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Competition Compliance Programmes – Note by Brazil

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More documents related to this discussion can be found at http://www.oecd.org/daf/competition/competition-compliance-programmes.htm.

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1. Competition compliance programmes are intended to prevent or mitigate the risk of violations of antitrust laws and provide mechanisms for the detection of possible anticompetitive practices, which makes them effective "private" allies, especially in the fight against cartels.[2]

2. Thus, the topic of competition compliance has been gaining prestige within the international academic community.[3] In 2011, the Organisation for Economic Co-operation and Development (OECD) prepared a study into the need of promoting competition compliance programmes. In the study, the delegates of the OECD Competition Committee identified and examined aspects such as antitrust, financial penalties, imprisonment, leniency programmes, and the establishment of a culture of competition.

3. The Brazilian Competition Law (Law 12529/2011) does not explicitly mention compliance programmes – or other programmes aimed at preventing antitrust violation – as mitigating factors to alleviate sanctions for antitrust violations. Nevertheless, CADE has been intensifying its efforts to promote and develop these programmes, applied to competition issues.

4. The anti-corruption wave, which has taken place as from the enactment of the Brazilian Anti-Corruption Law, has further increased the need for transparency and lawfulness in businesses. It functioned as a driving force for firms to adopt compliance programmes (as it is listed as mitigating factors to reduce the applicable sanctions according to the provisions of Article 7, Item III, of the Anti-Corruption Law). In the field of competition law, specifically, there is a symbiotic relationship between corruption and cartels in procurement, for example.[4]

5. Thus, in private firms' relations with governmental bodies, there is an increasing need for transparency and regularity, and compliance programmes can help safeguard these relationships. For this reason, competition compliance programmes are more effective if they are elaborated and implemented as part of comprehensive programmes focused on corporate integrity and ethics, without losing sight of the specific requirements of each law. The truth is that the term "compliance" nowadays is associated not only to compliance programmes but to a whole business model that deals with integrity in all activities carried out by a firm.[5]

6. Recently, cartels in procurement proceedings within the scope of the infamous Operation Car Wash were the subject of cease and desist agreements signed between CADE and some firms, many of which had compliance programmes in place (on paper, at

[1] Paper written in collaboration by Diogo Thomson de Andrade, Deputy Superintendent of CADE, Fernanda Garcia Machado and Raquel Mazzuco Sant'Ana, Heads of Anti-Cartel Units, Juliano Pimentel Duarte and Leandro Reis Lucheses, civil servants at the Anti-Cartel Units of CADE.

[2] ANDRADE, Diogo Thomson de; RODRIGUES, Eduardo Frade. A importância do compliance na detecção e combate aos cartéis. In: RODAS, João Grandino; CARVALHO, Vinicius Marques de (org.). **Compliance e Concorrência**. 2nd Edition. São Paulo: Revista dos Tribunais, 2016, pp.121-146.

[3] Id. pp. 122-128.

[4] Ibid, pp. 139-140.

[5] Ibid. pp. 124-125.

least), even though they did not actually comply with the law. These programmes had no practical effect, as part of their (management) corporate culture involved anticompetitive practices and corruption. It was only when firms started to be imposed heavy fines that the number of effective compliance programmes increased.[6]

7. Sham programmes are a great source of concern for CADE and any other competition authority. These superficial, ineffective schemes are not interested in observing the law or fostering a culture of competition. Thus, to elaborate robust compliance programmes, competition authorities should guide their implementation, with the commitment of the firm, the participation of senior management, the use of appropriate resources, whilst giving the firm autonomy and independence. Companies cannot implement these programmes (even if complex or well-structured) just for the sake of discounts, without changing their own corporate culture.

