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VOJVODINA BAR ASSOCIATION**

**ELDERLY PEOPLE AND DISCRIMINATION:
PREVENTION AND REACTION**

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Prevention and Reaction***

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Túlio Felipe Xavier Januário*

**THE ROLE OF COMPLIANCE PROGRAMS IN
PREVENTING AGE DISCRIMINATION:
AN ANALYSIS IN THE LIGHT OF BRAZILIAN LAW
10.741/03**

It is indisputable that contemporary society is marked by mass consumption, which has as protagonists large companies (often multinationals) that operate in the production, distribution and sale of the most varied products. The emergence of these entities that are undeniably complex, powerful and active in the most varied sectors of society, brought with it a greater concern with the crimes committed from this business environment and harmful to the interests not only of the company itself, but also of its employees and third parties. It is precisely in this context that compliance programs have gained prominence as an important instrument for preventing and repressing economic and business crimes. That being said, the object of this investigation focuses on a specific niche of crime that can also be committed from the business environment: elderly discrimination. It is a fact that in each of the stages of the customer chain, there may be facts that are harmful to the interests of the elderly, either by preventing or unjustifiably hindering their access to rights, services, products or jobs, or by displaying or conveying in media, advertisements with information or images that are derogatory or offensive to the elderly person. Aware of this reality, Brazilian legislators approved in 2003 the so-called Statute of the Elderly (Law 10.741/03), which also underwent significant changes through Law 14.423/22. This is a law that provides not only for some fundamental rights of the elderly, but also criminalizes various behaviors that are harmful to the interests of these people. In view of this scenario, the aim of this paper is to analyze the role of compliance programs in preventing elderly discrimination and how they can affect criminal liability, in the light of the Brazilian legal system. To do so, we will initially study the concept, fundamentals and concrete structure of compliance programs. Subsequently, we will analyze Law 10.741/03 (with the modifications brought by Law 14.423/22) in detail, with special attention to the crimes foreseen therein. At the end of the investigation, we will seek to understand how compliance programs should be structured so that they can be effective in preventing crimes against the elderly and how they can be considered in the attribution of criminal responsibility to individuals and legal entities, for the crimes provided for in the Law under analysis.

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Introduction

It is indisputable that contemporary society is marked by mass consumption, which has as protagonists large companies (often multinationals) that operate in the production, distribution and sale of the most varied products. The emergence of these entities, which are undeniably complex, powerful and active in several sectors of society, brought with it a greater concern with the crimes committed from this business environment and harmful to the interests not only of the company itself, but also of its employees and third parties. It is precisely in this context that compliance programs have gained prominence as an important instrument for preventing and repressing economic and business crimes.

That being said, the object of this investigation focuses on a specific niche of crime that can also be committed from the business environment: *ageism*. It is a fact that in each of the stages of the customer chain, there may be facts that are harmful to the interests of elderly people, either by preventing or unjustifiably hindering their access to rights, services, products or jobs, or by displaying or conveying in media, advertisements with information or images that are derogatory or offensive to them. Aware of this reality, Brazilian legislators approved in 2003 the so-called *Statute of the Elderly People* (Law 10.741/03), which also underwent significant changes through Law 14.423/22. This is a law that provides not only for some fundamental rights, but also criminalizes various behaviors that are harmful to the interests of these people.

In view of this scenario, the aim of this paper is to investigate the role of compliance programs in preventing and facing elderly people discrimination. To do so, we will initially study the concept, fundamentals and concrete structure of compliance programs. Subsequently, we will analyze Law 10.741/03 (with the modifications brought by Law 14.423/22) in detail, with special attention to the crimes foreseen therein. At the end of the investigation, we will seek to understand how compliance programs should be structured so that they can be effective in preventing the crimes under analysis.

1. On the origins, foundations and procedures of compliance programs

In the mid-1930s the Securities and Exchange Commission - SEC began to require companies to establish self-policing controls to prevent insider trading, which meant that, in the 1950s, most of the agencies and financial intermediaries were provided with (still primitive) forms of compliance programs. In the 1940s, the Department of Justice - DOJ dismantled a relevant cartel of companies operating in the field of electrical components, starting to demand from these corporations the adoption of compliance programs to prevent competition offenses. These two episodes are, according to Adán Nieto Martín, the beginnings of what we currently understand as compliance programs, although these have undergone significant changes over the decades¹.

