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Contribution
by
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Perspectives for the promotion of a competition environment in Brazil[1]

For at least two decades, the expression compliance has been part of the everyday activities of great organizations, corporations, as well as by a wide variety of economic agents and their respective regulatory agencies.

The term compliance means to act in accordance with the law, the norms and good practices, but its definition goes beyond the proper observance of a country's law. Compliance encompasses a range of practices that are subject to constant renewal within the market.

Those practices cannot always be governed only by the laws. In this sense, compliance can be defined as *the duty to comply, to be in accordance and enforce the laws, guidelines, internal and external rules, aiming to mitigate the risks associated with the reputation and the legal and regulatory risk*[2]. Overall, compliance means to act in accordance with the rules.

There is no doubt that this idea of compliance is embodied in the organizational culture or business model of many companies. In this sense, compliance brings a competitive differential to the company by enhancing its reputation towards the State, consumers and among competitors. In an extremely competitive, globalized and connected economy, the economic results derived from such reputation are not negligible.

Furthermore, the steady growth of a culture of compliance over the past 15 years is associated with a greater concern of the regulatory agencies, competition authorities and international organizations concerning the creation of a more transparent, integrated and predictable market and business environment, able to produce welfare not only for its economic agents, but also for its countries' economies and consumers in general. This

[1] This paper was written by Amanda Athayde Linhares Martins, Diogo Thomson de Andrade and Lívia Dias de Melo. It was translated by André Rothfeld Gratone, Fábio Lopes de Sousa and Raissa Guerreiro Bonfim.

[2] COIMBRA, Marcelo de Aguiar, MANZI, Vanessa Alessi (orgs.), *Manual de Compliance – Preservando a Boa Governança e a Integridade das Organizações*, São Paulo: Atlas, 2010, p. 2.

concern is reflected in a more proactive attitude of antitrust authorities regarding law enforcement.

Such enforcement has also strengthened the culture of compliance previously mentioned, resulting in a virtuous cycle. This cycle can be essentially defined by the relation between enforcement, awareness, and compliance. In short, the more the authorities enhance their power of monitoring and repression, the more the economic agents become aware of the risks of being punished, and of how it would affect their business. As to mitigate or eliminate those risks, the economic agents prefer to act in compliance than to be involved in infringements. Moreover, when compliance is stimulated, the capacities for preventing and detecting infringements are also improved, feeding the virtuous cycle.

As for penalties – especially the ones related to economic offenses – they should not only take into account punitive or retributive considerations, but also dissuasive concerns, in order to discourage other economic agents to practice infringements.

Competition Compliance and the prevention/detection of anticompetitive conducts

In the field of competition defense, this virtuous cycle is particularly relevant when analyzing the growth of a competition compliance culture in the private sector and the role played by antitrust authorities in this process.

First, it is necessary to stress that antitrust authorities usually play two roles in this context: they (i) act preemptively and repressively in order to avoid the abuse of economic power; and (ii) promote and defend competition in a wide variety of sectors in the economy.

Bearing this in mind and apart from actions regarding the imposition of sanctions, which is one of the ways of boosting a compliance virtuous cycle, the foremost objective of antitrust authorities is to ensure the development of an increasingly competitive business environment within the economy. This objective is grounded on a shared

understanding between several economic agents (consumers, public authorities and, most notably, companies), that competition is a principle that contributes to national development. The understanding that abiding by the rules is beneficial requires the consolidation of competition compliance within the companies' framework. In addition, it is worth noting that, as the main anticompetitive conduct investigated by antitrust authorities around the world, cartels constitute a complex criminal conduct whose characteristics evidence the high risk of compromising the reputation and morality of the economic agents within a competitive market.

Since cartels reflect an anticompetitive conduct that directly and indirectly harms consumers, innovation and even the public administration[3], antitrust authorities play a vital role in increasing the risks of engaging in such unlawful practice, as opposed to the economic agents who decide to comply with the laws. Given the risks of engaging in such conducts, compliance becomes an important additional asset regarding its reputation towards consumers and the society in general.

In this sense, competition authorities around the world, by means of their own initiative as well as through competition networks[4], have intensified their activities aiming at a more effective and dissuasive enforcement, as well as fostering a competition culture in the market. Enforcement therefore constitutes a fundamental step in promoting competition compliance.