8. In January 2016, CADE released its *Guidelines for Compliance Programs*[7], that informs companies about the structure and benefits of these programmes, with non-binding directives especially aimed at antitrust. The *Guidelines for Cease and Desist Agreements for Cartel Cases*[8], for its turn, provides that a compliance programme is a sign of an infractor's good faith, thus being a mitigating factor that can reduce the fine applicable to signatories in cartel cases. Executing leniency agreements and cease and desist agreements in the fight against cartels is one of the best compliance mechanisms available within the scope of the private sector. For those facing law enforcement, it offers a way out: it is an opportunity to identify and repair the illegal activity and to cooperate with authorities not only to fully disclose the antitrust violation but to severely punish the infractors. In cartels, sophisticated clandestine activities involving several participants, the combination of such alternative mechanisms with solid compliance programmes has an extremely positive dissuasive effect, including by building awareness of competition rules.

9. Against this background, CADE values and fosters compliance programmes for agreements that include alternatives to sanctions, in spite of the seeming paradox of regarding compliance as a mitigating factor (since no infraction would have happened were compliance actually in place). Unlike a judgement of conviction in a case where there was no cooperation, these "exit-door" mechanisms make it possible to enhance compliance programmes, valuing those who decide to cooperate and comply with the rules. At the same time, this allows us to improve tools to detect and punish antitrust violations, strengthening law enforcement and furthering a culture of free competition amongst players of a given market. In this sense, on the one hand, the *Guidelines for Compliance Programs* provides guidance on how to implement a successful programme; on the other hand, in it and in the *Guidelines for Cease and Desist Agreements*, the authority advises these programmes to be used as mitigating factors to alleviate sanctions, thus completing a virtuous circle. Before addressing how this has been put into effect, it is worth mentioning throughout the history

[6] AMCHAM: research conducted by AMCHAM in 2017 show 70.6% of executives state their companies have a well-defined compliance programme, a substantial increase compared to 2016. KPMG (2019): In the assessment of compliance risks, 85% of survey respondents answered one of the greatest challenges in compliance is identifying, assessing, and monitoring regulatory and compliance factors.

[7] CADE. Guidelines for Compliance Programs. 2016. Available at: https://cdn.cade.gov.br/Portal/centrais-de-conteudo/publicacoes/guias-do-cade/compliance-guidelines-final-version.pdf

[8] CADE. Guidelines for Cease and Desist Agreements for Cartel Cases. 2016. Available at: https://cdn.cade.gov.br/Portal/centrais-de-conteudo/publicacoes/guias-do-cade/guidelines_tcc-1.pdf

of CADE, the authority has always been open to compliance programmes. To illustrate that, we will make a brief examination of the authority's history regarding these programmes before the Brazilian Competition Law came into force.

1. A brief history of compliance as a mitigating factor for lighter sanctions within the Brazilian Competition Defense System

10. To better understand this topic, it is important to mention a few lessons and experiences the Brazilian authority has encountered along its path. The fight against cartels was boosted and became a priority for the Brazilian Competition Defense System (SBDC) when Law 10149/2000 brought significant changes to Law 8884/94, introducing sophisticated investigative and evidence-gathering tools, such as search and seizures and leniency agreements.

11. As authorities became better at detecting antitrust violations, infractors were imposed even larger fines[9], putting competition compliance on the private sector's radar. The public sector then realised the importance of developing public policies to promote compliance programmes, primarily to foster a culture of competition and, with the contribution of participants, the capacity to detect antitrust violations.

12. In 2004, the former Secretariat of Economic Law (SDE) of the Ministry of Justice issued Administrative Rule 14/2004[10], which established the Antitrust Violation Prevention Programme (PPI)[11]. However, competition compliance and culture were both new to Brazil; this, added to the disagreeing opinions on the authority's role to promote such programmes, created legal uncertainty. Hence, the single company that embarked on the programme had its consultation dismissed. In 2007, Resolution 46 introduced into the Statutes of CADE a provision allowing a PPI where a Cease and Desist Agreement was proposed (Article 129-A[12]). At that time, Cease and Desist Agreements (a kind of leniency programme) also became a possibility for cartel cases again – since this possibility was actually present in the original text of the law but had been removed in 2000. Since then, a series of precedents have required the PPI is adopted as a condition for applying to Cease and Desist Agreements (TCC).

