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**LATIN AMERICAN AND CARIBBEAN COMPETITION FORUM - Session I: Compliance
Programmes in Antitrust Enforcement**

– Contribution from Brazil –

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The attached document from Brazil is circulated to the Latin American and Caribbean Competition Forum FOR DISCUSSION under Session I at its forthcoming meeting to be held on 20-22 September 2021, via a virtual Zoom meeting.

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Session I: Compliance Programmes in Antitrust Enforcement

Compliance and Leniency

– Contribution from Brazil¹ –

1. Compliance: CADE's perspective

1. From CADE's perspective, compliance programmes are relevant to boost a regulatory scale². The expression regulatory scale refers to the reach for maximum effectiveness with public resource allocation to the antitrust policy, especially as private agents adhere to regulatory objectives.
2. A significant part of antitrust effectiveness happens via command and control actions, with agencies disseminating their standards and the laws defined by the Legislative Branch, besides reviewing any violations to the regulations on their own. As to the review, intelligence activities and ex officio investigations stand out.
3. Along with public efforts, the government can encourage private efforts concerning observance and diligence with the law. Such measure is significant since private companies knowledge of regulations and their compliance with them also reflect on the effectiveness of antitrust standards. Effectiveness here means the adhesion of private agents to regulations aimed at better market functioning.
4. The diligence of private agents with competition compliance is directly linked to the degree of success of public command and control efforts. Extensive and agile investigations robustly launched proceedings within the due legal proceeding, and severe fines can result in stakeholders realising that compliance is the path that best safeguards firms against allegations and possible penalties. The phenomenon described here suggests an interdependence between public and private enforcement, with the former playing a significant role in driving the latter.
5. Despite the interdependence of efficient private actions and the success of command and control actions, it is clear that the adoption of compliance efforts by private organisations has a reinforcing effect on CADE's work. An example of the regulatory scale that can be most useful to the mission of antitrust agencies of rendering vigorously competitive markets.
6. Compliance programmes can be authentic autoregulation policies when they suggest that organisations strengthen their compliance systems by adhering to competition principles. Therefore, antitrust authorities and private agents should operate consonant with the guiding principles for the best functioning of economic activities.

¹ This document was prepared by Alden Caribé de Sousa, Head of the Anti-Cartel Unit responsible for the Leniency Programme.

² Mário Shapiro and Sarah Marinho use the expression regulatory scale (*escala regulatória*).

SCHAPIRO, M.; MARINHO, S. . Compliance Concorrencial: Cooperação regulatória na defesa da concorrência. São Paulo: Almedina, 2019.

2. Compliance: the perspective of companies

7. From the perspective of companies, compliance programmes ensure their sustainability, i.e., their long-term viability, and provide clear reputational gains, which increase companies' capacity for influence and power. Unintentional non-compliance with the regulation, on the other hand, can result in involuntarily assuming unexpected obligations and costs, which can affect the performance or even the maintenance of activities over time. In the case of companies—organizations intended to obtain a profit—they can face a reduction of the surplus distribution, the jeopardizing of investments, the limitation or closure of establishments, amongst others. Regarding non-profit organizations—such as foundations and associations—the efforts to meet their social purpose can be unfruitful, much more costly or limited in scope in case of serious misconduct.

8. To prevent unforeseen events resulting from regulatory disagreement, exemplary compliance programmes³ must be designed to provide clear communication and sufficient reinforcement and monitoring actions for ethical standards to be followed by all members operating on behalf of the organisation.

9. There is no simple solution to the issue. Individuals of different backgrounds and qualifications are part of organisations, which implies a personal scale of values. Such characteristics and how individuals interact usually can bring agent-principal conflict situations.

10. Under the Agent-Principal Theory, the economic literature studies the dissonance amongst the interests of agents and the roles expected from them by the principal⁴. The theory considers that a person taking action on behalf of another person is invariably more aware of the circumstances involved in fulfilling their responsibilities than the other person. Thus, it can lead to misconduct by the agent unbeknownst to the organisation (principal).⁵

11. Actions dissonant with the mandate and carried out by several organisation members may constitute a distorted organisational culture, often opposed to the culture expected by law or other members.

12. The actions taken to ensure the agent optimise their performance for the actual benefit of the principal, without conflict of interests, is subject to great administrative and economic concern. The purpose of said actions is to align agent and principal interests. As to systemic issues, it can be considered reform measures for organisational culture, directed at bringing new values or impeding the recurrence of distorted values in an organisation. To the extent that alignment objectives are precisely the objectives aimed by compliance programmes, they are attractive to organisations deeply engaged in integrity cultures.

13. Although compliance programmes are well structured, their outcomes are more probabilistic than determining, i.e., the risks of deviation are mitigated, but hardly ever eliminated. Besides, economic resources are limited by their very nature—and the resources used for compliance are no exception. Therefore, it is advisable to set priorities when designing compliance actions and start with measures with better strategic effects.

³ Exemplary compliance programmes compared to sham compliance programmes intended to pretend commitment, deceiving people and agencies concerned with a company's compliance system.

⁴ The agent is the one taking action. The principal is the one who has the action taken on their behalf. Where one party has more or better information than the other, this is called information asymmetry.