With the disclosure of the *Watergate* scandal in the United States in the 1970s, a complex network of illegal financing of political parties and illegal commercial practices by numerous North American companies was also discovered. The complexity of the investigations exceeded SEC's human and financial resources, which is why it began to adopt as a strategy, agreements with companies that collaborated with the clarification of the facts².

This case led to the popularization of compliance programs and internal investigations, which ended up being institutionalized through the *US Sentencing Guidelines* of 1991. These provided for the reduction of penalties for legal entities that had, before the commission of the crime, systems of prevention and detection of infractions, in addition to other benefits for those who communicate the facts to public authorities before they become publicly known, cooperate in their investigations and/or confess them³.

At the turn of the millennium⁴, with the disclosure of major financial scandals such as those of Enron, WorldCom and Parmalat⁵, these programs became the object of great attention again, especially in the context of the emergence of the idea of *enforced*

¹ Nieto Martín, 2015: 27-28. As pointed out, however, by Eduardo Saad-Diniz (2019: 125), these manifestations of compliance were still primitive, very different from the current configuration of these programs.

² Estrada i Cuadras, Llobet Angl , 2013: 197-198. See also: Coffee Jr., 1977: 1115-1117; Mathews, 1984: 662ff.

³ Estrada i Cuadras, Llobet Angl , 2013: 198-199. See also: First, 2010: 36ff.

⁴ As Susana Aires de Sousa (2021: 29) points out, it is with the *Federal Sentencing Guidelines* of the 1990s that compliance programs gain truly legal contours, since based on the prior existence of programs with effective application, it was possible to mitigate the penalty applicable to the legal entity. On the evolution of the idea of mitigating the sanction by adopting compliance programs and by the cooperation of legal entities with the authorities, until their "reward" in other procedural moments, prior to the sentence, see: Sousa, 2019a: 12ff.

⁵ In this sense, see also: Sousa, 2019b: 125.

*self-regulation*⁶ as the main response to the proven ineffectiveness of the *pure self-regulation* of financial agents with regard to the prevention of illicit acts⁷ and the difficulties encountered by the State in its activities of regulation, prevention, investigation⁸ and repression of crimes in the corporate context⁹. In other words, the private entities are called upon to participate in those activities, defining their own standards, which are then ratified by the State when in line with public legislation and interests and whose violations can be punished¹⁰.

Within the scope of these enforced self-regulation tools, compliance programs can be understood as instruments of self-supervision and self-regulation inserted in the context of corporate governance, whose immediate purposes are the promotion of a culture of ethics and legal compliance in business activities and the prevention, investigation and repression of illegal practices within the corporate sphere. By its turn, their mediate aims are to maintain or recover the good reputation of the legal person, to secure the continuity of the business with potential profits and, mainly, to protect the corporation, its collaborators and representatives, from eventual liabilities in the most varied spheres, as well as from financial and reputational losses¹¹.

We observe that these programs have four “fronts” of action in the corporate scope: a) *the regulatory front*, with the establishment of bylaws, ethical standards, competences and internal procedures; II) *the preventive front*, which aims to prevent occurrences that may prove to be harmful to the company, including in terms of subsequent suits; III) *the investigative front*, referring to the occasions in which the corporation finds itself in the position of investigating potentially illegal occurrences that come to its attention; IV) and *the reactive front*, composed of “*post-factum*” compliance procedures, such as internal sanctions and continuous improvement of the program¹².

⁶ For a detailed analysis of how society's greater complexity, added to the emergence of increasingly complex technologies, the increase in corporate power and the ineffectiveness of national legal systems, have boosted debates on the most appropriate intervention or self-regulation techniques, especially in the 90s, see: Nieto Martín, 2008: 3, Gómez-Jara Díez, 2016: 92ff, On enforced self-regulation, see: Ayres, Braithwaite, 1992: 101ff.

⁷ Sarcedo, 2016: 24.

⁸ Neira Pena (2017: 317) lists as some of the difficulties encountered in the investigation of crimes committed in the corporate sphere, the technical complexity of these crimes, the opacity caused by the “veil of legal personality” regarding the concrete actions of its members, the decentralization of decisions, the division of labor, the control exercised by the company over its files and documents and the competent legal advice they have, either beforehand or after the eventual commission of crimes.