[9] As from CADE's first convictions for cartel formation in the context of the iron cartel case of 1999, its priority gradually became investigating anticompetitive conduct, with increasingly heftier fines (e.g. the cartel of medical and industrial gauze, fined BRL 2.9 billion in 2010, the authority's highest until then, and the cement cartel in 2014, fined BRL 3.1 billion).

[10] It sets general directives for elaborating an Antitrust Violation Prevention Programme (PPI) and the requirements and conditions for receiving a certificate of the programme from the former Secretariat of Economic Law (SDE).

[11] Formerly, the SDE could recommend CADE's sanctions were reduced, when effective for the case and requested by the interested party. This possibility was revoked by the SDE's Administrative Rule 48/2009.

[12] Article 129-A: in an application for a Cease and Desist Agreement, the following elements must be included: I- a detailed description of the defendant's obligations to stop the illicit activity under investigation or their harmful effects, in addition to other applicable obligations; II - the amount of financial contribution to be paid to the Fund for De Facto Joint Rights [Fundo de Defesa de Direitos Difusos], where applicable; **III - a provision setting an Antitrust Violation Prevention Programme [PPI];** IV - if the party is a company and/or an administrator, the turnover of the enterprise in the year prior to the year the administrative proceedings or preliminary enquiries were initiated. Sole Paragraph - The terms of the application may be granted confidential treatment.

13. The first such case was signed between company LAFARGE Brasil S/A and CADE in the context of an investigation into cartel activity in the cement industry[13]. Later, in July 2008, CADE entered into a Cease and Desist Agreement with ALCAN Embalagens do Brasil and stipulated a rule that a company's legal representative or director should be appointed Compliance Officer to coordinate the compliance programme[14]. Compliance programmes are not only applied in the fight against antitrust violations but also in the *ex-ante* reviews of M&A activity. For instance, CADE used to impose the adoption of a compliance programme as a condition to clear transactions through the former agreement for fulfilling post-merger conditions (TCD)[15]; the same happens with our present-day Merger Control Agreement (ACC), that imposes the adoption of compliance programmes amongst other measures.[16]

14. Thus, we can assume this topic is no longer new to the Brazilian competition authority, which has over the years enhanced its policy, mainly by taking them into account when considering proceedings to punish antitrust infractors. On a different note, we will now see how CADE, under Law 12529/2011 (the Brazilian Competition Law), has been

[13] Clause 3.1. of the Cease and Desist Agreement reads: "The SIGNATORY **commits to improve its internal rules for preventing antitrust violations and to undertake the attached competition compliance programme** (Annex II), which guides and draws the boundaries of every action taken inside and outside the company by the company itself, its employees, or its representatives before any third party, especially suppliers, customers, competitors, and organisations of workers or employers."

[14] ALCAN Embalagens, or any of its affiliate companies, must appoint one of its legal representatives or directors **Compliance Officer**, tasked with coordinating and supervising the programme to implement and strengthen its goals. The **Compliance Officer** must have been formally and expressly given full responsibility and authority to develop and enforce the compliance programme. POSITION OF COMPLIANCE OFFICER. 08700.005281/2007-96 Proposal for Cease and Desist Agreement within Administrative Proceedings 08012.004674/2006-50 Main Party Embalagens do Brasil Ltda Mercado Indústria de Plásticos e Borrachas. Type of proceedings: Application Filing. On 26 October 2007. Rapporteur: Commissioner Ricardo Villas Bôas Cueva. Filed before the Administrative Council for Economic Defense [CADE].