In Brazil, most notably after the restructuring of the Brazilian Competition Defense System since the entry into force of the New Competition Law[5], there has been an improvement in the fight against economic infractions. The implementation of a pre-merger review system and the improved effectiveness of cartel and unilateral conduct detection and repression mechanisms were decisive for the current Brazilian competition defense policy. As mentioned previously, the first and foremost initiative aimed at

[3] The clear intent to 'cheat' on the rules and the frequent connection with even more severe criminal conducts (corruption, money laundering, etc.) are also relevant evidence of the negative impact of cartels upon consumers, the public administration and innovation.

[4]Among such networks, we may quote the International Competition Network (ICN) and the OECD Competition Committee, as well as other international organizations such as the World Bank Group and the United Nations Conference on Trade and Commerce (UNCTAD).

[5] Law number 12.529/2011

creating a compliance culture must come from strict and effective action of antitrust authorities. The restructuring of the Brazilian authority is part of such efforts, allowing both a proactive detection of wrongdoings and assertive penalties.

However, there is a heated debate within the international scope regarding the dissuasive limits of a repressive stance against economic infractions. Despite the consensual understanding that the amount on fines imposed should be higher than the advantages derived from cartel practices, studies indicate that such amounts may also engender undesired or even unexpected effects. Exaggerated fines, for instance, do not necessarily solve the *principal-agent problem* between companies and their employees involved in anticompetitive practices. The companies' and their employees' incentives to cease their participation in collusive practices are not necessarily convergent[6]. In theory, after being condemned, a company does not have incentives to participate in cartels, but this does not imply the same reasoning for its employees, who may still engage in anticompetitive conducts with the purpose of obtaining work bonuses and promotions, among other benefits. Therefore, the company may have to adopt surveillance and supervision mechanisms that induce the desired incentives upon the employees. Bearing this in mind, there is no clear evidence that enhanced assertiveness in the imposition of fines might reduce the occurrence of anticompetitive conducts[7].

In other words, antitrust efforts aimed exclusively at retributive effects during the imposition of fines when - and if - a company or individual is caught do not suffice. In practice, economic agents acting rationally tend to price such risk as any other ordinary risk of its economic activity. Due to this reason, most countries have expanded the range of sanctions against anticompetitive conducts beyond the imposition of fines, combining prison sentences or other restrictive measures. In fact, more than expanding the types of sanctions available with the purpose of impeding the 'pricing' of risks, the dissuasive purpose of antitrust authorities' sentences should also be combined with measures that

[6] PAPP, Florian Wagner-von. Compliance and Individual Sanctions in the Enforcement of the Competition Law (27.04.2016). Johannes Paha, *Competition Law Compliance Programs – An Interdisciplinary Approach*, Springer, Forthcoming. Retrieved from: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2771289 on August 27, 2016.

[7] OECD Policy Roundtables. *Promoting Compliance with Competition Law*. 2011. Retrieved from: http://www.oecd.org/daf/competition/Promotingcompliancewithcompetitionlaw2011.pdf. on August 27, 2016.

elevate the reputational risks of infractions and compliance incentives as advantageous business models, as well as the improvement of anticompetitive conduct detection tools. In this case, the development of a compliance culture has been recently highlighted as a new and complementary perspective regarding competition advocacy. Whereas the enforcement of competition policy punishes the consequence of wrongdoings, the preemptive character intends to inhibit anticompetitive practices and conducts that may harm the market. Both dimensions have the purpose of encouraging companies and employees to act in accordance with the Brazilian competition law.

Another relevant discussion regarding this matter deals with the role to be played by antitrust authorities in fostering compliance. Apart from the effectiveness and assertiveness regarding sanctions, in what other ways should antitrust authorities – who have limited material and human resources – act in order to promote compliance, thus increasing the dissuasive implications of their actions?

Within the scope of the development of antitrust authorities' enforcement capabilities, some other initiatives have been incorporated and adopted as good practices or even as norms, allowing the establishment of a dialogical relation between antitrust authorities' enforcement and companies' compliance. The main mechanisms resulting from such initiatives are the leniency agreements and settlements. By means of such legal instruments, companies willing to terminate their involvement in anticompetitive practices and comply with the rules might cooperate with the authorities in detecting infractions and simultaneously start abiding by the rules in order to avoid the consequences of their involvement in wrongdoings.