⁹ Braithwaite, 1982. On the difficulties of prosecuting corporate crimes, see also: Neira Pena, 2014: 198ff.

¹⁰ Ayres, Braithwaite, 1992: 101-107, Coca Vila, 2013: 51, Januário, 2021: 1458-1460.

¹¹ Januário, 2019: 85-86, Januário, 2023a: 729.

¹² Januário, 2019: 86-87, Januário, 2021: 1461.

As we can see, at the origins of compliance programs lies the pretension of preventing typically economic and business crimes, such as insider trading, cartel, tax evasion, money laundering and corruption¹³. Currently, however, the importance of these instruments is indisputable also for other crimes that do not fit into a strict conception of economic crimes¹⁴. In this paper, we will analyze the potentialities of these programs for preventing and facing a specific type of discrimination perpetrated through business activities, which is discrimination against elderly people.

2. The protection of elderly people in the Brazilian legal system

Recognizing, on the one hand, the vulnerability of elderly people and the consequent and necessary duty of solidarity for their protection, but also the imperative respect for their autonomy¹⁵, the Brazilian Federal Constitution guarantees, in its Article 230, the duty of the family, society and the State, to support the elderly people and guarantee their participation in the community, as well as to defend their life, dignity and well-being¹⁶. This is an important innovation of the 1988 Constituent Legislator, especially focused on the protection of human dignity, since the old constitutional focus, prior to this Charter, was guided by patrimonial, productive and economic interests, which prevented any protective approach to this group of people, since they were outside the production chain¹⁷. The current concept of elderly people, for legal purposes, is brought by Article 1st of the *Statute of the Elderly People*, which thus considers people aged 60 or over¹⁸.

This Statute is certainly the most important law of the elderly protection system in the Brazilian legal order, since, in addition to providing for various rights guaranteed

¹³ In a similar sense, see: Sieber, 2013: 70.

¹⁴ There are different understandings regarding the concept of *economic crimes*. Bajo Fernández (1973: 96) understand, based on a *strict concept*, that economic crime is that committed in disfavor of the economic order. Sustaining a broader concept, Schünemann (1988: 529) understands as economic crimes all criminal or administratively punishable actions, committed within the scope of economic life or closely related to it. The author also develops his concept of business crimes, which, according to him, would be economic crimes committed by a company. In turn, Klaus Tiedemann (1983: 61-62), proposes that the branch destined to economic criminal law should encompass not only the transgressions of the so-called “economic administrative law”, which would protect the activity of regulation and intervention of the State in the Economy, but also the crimes that violate supra-individual legal interests related to economic life, as well as criminal facts related to the so-called “classic patrimonial criminal law”, provided that they are directed against collective legal interests or constitute abuse of measures and instruments of economic life. For a comprehensive analysis, see: Canestraro, Januário, 2022b, p. 74.

¹⁵ Ribeiro (2020: 661)

¹⁶ Brasil, 1988.

¹⁷ Moraes, Teixeira (2018: 2248).

¹⁸ Brasil, 2003.

to this group of people (such as the right to freedom, respect, dignity, food, life, health, education, housing, work, protection, among others), also provides that they will be guaranteed full protection and ensured, by all means, equal opportunities and absolute priority in the realization of their rights¹⁹.

With regard specifically to the right to non-discrimination, it is interesting to note that the Brazilian Federal Constitution is clear in prohibiting, in its Article 3rd, any kind of prejudice based on age²⁰. This prohibition is also provided for by Law 8.842/1994, which guarantees that elderly people cannot suffer discrimination of any kind²¹, and by Law 9.029/95, which prohibits discriminatory conducts based on age, in hiring and maintaining employment relationships²². The latter also provides for that, in the event of dismissal based on age, the employee will be assured, in addition to financial compensation, the choice of reintegration into employment with receipt of all wages for the period in which he/she was away, or, if he/she does not want to be reinstated, receiving double the wages in question²³.

In addition to other important provisions regarding the rights and instruments of protection for the elderly people, the Brazilian *Statute* also typifies several behaviors to be considered crimes against their interests. As for the specific object of the present study, it is important to point out Article 96, which provides for a penalty of six months to one year, plus a fine, for those who “practice discrimination against an elderly person, preventing or hindering his/her access to banking operations, means of transportation, the right to contract or by any other means or instrument necessary for the exercise of citizenship, due to age”. The same penalties are provided for those who “disdain, humiliate, belittle or practice discrimination against an elderly person, for any reason”²⁴.

