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It's not an "ego fight": The do's and don'ts of monitorships

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Companies dread monitorships. They are often expensive and intrusive, and occasionally they go wrong, elongating a company's time under government scrutiny.

But the use of monitorships is only becoming more popular. Many US government agencies use them to make sure misbehaving businesses don't reoffend. Multilateral development banks impose them as a way of ensuring

business partners don't misuse their funds. And government authorities outside the US – such as in Brazil and France – have recently started adopting their own form of monitorships.

Here, experts from the US, Brazil, the UK, France and Germany join a roundtable, chaired by Sam Eastwood at Mayer Brown, to discuss their experiences working on monitorships, and how to ensure they end well for the enforcement agency, the company and the monitor.

The panel

Sam Eastwood, a London-based partner in Mayer Brown's white-collar defence and compliance practice, has previously worked as the corporate monitor in cases overseen by the African Development Bank, the World Bank and the UK's Serious Fraud Office.

Adriana Dantas runs her own boutique firm in São Paulo. She advises companies on compliance matters, and has served as a monitor in Brazil. She is currently the chair of the Inter-American Development Bank's sanctions committee.

Bart Schwartz, the chairman of Guidepost Solutions who is based in New York, has been appointed as the monitor by a variety of US government agencies, overseeing the compliance improvements of organisations such as the New York City Housing Authority, General Motors and DHL.

Julie Zorrilla is a partner at investigations and compliance boutique Navacelle in Paris and has served on World Bank-appointed monitorship teams.

Oliver Schieb is the co-founder of Berlin-based investigations and compliance boutique Comfeld where he has worked on international monitorships imposed by the US Department of Justice.

The roundtable: "This will save costs"

Eastwood: The common element here is that we all have experienced the monitorship process – and we have acted as monitors or independent compliance experts, a small but growing community. We thought we'd start by setting out some foundational steps. What's a good initial step?

Schwartz: Probably the most important step – before there is any monitorship agreement – is understanding, as best as possible, the depth of the problem and its location inside the company as a way to judge the likelihood of there being a successful monitorship. Is the problem cultural? Is it ineptitude? And is the company a good candidate for a monitorship? The regulator should assess what kind of cooperation the company is ready to provide, whether the company's senior management really are intent on remediation, and whether a monitorship could be beneficial to the company.

Dantas: Companies have to be clear up front what they want to achieve with the monitorship. This will save costs and lead to a much more efficient process. Most companies that I have seen in recent experience in Latin America don't really understand what they enter into when they sign up for a monitorship. This leads to conflicts in the course of the monitorship because the company and regulator have different expectations. The monitor may make demands of the company that it had not anticipated – especially when the company is traditionally less focused on process, on checks, and testing.

Eastwood: What are we looking for in the monitor's letter of appointment and how important is that?

Zorrilla: For the monitor to work efficiently the modus operandi set out in the letter of appointment must be clear – and supported by the regulator and company. It also needs to anticipate all the processes. Each step should be described in this letter of appointment, or engagement letter: work plan, timeline, geographic scope, interviews, resources, maybe key contacts for the corporation and the regulator, as well as identification of the applicable laws and legal issues.

During our last appointment by the World Bank, we were requested to set out, in the engagement letter, an outline of our capability and our approach to monitoring the company. The modus operandi should comply with best practices concerning confidentiality, privilege, conflict of interest, independence, and impartiality. And so, the idea is just to have all the information in the engagement later, in order to be clear about the next steps of the monitorship.

Schwartz: I remember being appointed a monitor on one occasion and, of course, I was the only person who didn't participate in drafting the monitorship agreement. I get the monitorship agreement and it says that I'm to conduct an "operational audit".

So I went to the company, and I said, "What did you think you agreed to when you agreed to an operational audit?" And they said to me, "We were so tired of negotiating. This was the last thing the regulator brought up. We just said yes." Then I asked the regulator, who said, "Well, somebody on our team had read about an operational audit, and it sounded like a good idea. So at the end we decided to ask for it and they agreed."