Behind such concepts is the idea of resilience – a concept borrowed from materials engineering, the recovery capacity of a certain body (in our case, a company, individual or organization) by using the same energy that reformed it. In short, by means of such legal instruments foreseen in the competition law, the economic agent might initiate or return its normal course (integrity) in a resilient way: during a certain period, a company, its activity and its reputation will face a downturn and, depending on the kind of agreement signed, the company might even have to pay part of the fines imputed to its anticompetitive practice. Besides, although the company's recovery will certainly entail costs and efforts, when choosing compliance, the chances of getting back on the course

and achieving foreseeability in corporative environment increase. It is also worth noting that by adopting such mechanisms, the company avoids being denounced by other company, who might eventually anticipate the provision of information on the anticompetitive conduct in question to the antitrust authority.

In this sense, the Brazilian leniency program was introduced in 2000[8] and the Cease-and-Desist agreement system (TCC) in cartel cases was reinserted within the legislation in 2007[9], both aiming at strengthening the repression of economic infractions. The leniency agreement is available only for the first applicant to report to CADE an anticompetitive conduct between competitors, entailing both administrative and criminal immunities. The TCC, on the other hand, is accessible to all the companies investigated in a given infraction, as long as the requirements foreseen in Law number 12.529/11 and regulated by CADE's Internal Rules are met. It is important to emphasize that TCCs are restricted to the administrative sphere and do not entail any automatic benefits in the criminal sphere[10]. CADE's updated records evidence that the antitrust authority has signed 54[11] leniency agreements since the beginning of the program and the Administrative Tribunal has validated 100[12] TCCs related to cartel cases since the entry into force of the new Brazilian Competition Law.

Another effective and preemptive way of promoting compliance is to improve transparency and predictability of the antitrust authority's decisions. When the increased risks of detection (which are intensified by the leniency and TCC mechanisms), are combined with the certainty regarding the competition authority's understanding of the

[8] By means of Law number 10.149/2000, which altered the former Brazilian Competition Law (Law number 8.884/1994)

[9] The Cease-and Desist Agreement was introduced in Brazil by Law number 8.884/1994. In 2000, Law number 10.149/2000, which instituted the leniency program in Brazil, did not foresee Cease-and-Desist Agreements in case of cartels. Such stance was reverted with Law number 11.482/2007.

[10] On March 2016, CADE has signed a Memorandum of Understanding with the Federal Prosecution Service of São Paulo (MPF/SP), which is the institution responsible for criminal prosecution of cartels in Brazil, with the purpose of coordinating the actions of both institutions regarding Cease-and-Desist Agreements and Collaboration Agreements. The intent is to improve transparency and legal certainty for companies or individuals seeking to collaborate with the aforementioned authorities in exchange of administrative and criminal benefits. Retrieved from: http://www.cade.gov.br/noticias/cade-e-mpf-sp-assinam-memorando-de-entendimentos-para-fortalecer-atuacao-no-combate-a-carteis on 2 September 2016.

[11] CADE. Retrieved from http://www.cade.gov.br/assuntos/programa-de-leniencia on 2 September 2016.

[12] The data regarding validated Cease-and-Desist Agreements mentioned above ranges from 2012 to 2016.

(un)lawfulness of certain commercial practices, the cost-benefit assessment by the companies tends to favor their adaptation to the rules and good practices.

Over the last years, CADE has spared no efforts to define clear criteria and parameters by means of its precedents on the judgment of anticompetitive conducts and of the consolidation of its Guidelines as well as on enhancing accessibility and transparency regarding its rules and proceedings. For that purpose, CADE has (i) restructured its website, making it more didactic and transparent to external users; introduced the electronic proceeding through the Electronic Information System (SEI), (iii) conducted 16 public consultations since 2012 and (iv) recently published[13] several Guidelines on competition topics.[14]

With a more direct outreach purpose, antitrust authorities may also stimulate compliance by disseminating within the academic and business environments both its importance and the risks of not complying.

As with foreign authorities, CADE has gradually reinforced the subject compliance in its agenda aiming at improving legal certainty and transparency concerning its understanding of the law[15].