Article 100 of the *Statute of the Elderly People* also typifies specific acts of discrimination, in the following terms:

“Art. 100. It is a crime punishable by imprisonment from 6 (six) months to 1 (one) year and a fine:

- I - prevent someone from holding any public office due to age;
- II - deny someone, due to age, employment or work;

¹⁹ Brasil, 2003, Ribeiro (2020: 662).

²⁰ Brasil, 1988.

²¹ Brasil, 1994.

²² Ribeiro (2020: 664-667).

²³ Brasil, 1995.

²⁴ Free translation. Brasil, 2003.

III - refuse, delay or hinder care or fail to provide health care, without just cause, to the elderly person;

IV - fail to comply with, delay or frustrate, without just cause, the execution of a court order issued in the civil action referred to in this Law;

V - refuse, delay or omit technical data essential to the filing of the civil action object of this Law, when requested by the Public Prosecutor's Office"²⁵.

It is also important to mention the crime provided for in Article 105, which establishes a penalty of one to three years and a fine, for anyone who “displays or conveys, by any means of communication, information or images that are derogatory or offensive to the elderly person²⁶”.

As noted, in addition to other conducts contrary to the interests of elderly people, the *Statute* criminalizes various forms of discrimination against them, whether in terms of hiring, provision of services, advertisements, or any other means. Furthermore, when it comes to crimes committed against elderly people, both the Brazilian Penal Code (Article 61, h) and the Consumers' Code (Article 76, IV, b) provide for that this fact is a circumstance that aggravates the crime and, consequently, the penalty to be applied²⁷.

3. The importance of compliance in preventing ageism in Brazil

Bearing in mind the aspiration to guarantee elderly people not only their right not to be discriminated against, but also to participate in society on full terms of equality, it is important to pay attention to situations in which they may be victims of crimes related to business activities, either as workers or as *direct* or *indirect*²⁸ consumers. Based on this possibility, the issue that we will address concerns the potentialities and particularities of compliance programs in Brazil, with regard to preventing and facing discrimination against elderly people.

For that, the first question to be answered regards the incentives for the adoption of compliance programs in Brazil. In other words, since the Brazilian legal system does

²⁵ Free translation. Brasil, 2003.

²⁶ Free translation. Brasil, 2003.

²⁷ Brasil, 1940, Brasil, 1990.

²⁸ Brazilian legislation extends the protection of consumers to those who are not strictly consumers of the product or service in question, but who have been victims of damages or defects caused by them. They are called “indirect consumers”, “consumers by equivalence” or “bystander consumers”, and their protection is provided for in Article 17 of Law 8.078/90. See in detail at: Brasil, 1990, Januário, 2023b: 195, Andrade, Masson, Andrade, 2020: 541.

not impose them, one wonders why companies and their administrators would be motivated to make high financial investments in these programs, if, after all, they could even be condemned based on the information collected by themselves.

According to Engelhart, there are six progressive levels of state incentives directed at companies, in terms of implementing compliance programs: I) *self-regulation*, characterized by state abstention, in which incentives for the adoption of these programs would derive solely from potential benefits or market demands; II) *informal state support*, through training and other incentives; III) *rewarding compliance*, through its consideration in non-prosecution or deferred prosecution agreements, or even as a basis for reducing the sentence; IV) *sanctioning the lack of compliance*, which may result in the aggravation of penalties or even in the court order of adoption or correction of the program; V) *excluding responsibility due to compliance*, which is certainly one of the strongest and fairest incentives, reason why it has been progressively adopted by legal systems; and VI) a *general obligation to implement compliance programs*, which would be the strongest level, but it is still not observed in most countries, with the exception of sectorial obligations, such as those directed at activities with high-risk of money laundering²⁹.

In the Brazilian legal system, not only is there no general obligation to implement compliance programs, but also no incentive can be extracted from corporate criminal liability. That is because not only is it restricted to environmental crimes, but also the *vicarious model* adopted does not take into account the implementation of compliance programs³⁰. The major incentives for the adoption of these programs lie, in addition to market interests, or in specific sectors (such as anti-money laundering or anti-corruption), or the obligation of many companies before foreign laws (such as the North-American FCPA).