I actually became a mediator. It worked out because I had responsible people on each side, and I was able to work out what I thought an operational audit was, get their buy-in, and then

proceed with the audit that everyone had agreed upon, rather than guessing and then finding out later that's not what everyone wanted, which is when you get friction.

It's beneficial for the monitorship if the regulator takes an active role

Eastwood: How important is it for the regulators to have a strong sense of what good compliance is? And what are you seeing and experiencing in practice?

Dantas: Most regulators here in Brazil, in particular federal prosecutors or state prosecutors, are very advanced in criminal law, but not as much in compliance or corporate law. This may lead to lack of understanding of how a corporation is structured and operates in practice. Senior staff with corporate and compliance experience, like we see in the US and more recently the UK, would be a welcome development in the region. Our recent experience shows that independent monitors have played an important role in educating regulators in the course of the monitorship process.

Schieb: It's beneficial for the monitorship if the regulator takes an active role in the process. But in the past, regulators have tended to hold back once the settlement is finalised. The regulator needs to have its own detailed view of the company's compliance management status because there might be situations where the corporation seeks the regulator‘s second opinion because of a disagreement with the monitor. That's what I experienced in a monitorship where the company heavily lobbied the regulator where it disagreed with the monitor, especially towards the end of the monitorship. The company put so much effort in discussing with the regulator and influencing them, so that they eventually got certified in the end, even though the monitor still had significant concerns.

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Eastwood: I've had different experiences working with the development banks (the World Bank and the African Development Bank) who are very engaged with the monitorship process – and very familiar with compliance best practice . But what does that mean? It means the regulator will attend an overseas "kick-off" meeting with the monitor at the outset, and will sit down with the company for three days and talk about the business; they will meet the chairman, the board, the chief compliance officer and his or her team. That's incredibly powerful because what they are doing is developing a rapport – and marking a departure from the contentious pre-settlement phase to a distinctly collaborative approach. My experience as a monitor for these development banks also extends to site visits with the development bank representative in the course of the monitorship. So the monitor is observing the chief compliance officer who in turn is observing the company and the regulator is accompanying the monitor. It's quite a circus but it's really important.

If you anticipate the key areas to improve, it will save you time

Schieb: As a corporation, if you can anticipate the monitorship requirements and identify your compliance gaps well before you sign a settlement, that puts you far ahead of the curve. If you start early on, you will be able to fill the biggest compliance gaps before the monitor arrives. Once the monitor is there, it's all about anticipation because you will be better able to understand where the monitor's programme is heading. If you anticipate the key areas to improve, it will save you time, resources and money. There have been many monitorships where companies rush through them for the last year because they have lost time and haven't anticipated what needs improving. And they have to then heavily invest in consultants and external resources in order to turn it around.

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Eastwood: Who is well placed to advise the company through the monitorship process? Is it the investigation counsel who's spent one, two, three, possibly four years defending the company through the case?

Dantas: It varies by case. Investigation counsel will not necessarily be the right lawyers to assist the company through a one to three-year monitorship.The most important element in my view is that the company's lawyer has to recognise that there is a change in context in the sense that there is a need to ensure cooperation with the monitor so as to achieve better and more cost efficient results for the company. I have experienced cases where a few defence attorneys challenged every single monitor request, and this was counterproductive. In that specific case, I almost dropped out, which would have had a huge impact and reputational effect on the company. Making credible arguments and the willingness to work and understand the monitor are attributes that will necessarily lead to a favourable outcome for the company.

A monitorship is not a litigation process

Eastwood: What about relationship management during the monitorship process?