[15] Merger Review 08012.002148/2008-17 (Campo Limpo joint venture). The antitrust compliance programme was a result of concerns raised by sensitive information sharing. According to the former Secretariat for Economic Monitoring (SEAE), "the joint venture would create a legitimate forum where representatives of the holding companies can interact, sharing relevant competitive information on the market that is nearly undetectable by competition authorities."

[16] Merger Review 08700.009924/2013-19 (Applicants: Innova S.A. and Videolar S.A.). The applicants also committed to adopt an open-door policy with CADE. Regarding the interim measures CADE imposed, we highlight: "2.3. The Signatories commit to improve their internal rules for preventing antitrust violations and to undertake the compliance programme, which guides and draws the boundaries of every action taken inside and outside the companies by the Signatories, their employees, or their representatives before any third party, especially suppliers, customers, competitors, and organisations of workers or employers."; and "2.3.1. The Signatories undertake to publicise the compliance programme within their companies and to effective and regularly train every person directly or indirectly connected to the tactical and strategical departments of the Signatories. These persons must abide by the rules established in the programme, under pain of facing disciplinary proceedings." Regarding Merger Review 08700.008607/2014-66 (Applicants: GlaxoSmithKline PLC and Novartis AG), a joint venture between the applicants led to CADE introducing some principles to guide corporate governance, so as to ensure no undue information sharing takes place. We highlight the following principle: "10.1.1 ... In particular, the undue sharing of this information within the Novartis group will be prevented through strict barriers that will block access to the information (such as physical and electronic barriers, compliance training, and mechanisms for constant monitoring)."

using these programmes as a mitigating factor for lighter sanctions within Cease and Desist Agreements in cartel cases, whilst taking the opportunity to introduce a culture of compliance and have greater dissuasive effects.

2. The use of compliance to mitigate sanctions in Cease and Desist Agreements under Law 12529/2011.

2.1. The compliance clause in Operation Car Wash's agreements

15. As set forth in CADE's *Guidelines for Competition Compliance Programs*, merely undertaking a compliance programme does not preclude the authority from punishing antitrust violations. Nonetheless, a robust programme may be understood as an evidence of the infractor's good faith and of reduced negative economic effects on the market, hence, it can be a mitigating factor in determining a fine.

16. CADE's *Guidelines for Cease and Desist Agreements* contains a similar but more specific provision on the matter. According to the guidelines, a compliance programme indicates an infractor's good faith and is thus considered a mitigating factor, reducing the financial contribution levied on an agreement's signatories in cartel cases. However, one must prove the programme existed before the agreement. In addition, the decision to propose the agreement must be directly related to the decision to enter into it and to the information and documents provided.

17. For instance, CADE offered a discount related to implementing or maintaining these programmes in nine Cease and Desist Agreements executed[17] in the scope of cartel investigations of Operation Car Wash.

18. In those cases, no mitigating factors have been applied and the tax rate of expected fines for the firms were established at its maximum value (or nearly), to ensure the deterring character of the financial contributions.

19. Nonetheless, the cases of the Cease and Desist Agreements followed other possibilities provided for in CADE's *Guidelines for Competition Compliance Programs*, according to which the compliance programme may increase the discount percentage applicable.

20. CADE has considered the compliance programme as one possible manner of contribution from the firms, based on the expectation that adopting a well-developed, solid

[17] The Applications are the following:

08700.004337/2016-86 SEI/CADE - 0549603 - Cease and Desist Agreement (TCC);

08700.004341/2016-44 SEI/CADE - 0549581 - Cease and Desist Agreement (TCC);

08700.008159/2016-62 SEI/CADE - 0549175 - Cease and Desist Agreement (TCC);

08700.007077/2016-09 SEI/CADE - 0549539 - Cease and Desist Agreement (TCC);

08700.008158/2016-18 SEI/CADE - 0549563 - Cease and Desist Agreement (TCC);

08700.005078/2016-19 SEI/CADE - 0549259 - Cease and Desist Agreement (TCC);

08700.004137/2017-12 SEI/CADE - 0841523 - Cease and Desist Agreement (TCC);

08700.004408/2017-21 SEI/CADE - 0841526 - Cease and Desist Agreement (TCC); and 08700.004419/2017-10 SEI/CADE - 0841529 - Cease and Desist Agreement (TCC).

and lasting programme of competitive integrity will prevent the respective firms and its staff from incurring once again antitrust violations.