It is true that, since compliance programs are generally not structured in a *sectorial manner*, aimed at managing only specific risks, but rather, in a broad and general manner, aiming to promote a real change in the corporate culture and to prevent and punish all identified violations, the anti-discriminatory scope will certainly benefit from the existence and effectiveness of these programs, even if the incentives specifically designed for this sector are subtle, in the Brazilian system. However, we believe that the efficiency of prevention and repression of discriminatory acts against elderly people lacks the provision for corporate criminal responsibility for these crimes, especially through models that take into account the adoption of effective compliance programs.

²⁹ Engelhart, 2018: 21-30. See also: Canestraro, *Januário*, 2020: 230, *Januário*, 2021: 1466-1467.

³⁰ See in details at: *Januário*, 2018: 211ff.

It is also evident that the mere adoption of a “*paper compliance program*” is not enough, and it is very important to analyze how it should be structured in order to be considered effective. There is no pre-defined model, nor would it be ideal if it existed, since it depends on the particularities of the company, its sector of activity and the legal systems to which it is subject³¹. The Brazilian anti-corruption system, for example, establishes, through Article 57 of Decree 11.129/22, the parameters from which the effectiveness of compliance programs will be evaluated, for the purpose of mitigating the fine eventually imposed on the company. Among others, they are: management’s commitment; codes of ethics and standards of conduct; trainings; risk management and periodic evaluation of the program; accounting records audited by internal controls; independence of the compliance department; reporting channels and whistleblower protection programs; disciplinary measures; procedures that guarantee the immediate interruption of infractions and remediation of damages; and due diligence procedures³².

Bearing in mind the particularities of this scope and starting from the theoretical model proposed by Marc Engelhart³³, it is possible to identify some important aspects to be observed in the *i) formulation, ii) implementation, iii) consolidation and improvement* of compliance programs, in order to ensure their effectiveness in prevention and repression of ageism.

The *formulation* of the program, characterized by the trinomial *detect - define - structure*, includes risk management procedures, approval of a code of ethics and standards of conduct, the establishment of a whistleblowing channel and the definition of competences within the scope of the program. At this stage, it is important that the particularities of the company and its sector of activity be considered, in order to properly identify the risks derived from its activity and the proper procedures for mitigating them. With regard specifically to the object of the present study, it is essential to carry out a prior analysis of how and to what extent the corporation can be involved in acts of age discrimination (e.g., through age-based hiring criteria, inappropriate marketing campaigns or premises without proper accessibility measures) and conducting studies to mitigate these situations (Ljubičić, 2021: 525). Corporate values of inclusion and non-age discrimination in all corporate activities must be expressly included in the code of ethics and be implemented through standards of conduct that ensure that employees promote them daily in their scope of action.

³¹ See: Rodrigues, 2020: 102.

³² Brasil, 2022, Brasil, 2013.

³³ See in details at: Engelhart, 2012: 711-719

The *implementation* of the program, marked by the trinomial *communicate - promote - organize*, encompasses the daily dissemination and promotion of compliance, as well as the training of employees and interested parties. It is essential that all employees be aware of the aforementioned corporate values and concrete standards of conduct to be observed in their respective activities, without prejudice, of course, to the possibility of contacting the help-desk in case of doubts. However, there is no point in providing for abstract rules and imposing them on employees if senior management is not committed (e.g., one could think of the numerous cases of companies that do not have long-term career plans and adopt as a policy the frequent replacement of employees to reduce costs). There must be a true engagement from the latter not only to non-discriminatory values, but to the compliance program itself. This involvement could be observed, for example, in the constant supervision of compliance with the company's policies, in frequent updating and awareness actions, in valuing long-term employees and in strict attention to the needs of the elderly public.

Another important aspect concerns the company's commercial partners. As advantageous as a certain business may be, in financial terms, the company cannot simply ignore any lack of commitment of its commercial partner, with anti-discriminatory values. For this reason, due diligence procedures³⁴ are essential to assess whether its current or potential commercial partners, as well as its subsidiaries, are engaged, in every way, in the prevention and repression of ageism in their activities.

Finally, the *consolidation and improvement* of the program, characterized by the trinomial *react - sanction - improve*, encompasses the internal investigation and sanctioning procedures, as well as the evaluation and continuous improvement of the company's compliance. It is evident that the creation of several preventive mechanisms is not enough if the corporation does not undertake to investigate and punish eventual violations. For this reason, it is important that denouncements of ageism are properly investigated and, if the facts are proven, the perpetrators are exemplarily punished. In addition, it must be evaluated whether there was a failure in the compliance program and how it can be updated, to avoid similar situations in the future.