In 2014, CADE and the Economic and Social Law Research Center (CEDES) have organized a seminar on compliance and competition defense[16] in partnership with the Brazilian Association of Federal Judges (AJUFE) and with the School of Federal Judges of the 3rd Region (EMAG). The joint initiative promoted the debate on the subject and supported the dissemination of competition compliance in Brazil.

In the beginning of 2016, CADE has addressed important topics about the structure and benefits of adopting competition compliance programs with the publication of its Guidelines on Compliance. The content of this publication may help on preventing abuses that harm the market, addressing the demands of the society in general, which is

[13]CADE. Retrived in Portuguese from http://www.cade.gov.br/acesso-a-informacao/publicacoes-institucionais/guias_do_Cade/capa-interna on 2 September 2016.

[14] CADE has released Horizontal Mergers, Gun Jumping, Compliance, Cease-and-Desist Agreements and Leniency Guidelines.

[15]CARVALHO, Vinícius Marques de. Compliance – concorrência, efetividade e transparência (01.10.2015). Jota. Disponível em: <http://jota.uol.com.br/compliance-concorrencia-efetividade-e-transparencia>. Acesso em 27.08.2016.

[16] CADE. Retrieved in Portuguese from http://www.cade.gov.br/noticias/seminario-sobre-compliance-concorrencial-comeca-nesta-quinta-feira-28 on August 28, 2016.

following CADE's initiatives against cartels in public bids. In the same year, the authority has organized a literary contest in partnership with the School-Enterprise Integration Center (CIEE). The contest supports the improvement of antitrust policies and stimulates the debate for the new generations, since it is directed to university students[17].

As we may see, CADE has made progress in developing its compliance program as an ex-ante control mechanism or, in other words, as an instrument of public policy capable of preventing anticompetitive conducts.

Finally, there is one last topic about compliance, which is also the most controversial, and refers to how competition authorities may consider compliance as an *ex post* control mechanism subject to the mitigation of the penalties[18].

The dilemma in this case rests on the fact that if a company has a compliance program and still an anticompetitive conduct prevails, this would demonstrate that there was no compliance after all. On the other hand, previous experiences show that in many cases, the detection of wrongdoings tends to favor a culture of compliance. In this case, would it be reasonable to consider the good faith or subsequent regret by the wrongdoer as an element that may affect the penalties imposed? We shall see how CADE has faced this dilemma.

Compliance as an *ex post* control mechanism

CADE's efforts in discussing compliance are not new. The antitrust authority has been addressing the subject and it is possible to see the growing importance given to that matter.

As a general rule, CADE's jurisprudence has appointed compliance programs and procedures in the context of: (i) Performance Agreements (TCDs[19]), which restrain the approval of certain operations depending on the adoption of obligations such as the compliance program by the company ; (ii) Merger Control Agreements (ACCs), in which a compliance program is set as a one of the conditions for the approval of certain

[17] CADE. Retrieved in Portuguese from http://www.cade.gov.br/noticias/compliance-concorrencial-e-tema-de-concurso-literario on August 28, 2016.
[18] LUIS, Sara Salvador de. Antitrust Compliance Programs in the E.U. and U.S. Seeking the Best Carrot and Stick Approach. (16.01.2014).
[19] The Performance Agreement (TCD) of Law nº 8.884/94 was revoked by the Merger Control Agreement (ACC) of Law nº 12.529/2011

operations; and (iii) the Cease-and-Desist Agreements (TCCs), which establish compliance as an instrument to internalize the rules of competition defense and to increase the transparency of the companies towards CADE and the market.

In a recent decision, CADE's Administrative Tribunal approved a merger regarding the acquisition of HSBC Brasil by Bradesco[20] under the conditions established in a Merger Control Agreement between the parties. The legal instrument aimed to mitigate competitions issues identified by the authority and provides behavioral remedies, divided into six axes, among then there is the commitment of Bradesco in revise its internal governance structure, according to the instructions provided in the CADE's Guidelines Competition Compliance Programs. In this case, the Merger Control Agreement also determined that the implementation of the compliance program must be delegated to an external agent to Grupo Bradesco and that such external agent must have its reputation acknowledged by the market and be approved by CADE.

Among all the precedents that the Brazilian authority had determined for the adoption of compliance programs, perhaps the most innovate one was the TCC settled between CADE and Rodrimar[21] in an investigation of alleged abuse of dominant position in the market of customs warehousing in the port of Santos, São Paulo. The TCC signed in this case established in its third clause ancillary obligations to Rodrimar regarding the implementation of a compliance program and an open door policy[22] with CADE.

