

Governance, Compliance and Competition Culture in Brazil: Time for an Effective Change



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I. INTRODUCTION: GENERAL OVERVIEW

Broadly speaking, compliance is a hot topic in the Brazil's current agenda, which is not different from the reality abroad. Within the legal framework, compliance has been playing a pivotal role in the face of ubiquitous investigations underway carried out by different authorities in Brazil.

Considering a scenario apparently marked by growing awareness as to ethics behaviors and an increasing and systematic fight against wrongdoings, the Brazilian society may be experiencing a unique moment: more reflection related to compliance with the rules is beneficial, in particular for claiming accountability and transparency of both public and private sectors. Ultimately, the outcome herein would leverage the country's governance, a centerpiece for Brazil's development and also to redeem confidence that has been overshadowed in light of some scandals.

Under this outlook, one can identify a preventive and positive approach as regards the competition agenda in Brazil. One of the key drivers in business compliance engineering is to set up credible and effective antitrust policies, programs and rules. Accordingly, the competent authorities have been acting in a way to encourage a profound shift in the compliance culture. In other words, the purpose is to change an apparent friable corporate paradigm so that the economic agents can genuinely review their internal governance, thus committing themselves to invest and strengthen the level of compliance by formulating and shoring up their internal mechanisms for such.

Therefore, the momentum requires a proactive and responsive attitude on the eyes of the companies, with the aid of the authorities as to provide guidance for an authentic change. Indeed, the contemporary frame is auspicious to

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incentivize the cooperation between the companies and the competent authorities for purposes of developing a comprehensive debate in relation to governance and compliance modelling.

II. ANTITRUST LAW AND THE COMPLIANCE DYNAMIC IN A NUTSHELL

At the outset of Law No. 8,884/1994 (Revoked Antitrust Law) the mindset of antitrust compliance emerged within the Brazilian Competition Defense System (SBDC) through the development of tools aimed at detecting anticompetitive practices in connection with a seminal role of competition advocacy. Experience from the past was key to generate a cornerstone that has been perfected under the Law No. 12,529/2011 (Current Antitrust Law). Nowadays antitrust compliance has gained effectiveness and granted an institutional credibility to the Administrative Council for Economic Defense (CADE) in addition to better instill a competition culture in the Brazilian society.

The antitrust compliance waves in Brazil are far from being erratic and reflect heated discussions in the international playfield. Antitrust authorities in other countries, for instance, have strengthened research strategies under a scenario marked by the sophistication of global cartels, on one hand, and, apparently, the insufficiency of traditional methods of deterrence, on the other hand. Such inference drives the need for an engineering of innovative and credible tools that combined with the traditional methods could enable for a more effective enforcement of the competition law.

Furthermore, given global and local trends for ethics and integrity in the business environment, especially under the scope of anti-corruption regulations, CADE is giving priority to its compliance agenda, meaning not measuring efforts to promote the dialogue with other authorities, looking forward to a convergent approach as to sensitive subjects with fine lines of intersections (e.g. cartels, corruption and public procurement).

It is also worth mentioning SBDC/CADE's ongoing efforts to promote free competition alongside with the competition advocacy role. Since Law No. 12,529 /2011, as of May 29, 2012, whose anniversary of four years was recently observed, certain guidelines were issued, noticing a specific orientation on competition compliance programs. The dialogue with the civil society has been the rule of thumb embedded in the Brazilian authority's spirit; evidence in that regard should be perceived from public consultations to improve the legislation, participation in events and seminars and so on.

In the past two years, CADE has been a protagonist within the international competition arena, being awarded and recognized by their peers given its permanent effort with a view to improve the competition policy to high-level parameters.

III. PRELIMINARY THOUGHTS AND UNAVOIDABLE CONCLUSION

CADE has advanced in a rampant fashion in its macro agenda of compliance. By way of example, one should underscore (i) live trial sessions via internet and the easiness to access the decisions and the case archives, (ii)





development of guidelines and resolutions on cutting-edge and current subjects, (iii) transparency and dialogue with the market and the society, (iv) a seeking for intra and inter-sectoral convergence.

Moreover, in the face of prominent investigations that have recently amassed, together with a myriad of initiatives took by CADE to enforce the law, the overall perception is that the competition sense is being gradually and consistently instilled and internalized by the corporate sector. From the lens of the antitrust authority, and irrespective of future challenges – a natural and desirable phenomenon – much has already evolved in this short period of four years since the effectiveness of Law No. 12,529/2011.

In view of the foregoing, the prospective analysis may signalize for an era of governance consolidation in Brazil so as to push the antitrust compliance at the forefront. Undoubtedly, there is an upward learning curve in this horizon: much was done and much still can be honed concerning antitrust compliance from a public policy standpoint. Without caveats, the more the compliance degree the healthier the environment as a whole.

In conclusion, we foresee fertile ground for antitrust compliance under both companies' and competent authorities' viewpoints. With the purpose to secure a harmonious and fruitful interaction, it is vital to establish the right incentives to create a cooperative spirit between the involved parties in a way to ignite regulatory enforcement and enable vigorous compliance. As a result, one can see an authentic competition culture under maturing.

All in all, the above said reinforces the core premise of “compliance matters”. The power of a compliance mindset is valuable in an array of nuances. In turn, the opposite (non-compliance) can be virtually insurmountable and with sensitive side effects. Regardless of good compliance examples, unfortunately there are companies that have been learning the price of non-compliance by means of tough lessons. It is always better to play safe and be compliant with the rules than sorry later. Carrot and stick approach talks by itself.