Conclusion

As demonstrated throughout the investigation, if, on the one hand, the participation of elderly people in the production chain, either as employees of large corporations or as consumers of the products produced by them, is the realization of their right to full

³⁴ See: Canestraro, Januário, 2022a.

and equal participation in society, on the other hand, it amplifies the situations in which they can be victims of discrimination in the most varied business activities. In view of this situation, the Brazilian *Statute of the Elderly People* provides for as crimes, several conducts that constitute discrimination in various areas and activities, such as hiring, assuming public offices, providing services, advertisements, among others.

In our view, despite the lack of legal incentives in this regard (e.g., absence of criminal liability for legal entities in Brazil, with the exception of environmental crimes), compliance programs play a fundamental role in preventing and confronting ageism committed from business activities. Either because of the changes in the business culture that they promote, or because of their concrete mechanisms that help in the prevention, detection and internal repression of concrete episodes of discrimination, we understand that these programs are very important in aiding the public authorities to face these crimes.

Bearing in mind not only the *horizontal effectiveness of human rights*, but also the leading role assumed by large corporations in contemporary society, the *neutrality* of these agents in the face of discriminatory acts is no longer enough³⁵. It is imperative that they assume an active role in this battle, and effective compliance programs are a fundamental instrument for achieving this objective.

References

- Andrade, A., Masson, C., Andrade, L. (2020) *Interesses difusos e coletivos, vol. 1*. 10. ed. São Paulo: Método.
- Ayres, I., Braithwaite, J. (1992) *Responsive Regulation: Transcending the Deregulation Debate*. Oxford: Oxford University Press.
- Bajo Fernández, M. (1973) “El derecho penal económico: un estudio de derecho positivo Español”, *Anuario de derecho penal y ciencias penales*, 26(1), 91-139.
- Braithwaite, J. (1982) “Enforced self-regulation: a new strategy for corporate crime control”, *Michigan Law Review*, 80(7), 1466-1507.
- Brasil (1940) *Decreto-Lei nº 2.848, de 7 de dezembro de 1940: Código Penal*.
https://www.planalto.gov.br/ccivil_03/decreto-lei/del2848compilado.htm.
- Brasil (1988) *Constituição da República Federativa do Brasil de 1988*.
https://www.planalto.gov.br/ccivil_03/constituicao/constituicao.htm.
- Brasil (1990) *Lei nº 8.078, de 11 de setembro de 1990: dispõe sobre a proteção do consumidor e dá outras providências*. https://www.planalto.gov.br/ccivil_03/leis/18078compilado.htm.
- Brasil (1994) *Lei nº 8.842, de 4 de janeiro de 1994: dispõe sobre a política nacional do idoso, cria o Conselho Nacional do Idoso e dá outras providências*.
https://www.planalto.gov.br/ccivil_03/leis/18842.htm

³⁵ See: Pereira, Rodrigues, 2021.