21. Therefore, the firms were granted an additional discount of up to 4%[18] on the financial contributions in the Cease and Desist Agreement, as long as they employed, maintained and improved a competition compliance programme in all of their transactions in Brazil or abroad but with possible impacts in Brazil.

22. Competition compliance programmes must follow the guidelines and possible updates of CADE's *Guidelines for Competition Compliance Programs*, particularly regarding: a) the commitment of the senior management; b) the adoption of a code of conduct with formal guidelines on competition compliance; c) the autonomy and independence of the compliance team; d) the criteria, methodology and individuals responsible for competition risk analysis; e) the internal communication and reporting channels and activities, with broad disclosure amongst employees, suppliers, service providers, in addition to ensuring the anonymity of applicants; f) the regular courses and training programmes; g) the review, adjustment or change of the Programme, h) the adoption of specific procedures to prevent sensitive information sharing or agreements between competitors, especially within participation in procurements and meetings of unions and entities of the sector.

23. The commitments related to competition compliance programmes must be fulfilled for the entire term of the agreements. That means firms must maintain, develop and improve their compliance activities, with a focus on competition, for a term of about 20 years.

24. The firms must submit to CADE annual reports on the programme, with an external professional opinion, for the authority to monitor compliance with the commitments. Besides, firms shall report to CADE whenever there is a sign or suspicion of possible anticompetitive practices.

25. It is worth mentioning that eventual non-compliance with these commitments will not necessarily imply total non-compliance with the Cease and Desist Agreement. However, firms that fail to comply with the compliance programme commitments must pay a fine to CADE corresponding to twice the amount of the discount obtained, in updated amounts.

26. Besides penalising the firms involved in severe antitrust violations, such as those under investigation within the Operation Car Wash, it is important to ensure that history does not repeat itself. This is achieved not only with strict penalties but with a cultural change within the organisations and the market in which they operate. CADE understands that competition compliance programme will add to this cultural change in infrastructure sectors.

27. Therefore, there is an incentive to adopt, maintain and develop an effective compliance program that adds to the antitrust enforcement through the financial contribution, which is calculated based on an expected proportional and dissuasive fine.

28. The firms that entered into a Cease and Desist Agreement with CADE are large corporations operating in many different markets that have decided to turn the page by admitting their illegal conduct and committing not to repeat it. Thus, the commitment of

[18] This maximum discount was defined based on the maximum value applied to discounts provided for in Article 18, Item V of the Executive Order 8420/2015, regarding Leniency Agreements within the Anti-Corruption Law (Law 12846/2013); and following the discount limits established in the Statutes of CADE.

firms with competition compliance may contribute to fulfilling the commitments assumed with CADE. Additionally, it guides their performance by ethics and legality, and ensures the good functioning of markets, with positive external effects to strengthen a culture of competition in Brazil.

2.2. The case of fuels in the Federal District

29. The Administrative Proceeding 08012.008859/2009-86[19], in progress at the General Superintendence of CADE, investigates a cartel in the markets of distribution and resale of fuels in the Federal District. Approximately 40 groups of resellers and the main distributors of Brazil are under investigation. In 2017, the firm Cascol Combustíveis para Veículos Ltda.[20] (the largest company in the market of resale) entered into a Cease and Desist Agreement with CADE.

30. Amongst the obligations (such as divestiture and corporate restructuring), the agreement imposed a behavioural obligation related to the establishment of a compliance programme, which should be implemented within 12 months after signing the agreement. Due to the programme, in addition to the regular discount related to procedural collaboration, an extra 5% discount was granted on their financial contribution.