⁵ LAFFONT, Jean-Jacques; MARTIMORT, David. *The Theory of Incentives I: The Principal-Agent Model*. Princeton: Princeton University Press, 2002, pp. 54-55.

14. Risk maps are fundamental to identify routines and structures more likely to lead to deviation. Individuals in high-ranking positions who deal with the sales and marketing policy of companies, for instance, are more susceptible to engage in cartel practices such as price setting, prioritizing areas of activity, or defining new lines or products to be offered.

15. After identifying the riskier positions and routines, the next step is to plan measures to mitigate these risks, that is, measures that will ensure company representatives comply with competition laws and standards, thus ensuring the maintenance of the company. The following are a few examples of such measures:

- Adopting a clear Code of Conduct and offering regular training for positions more likely to commit antitrust violations to raise awareness on organisational ethics.
- Enhancing oversight, which reduces the asymmetry of information between the organisation and its representatives. Recording and knowing the details of their agents' actions, to take steps if any misconduct is detected. Simple but effective monitoring is enough to inhibit misconduct since, if representatives do not know whether there is information asymmetry, they will likely forgo getting involved in a conflict of interest.
- Giving high compensation. Well-paid workers usually avoid opportunistic behaviour as, if caught, they may not find such a high-compensating job again.
- Giving late compensation. Especially by postponing the performance-related pay given to upper management employees, the organisation can reset the terms for performance and include long-term sustainability. It induces compliance with rules that, if breached in the short term, may severely compromise the solvency and performance of the organisation later.

16. Finally, the costs of an antitrust compliance programme may be more easily borne when the topic is part of the organisation's actions for ensuring global integrity instead of being restricted to a part of the organisation. CADE and the National School of Public Administration structured an online course on competition compliance to disseminate information on topics of interest and general guidelines to the general public, different government bodies, and small and medium-sized enterprises.

3. Convergence of compliance and leniency programmes

17. CADE's experience has shown that good integrity programmes give rise to better leniency agreements.

18. That is because a good integrity programme has mechanisms to detect and address misconduct, allowing for identifying red flags more swiftly, thus leading to faster internal investigations, as they start at an earlier stage. Moreover, successful compliance programmes usually draw risk maps to predict where a violation is more likely to occur; thus, if it comes to pass despite the programme's control and mitigation tools, the investigations can be carried out faster and more effectively. Additionally, agents' activities are routinely documented, making it easier to clarify matters related to suspicious activities, gather evidence in internal investigations, and submit successful leniency applications. On the one hand, a successful leniency application offers the government the opportunity to detect violations it was completely unaware of or with insufficient evidence. On the other hand, the signatory organisation and representatives who helped disclose the violation are entitled to great legal benefits, which can go as far as total immunity from administrative prosecution.

19. CADE's experience shows that approximately three-fourths of the antitrust leniency applications filed with its Office of the Superintendent General are denied. The most common reasons for rejection are a pre-existing application (as only the first to apply is entitled to the agreement) or insufficient evidence to support the allegations. However, if a request is rejected for one of these reasons, the organisation can still join a compliance programme in the future, after due preparation.

20. Finally, it should be noted some monitoring actions can be especially useful in applying promptly and with all necessary evidence:

- In meetings with competitors, financial advisers, and unions, have at least two agency employees and routinely document all proceedings. Record or minute every meeting. In communications with competitors, financial advisers, or unions, log the use of work equipment (such as smartphones, tablets, laptops, and personal computers). Keep a list with the time and name of those who call through secretaries. Have the written agenda of previously scheduled meetings accessible to the organisation. Etc.
- Adopt channels to receive questions and complaints.
- Regularly audit risky areas.
- Regularly review and assess the efficiency of risk maps and the actions to address these risks.

4. Compliance programmes and the calculation of fines for antitrust violations

21. A burning issue in discussions about competition policy is whether a company's compliance programme is a mitigating or an aggravating factor.

22. By adopting a compliance programme, the company avoids letting its representatives in charge of risky areas, thus ensuring its long-term sustainability.

23. In addition to this logic and inherent advantage, some people think the government agency, when imposing sanctions, should acknowledge the organisation's compliance efforts. That is, the government should consider reducing the sanction if the organisation proves it attempted to raise awareness on compliance matters and align its representatives' interest with its own.

24. However, the matter is not that simple. The programme creates a regulatory scale and benefits the government; thus, considering the programme as a mitigating factor would promote compliance. On the other hand, committing a violation after receiving competition integrity training is even more reproachable. After all, violators are, in this case, fully aware of the boundaries, consequences, and illegality of the practices

25. To address this contradiction, it may be a good idea considering two additional things: the robustness of the programme (to ensure sham programmes cannot qualify as a mitigating factor) and the scope of the violation (to determine whether liability falls squarely on an individual's shoulders or arises from the organisational culture of an entity that remained unaffected by its compliance programme).

26. Robust and effective compliance programmes increase the efficiency of competition law and thus must be incentivised and further promoted by the government. CADE's Guidelines for Competition Compliance Programs, published in 2016, recommends that the Administrative Tribunal consider a programme successful whenever there is evidence of good faith or a Cease and Desist Agreement has been signed. In the first situation, the programme is to be considered as a mitigating factor to reduce the fine. In the latter, the programme can justify reducing the financial contribution levied on the company up to the highest discount allowed by law.