- Brasil (1995) *Lei nº 9.029, de 13 de abril de 1995: Proíbe a exigência de atestados de gravidez e esterilização, e outras práticas discriminatórias, para efeitos admissionais ou de permanência da relação jurídica de trabalho, e dá outras providências.*
https://www.planalto.gov.br/ccivil_03/leis/19029.htm
- Brasil (2003) *Lei nº 10.741, de 1º de outubro de 2003: dispõe sobre o Estatuto da Pessoa Idosa e dá outras providências.*
- Brasil (2013) *Lei nº 12.846, de 1º de agosto de 2013: Dispõe sobre a responsabilização administrativa e civil de pessoas jurídicas pela prática de atos contra a administração pública, nacional ou estrangeira, e dá outras providências.*
https://www.planalto.gov.br/ccivil_03/_ato2011-2014/2013/lei/112846.htm.
- Brasil (2022) *Decreto nº 11.129, de 11 de julho de 2022: Regulamenta a Lei nº 12.846, de 1º de agosto de 2013, que dispõe sobre a responsabilização administrativa e civil de pessoas jurídicas pela prática de atos contra a administração pública, nacional ou estrangeira.*
https://www.planalto.gov.br/ccivil_03/_Ato2019-2022/2022/Decreto/D11129.htm
- Canestaro, A. C., Januário, T. F. X. (2022a) “Beyond Ecocide: Extraterritorial Obligations of Due Diligence as an Alternative to Address Transnational Environmental Damages?”, *RIDP* 93(1) 231-250.
- Canestraro, A. C., Januário, T. F. X. (2020) “Dos níveis de exigibilidade dos procedimentos de investigação interna” in: Instituto Brasileiro de Ciências Criminais, *Anais do CPCRIM: IV Congresso de Pesquisas em Ciências Criminais, de 21 a 23 de outubro de 2020*. São Paulo: IB-CCRIM. https://www.researchgate.net/publication/348003049_CANESTRARO_Anna_Carolina_JANUARIO_Tulio_Felippe_Xavier_Dos_niveis_de_exigibilidade_dos_procedimentos_de_investigacao_interna_In_Anais_do_IV_Congresso_de_Pesquisas_em_Ciencias_Criminais_de_21_a_23_de_o.
- Canestraro, A. C., Januário, T. F. X. (2022b) “Programas de compliance e branqueamento de capitais: implicações da lei nº 83/2017, de 31 de agosto, no regime jurídico de Portugal”, *Revista Científica do CPJM*, 1(3), 65-98, <https://rcpjm.cpjm.uerj.br/revista/article/view/61>.
- Coca Vila, I. (2013) “¿Programas de cumplimiento como forma de autorregulación regulada?” in: Silva Sánchez, J. M. (dir.), Montaner Fernández, R. (coord.) *Criminalidad de empresa y compliance: prevención y reacciones corporativas*. Barcelona: Atelier, 43-76.
- Coffee Jr., J. C. (1977) “Beyond the Shut-Eyed Sentry: Toward a Theoretical View of Corporate Misconduct and an Effective Legal Response”, *Virginia Law Review*, 63(7) 1099-1278.
- Engelhart, M. (2012) *Sanktionierung von Unternehmen und Compliance: eine rechtsvergleichende Analyse des Straf- und Ordnungswidrigkeitenrechts in Deutschland und den USA*. 2. ed. Berlin: Dunker & Humblot.
- Engelhart, M. (2018) *The Nature and Basic Problems of Compliance Regimes*. Freiburg im Breisgau: Max-Planck-Institut für ausländisches und internationales Strafrecht.
<https://doi.org/10.30709/archis-2018-3>
- Estrada i Cuadras, A., Llobet Anglí, M. (2013) “Derechos de los trabajadores y deberes del empresario: conflicto en las investigaciones empresariales internas” in: Silva Sánchez, J. M. (dir.),