31. Furthermore, CADE has imposed a corporate restructuring on the Cascol Group for the start of a new phase in the management of the business. Additionally, the authority has prohibited cross-shareholdings and required the establishment of an executive board to strengthen the internal control systems of the firm, which should be formed by at least four members, who cannot hold concurrently management positions nor be a partner or work with competing companies. Besides the mere undertaking of compliance programmes, given the severity of the incurred conduct and the strong influence on the conduct by the firm applicant of the agreement (which was a leader and the largest group in the market in the Federal District), it was observed the need for a real change in the business management to establish a new culture for competition.

32. Additionally, CADE defined that implementing the compliance programme along with the establishment of the executive board would be a precondition for the managing members of the Cascol group, investigated for the practice of cartel, be able to retake their managing positions in the firm (end of debarment).

33. Thus, the Cease and Desist Agreement defined that the compliance programme to be implemented should comply with the following guidelines: establishment of a code of ethics of the firm, with well-defined principles and guidelines to guide the business administration, following the guidelines provided by the Guides of CADE and the Office of the Comptroller General of Brazil (CGU); definition of the areas and extent of risk involved in the several activities of the firm; establishment of a compliance committee or equivalent body for the continuous monitoring of risk, as well as for the follow-up and

[19] Administrative Proceeding 08012.008859/2009-86. Applicant: José Antonio Machado Reguffe. Respondents: Cascol Combustíveis Para Veículos Ltda; Sindicato do Comércio Varejista de Combustíveis Automotivos e de Lubrificantes do Distrito Federal (Sindicombustíveis-DF); Petrobrás Distribuidora S/A.; Raízen Combustíveis S/A (successor of Shell Brasil Ltda. and Cosan Combustíveis e Lubrificantes S/A); Ipiranga Produtos de Petróleo S/A.; Alesat Combustíveis S/A; the service stations networks Autoshopping; Brasal; Gasolline, Igrejinha, Ilson, Iticar; Karserv; Mizuno Kay; Passarela; Serv Car; Arrochela; JB; JPC; Disbrave and Rede Z+Z.; amongst others.

[20] Application 08700.004602/2016-26 related to the Administrative Enquiry 08012.008859/2009-86. Applicant: Cascol Combustíveis Para Veículos Ltda. Available at: SEI/CADE - 0318671 - Cease and Desist Agreement (TCC).

execution of the compliance programme, which shall be responsible for receiving and investigating reports and training employees; and, the commitment of the senior management, especially the executive board, responsible for supervising the fulfilment of the compliance programme, including the appropriate measures in case of non-compliance with the firm's code of ethics.

3. Final Considerations

34. The examples here illustrated show that best practices and compliance with the Brazilian Competition Law can be beneficial to society, the firms themselves and third parties, such as investors, customers and business partners. For organisations, compliance provides risk prevention, early identification of issues, recognition of wrongdoings by other organisations (competitors, suppliers, distributors or customers), reputational benefit, awareness of employees, and reduction of costs and contingencies. In sum, it provides an "exit-door" from unlawfulness towards compliance and corporate governance.

35. The experience of CADE evidences the importance of both private and public sectors making efforts to enhance the adhesion to compliance programmes. The Brazilian authority, through competition advocacy, guides private sectors to adopt internal mechanisms for prevention, identification and repression of anticompetitive practices (to which has even provided guidelines). Additionally, CADE incentivizes companies to promote effective compliance programmes which may be used for mitigating sanctions within the scope of cease and desist agreements by setting conditions to implement the programmes and simultaneously encouraging businesses to adhere to them to mitigate said sanctions (observing the legal requirements). Finally, the importance of compliance is related to the possibility of going beyond repressive methods towards the goal of promoting a more effective competition policy.