Zorrilla: Relationships are critical to the success of the monitorship because a compliance monitor's mission is to confirm that the company compliance programme meets the standards required by the regulator. And the quality of relationships between the regulator, the corporation, its employees and the monitor are the basis of the successful compliance monitorship. Trust, a good working relationship and a clear head are key when things go south. For instance, natural tensions may arise during a monitorship. And for many reasons, some business units can find interviews or implementing recommendations time-consuming. But good relationships will foster an environment in which employees

understand that a good compliance programme is better for a good brand.

Schieb: A monitorship is not a litigation process. And the regulator, as a key party of the whole process, should make good relationships and a non-adversarial approach to the monitorship a key requirement for all parties involved. The more the corporation falls into the 'us against them' mode, the less successful a monitorship is going to be. And relationships between the parties will eventually go public.

Schwartz: I have turned down opportunities where a company has told me to investigate, tell us who's at fault, and then fix it. You really can't do both. If you want me to point fingers at people, I know how to do that. If you want me to fix things, I know how to do that. But I'm not going to be able to get people to cooperate with me and fix things if I have been pointing fingers.

Ego fights are very destructive

Dantas: Picking the monitor with the right qualifications is important but so is choosing one with the right personal characteristics. Because you don't want someone who is debating or has an ego fight. Because no one wins that. Ego fights are very destructive to the process and ultimately impact on credibility. If you don't believe in the willingness to change or the efforts of the other party, the process becomes lengthy and tiring. It's a never-ending story. The ability to collaborate and work together is key for a successful monitorship, bearing in mind that all parties benefit from a successful process that leads to a change in the corporate culture.

Schwartz: It's absolutely critical that management sends a strong message to its employees that they want to get value out of the process. And you can do that by appointing a company person,

who everyone respects, to lead the team that's dealing with the monitorship. You don't reach into the retirement pool for the person who's on his or her way out.

Schieb: I recently witnessed a monitorship where the company failed to establish a dedicated internal monitorship team. Instead, they changed it three times in the course of the first two years of the monitorship. And the result was that the monitorship got extended. You have to manage and drive the change within the organisation. And that's why you need a dedicated and well-equipped team to oversee all the changes created by the monitorship, and then test what's been developed.

Eastwood: In terms of monitor management I can think of two contrasting examples. In one case, at the outset of the monitorship I received delivery of a significant amount of high quality documentation that gave me a flying start, when it came to the initial step, which was a desktop review of the effectiveness of the programme. In another case, I was given information but it was not ordered, nor particularly coherent – and tellingly there was no risk assessment. So my challenge was to report on what I saw in terms of framework and structure. And yet I didn't have a key foundational element of any compliance programme. It meant a lot of work on my part, and required a lot of communication on the part of the regulator. The company and its advisers had to run very hard to catch up.

Transparency is really important

Zorrilla: The monitorship is a success only if we have support from all levels of the company. And for the monitorship to have a good picture of the reality of the corporation, the best way to proceed is to identify key contacts in the company who have access to all the important information such as reporting lines.

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Companies want effective and tailored recommendations to enhance their compliance programmes. But in my experience, the main concern of certain French companies, particularly in low-margin industries, is to ensure that the monitor has recommendations in line with the reality of the business. The best way for the company to achieve that is to be transparent with the monitor.

Eastwood: Transparency is really important. If you've got a large organisation operating in difficult jurisdictions then there will be compliance challenges however sophisticated the compliance programme. And frankly, as a monitor, if there are no compliance incidents or challenges or no whistleblower reports, I'm worried. So there will be incidents; people will make the wrong decisions; people may make bad decisions. The monitor wants to see this; the monitor wants to see how the whistleblowing programme works in practice. They want to see how the incident management system works in practice. And they want to see how management responds to really challenging situations.

Schwartz: A monitor’s work has an end. A company’s work never ends. It’s not a static process and the company always has to look at it. If the company has worked in good faith and has demonstrable evidence of effective compliance programme implementation, the monitor‘s role is over. But it’s also important for the monitor to teach the company how to do it on their own.

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