- Montaner Fernández, R. (coord.) *Criminalidad de empresa y compliance: prevención y reacciones corporativas*. Barcelona: Atelier, 2013, 197-228.
- First, H. (2010) "Branch Office of the Prosecutor: The New Role of the Corporation in Business Crime Prosecutions", *North Carolina Law Review*, 89(1), 23-98.
- Gómez-Jara Díez, C. (2016) "Fundamentos de la responsabilidad penal de las personas jurídicas" in: Bajo Fernández, M., Feijoo Sánchez, B., Gómez-Jara Díez, C., *Tratado de responsabilidad penal de las personas jurídicas: adaptada a la Ley 1/2015, de 30 de marzo, por la que se modifica el Código Penal*, 2. ed., Navarra: Civitas, 89-120.
- Januário, T. F. X. (2018) "Criminal Liability for Legal Entities: A Comparative Study Between Spain, Portugal and Brazil", *Polar - Portuguese Law Review*, 2(2), 191-224.
- Januário, T. F. X. (2019) *Criminal compliance e corrupção desportiva: um estudo com base nos ordenamentos jurídicos do Brasil e de Portugal*. Rio de Janeiro: Lumen Juris.
- Januário, T. F. X. (2021) "Cadeia de custódia da prova e investigações internas empresariais: possibilidades, exigibilidade e consequências processuais penais de sua violação", *Revista Brasileira de Direito Processual Penal*, 7(2), 1453-1510. <https://doi.org/10.22197/rbdpp.v7i2.453>
- Januário, T. F. X. (2023a) "Corporate Internal Investigations 4.0: on the criminal procedural aspects of applying artificial intelligence in the reactive corporate compliance", *Revista Brasileira de Direito Processual Penal*, 9(2), 723-785, <https://doi.org/10.22197/rbdpp.v9i2.837>.
- Januário, T. F. X. (2023b) "Vulnerabilidad e hiposuficiencia 4.0: la protección jurídico-penal de los consumidores en la era de la inteligencia artificial" in: Fontestad Portalés, L. (dir.), Pérez Tortosa, F. (coord.) *La justicia en la sociedad 4.0: nuevos retos para el siglo XXI*. A Coruña: Colex, 187-199.
- Ljubičić, M. (2021) "Ageism in medicine and the right to life" in: Yearbook human rights protection right to life, Provincial Protector of Citizens - Ombudsman, Institute of Criminological and Sociological Research, 525-537.
- Mathews, A. F. (1984) "Internal Corporate Investigations", *Ohio State Law Journal*, 45(3) 655-702.
- Moraes, M. C. B., Teixeira, A. C. B. (2018) "Art. 230" in: Canotilho, J. J. Gomes et al. (coord.) *Comentários à Constituição do Brasil*. 2.ed. São Paulo: Saraiva, 2246-2250.
- Neira Pena, A. M. (2014) "Corporate Criminal Liability: Tool or Obstacle to Prosecution" in: Brodowski, D., de los Monteros de la Parra, M. E., Tiedemann, K., Vogel, J. (eds.) *Regulating Corporate Criminal Liability*. Cham: Springer, 197-210.
- Neira Pena, A. M. (2017) *La instrucción de los procesos penales frente a las personas jurídicas*. Valencia: Tirant lo Blanch.
- Nieto Martín, A. (2008) "Responsabilidad social, gobierno corporativo y autorregulación: sus influencias en el derecho penal de la empresa", *Política Criminal: Revista Electrónica Semestral de Políticas Públicas en Materias Penales*, (5), 1-18.
- Nieto Martín, A. (2015) "El cumplimiento normativo" in: Nieto Martín, A. et al. (dir.) *Manual de cumplimiento penal en la empresa*. Valencia: Tirant lo Blanch, 2015, 25-48.

- Pereira, F. L. B., Rodrigues, R. B. (2021) “Compliance em direitos humanos, diversidade e ambiental” in: Nohara, I. P. D., Almeida, L. E. (coord.) *Coleção compliance*, vol. VI. São Paulo: Thomson Reuters Brasil. Ebook.
- Ribeiro, L. (2020) “Direito do idoso” in: Andrade, A. et al., *Interesses difusos e coletivos*, vol. 2. 3.ed. São Paulo: Método, 2020, 655-717.
- Rodrigues, A. M. (2020) *Direito penal económico: uma política criminal na era compliance*. 2. ed. Coimbra: Almedina.
- Saad-Diniz, E. (2019) *Ética negocial e compliance: entre a educação executiva e a interpretação judicial*. São Paulo: Thomson Reuters Brasil.
- Sarcedo, L. (2016) *Compliance e responsabilidade penal da pessoa jurídica: construção de um novo modelo de imputação baseado na culpabilidade corporativa*. São Paulo: LiberArs.
- Schünemann, B. (1988) “Cuestiones básicas de dogmática jurídico-penal y de política criminal acerca de la criminalidad de empresa”, *Anuario de derecho penal y ciencias penales*, 41(2), 529-558.
- Sieber, U. (2013) “Programas de compliance en el derecho penal de la empresa. Una nueva concepción para controlar la criminalidad económica” in: Arroyo Zapatero, L., Nieto Martín, A. (dir.) *El derecho penal en la era compliance*. Valencia: Tirant lo Blanch, 63-110.
- Sousa, S. A. (2019a) “A colaboração processual dos entes coletivos: legalidade, oportunidade ou “troca de favores”, *Revista do Ministério Público*, (158), 9-36.
- Sousa, S. A. (2019b) *Questões fundamentais de direito penal da empresa*. Coimbra: Almedina.
- Sousa, S. A. (2021) “As diferentes faces dos programas de compliance” in: Nieto Martín, A., Saad-Diniz, E. (org.) *Legitimidade e efetividade dos programas de compliance*. São Paulo: Tirant lo Blanch, 27-36.
- Tiedemann, K. (1983) “El concepto de derecho economico, de derecho penal economico y de delito económico”, *Revista chilena de derecho*, 10(1), 59-68.