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[20] Merger nº 08700.010790/2015-41(Applicants: Banco Bradesco S.A, HSBC Bank Brasil S.A- Banco Múltiplo, and HSBC Serviços e Participações Ltda). The transaction was submitted to CADE in 27 October 2015, and approved by CADE's Tribunal in the judgment session held in 08 June 2016, restrained to the signing of the Merger Control Agreement. The parameters, targets and implementation forms of compliance set forth in the 2.7.1 clause of the Merger Control Agreement are described in the Appendix nº 2.7 of the Merger Control Agreement. Press release retrieved in Portuguese from http://www.cade.gov.br/noticias/cade-autoriza-aquisicao-do-hsbc-pelo-bradesco on August 28 2016.

[21] The Cease and Desist Agreement requirement nº 08700.004780/2015-76, part of the proceeding nº 08012.009690/2006-39 (Applicant: Rodrimar S/A Transportes, Equipamentos Industriais e Armazéns Gerais). The Cease and Desist Agreement was validated by CADE's Administrative Tribunal in the judgment session in 19 August 2015. Press release available in : <http://www.cade.gov.br/noticias/cade-firma-acordo-de-cessacao-no-mercado-de-armazenagem-alfandegada>. Accessed on 28.08.2016.

[22] Regarding the competition measures of the open door policy, on October 1st,2014. CADE's Administrative Tribunal approved with restrictions the acquisition of Innova by Videolar (Merger nº 08700.009924/2013-19. Applicants: Innova S.A and Videolar S.A. The approval was conditional to the fulfillment of the Merger Control Agreement signed by CADE and the applicants, in which also establishes the parties' commitment on adopting a compliance program that has to be presented before CADE in up to six months after the signing of the Merger Control Agreement, and the adoption of the open door policy with the antitrust authority that can request technical collaboration and carry out inspections in any of the

Through the open door policy, Rodrimar has committed to allow that any CADE's employee, upon the request of previous notification in a period of 72 (seventy-two) hours, and independently of a warrant, to have access to its facilities and carry out inspections. Nonetheless, the most interesting part of this case was the opinion of the Reporting Commissioner Márcio Oliveira Júnior, in which he understood that the compliance and open door policies should be considered relevant while in the calculation of the pecuniary contribution to mitigate the penalty. In this context, in his opinion, the Reporting Commissioner suggested that the amount of the contributions should it be adjusted from R$174,427.13 to R$150,000.00 based on the understanding that the timeliness of the agreement and that the assumption of the aforementioned obligations would overate the differences between the values and therefore be more beneficial to the parts.

One of the most controversial aspects of the compliance enforcement is the dosimetry of the penalties. CADE, as well as others foreign competition authorities, has not explicitly recognized compliance programs as elements for the reduction of the fines. However, CADE has been showing signs of a gradual change on its stance regarding compliance not only as an *ex ante* control mechanism but also as a mechanism of mitigation of the penalties or as an *ex post* control mechanism.

CADE's Cease-and-Desist Agreement Guidelines also consider the existence of a compliance program that has a direct relation with the proposition of a TCC and/or that has resulted in the cooperation in question[23], as an example of good faith of the offender that can be used to mitigate the fines imposed in cases of classic cartel.[24]

The path for the incorporation of compliance as a public policy and as a corporative culture of companies is on the right path. The next step is to explore the experiences obtained on this subject in order to promote a healthier and more sustainable competition environment in Brazil.

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parties facilities. Retrieved in Portuguese from: http://www.cade.gov.br/noticias/aquisicao-da-innova-pela-videolar-e-aprovada-com-restricoes on August 28, 2016.

[23] Ministry of Justice. Administrative Council for Economic Defense. *Guidelines Cease and Desist Agreement for Cartel Cases.* 2016. Retrieved from http://en.cade.gov.br/topics/publications/guidelines/guidelines_tcc.pdf on August 28, 2016.

[24] Typically, that would be the situation when it is possible to demonstrate, in a case of a compliance program, if it succeed on gathering evidence of the conduct and if it took the decision of collaborate with the investigations, assuming its participation in the conduct and paying a pecuniary contribution, by means of the Cease and Desist Agreement.

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