market practices, the compliance teams must be structured so as not to bring excessive rigidity in the work processes and neither excessive monitoring costs.

Thus, greater effectiveness in relations with third parties is suggested when the company chooses to adopt criteria and strategies in a considered manner and focus on those third parties most exposed to integrity risk. By limiting the scope of third parties to be monitored, the company has a robust and appropriate capacity to monitor its relationships, as well as greater chances to react quickly and appropriately when third parties are suspected of wrongdoing.

This article is not intended to be exhaustive since case studies alone cannot be generalized and components of an integrity risk assessment vary according to the economic sector, size, scope, geographic reach and other factors inherent to each organisation.

As this is still a recent topic within the context of organisations, the adoption of due diligence and monitoring of third parties are fields of study with opportunities for development. It is expected that, with the research carried out in this article, the academia can advance in the discussions of the proposed theme, testing new data to confirm the propositions made here, as well as associating them to the occurrence of irregularities by the assessed third parties. Quantitative comparisons between the number of companies adopting due diligence on third parties and the occurrence of illicit acts could prove to be a way to advance in verifying the effectiveness of integrity assessments. Finally, new methodologies for conducting due diligence that overcome the limitations suggested here are also opportunities for research.

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