ANTITRUST COMPLIANCE IN BRAZIL

BY ALEXANDRE CORDEIRO MACEDO & ALDÉN CARIBÉ DE SOUSA[1]

1 Alexandre Cordeiro Macedo is President of the Administrative Council for Economic Defense ("CADE"). Alden Caribé de Sousa is the general coordinator of CADE's leniency program.

CPI ANTITRUST CHRONICLE NOVEMBER 2021

Visit www.competitionpolicyinternational.com for access to these articles and more!

Antitrust Compliance in Brazil

By Alexandre Cordeiro Macedo & Aldén Caribé de Sousa

Antitrust compliance programmes are not mandatory in Brazil. Nevertheless, the Brazilian antitrust authority, CADE, pays special attention to them. In this regard, CADE institutionally promotes the compliance agenda and, when examining anticompetitive conduct or merger review proceedings, is receptive to compliance programmes' clauses. Compliance programmes are valuable tools to multiply the effects of competition law enforcement, as they decentralise enforcement, and detect and deter wrongdoings in a prompt and documented manner. Considering 73 percent of antitrust immunity applications are rejected for untimeliness or lack of documentation, the authority recently launched evidential guidelines, which can be a useful resource in improving compliance routines.

I. INTRODUCTION

The Brazilian Competition Law does not require private companies to adopt compliance programs. However, the law provides for liability regardless of fault, which to some extent encourages companies to implement these programs.

Imposing a penalty when there is liability regardless of fault only requires the antitrust authority to identify the wrongdoing and its causal link, connecting the violation to the violator. As the authority does not examine whether there was intention or negligence, in order to avoid sanctions, the best path is to avoid taking risks – and compliance programs serve exactly this purpose.

Conversely, the Brazilian Competition Law (Law 12529/2011) does not make explicit mention of compliance programs as remedies for merger proceedings nor does it reckon them as mitigating factors for antitrust violations. However, CADE has intensified its efforts to promote and develop such programs, bringing them into the authority's merger control agreements ("ACC") and cease and desist agreements ("TCC"). This way, the signatories undertake to implement or improve their compliance programs to have a merger cleared or a sanction mitigated. In the case of anticompetitive conduct, a precedent (Application 08700.001429/2015-23) established that if a company's compliance program is combined with an open-door policy, the company can have up to 5 percent of discount on its expected fine (which usually ranges from 12 to 18 percent of its gross revenue for cartel conduct). The open-door policy is a policy that facilitates the authority's investigations, giving CADE the possibility to enter a firm's headquarters at any moment.

It is worth mentioning the authority has no precedents establishing it can unilaterally impose a compliance program, as CADE understands that an applicant's decision to implement the program is important for its effectiveness. As to the cases in which CADE levies financial contributions on agreement signatories, it determined the value to be repaid for failure to comply with the terms of the agreement should be twice the amount of the granted discount.[2]

Finally, the authority is interested in investing resources to promote antitrust compliance in its advocacy actions, with initiatives designed to foster a free market.

As the adoption or improvement of compliance programs are not mandatory, one may wonder why CADE is engaged in promoting them in several ways, or even ponder on the advantages of compliance for bidders in procurement processes.

II. WHY COMPLIANCE? CADE'S PERSPECTIVE

From CADE's perspective, compliance programs boost regulatory scale. 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.

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.

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.

The diligence of private agents with competition compliance is the result of successful public command and control efforts. Extensive and agile investigations, robustly launched proceedings within the due legal proceeding, and severe fines can result in stakeholders realizing 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.

Thus, promoting efficient integrity programs is a systemic effort. The first measure in making the private sector heed integrity, and hence promote successful programs, is to develop ex officio investigations that impose relevant fines – that is, to educate openly about the disadvantages of breaching the law. Against this backdrop, between 2012 and 2020, the authority levied fines amounting to over BRL 6 billion, received

2 Applications 08700.004337/2016-86; 08700.004341/2016-44; 08700.008159/2016-62; 08700.007077/2016-09; 08700.008158/2016-18; 08700.005078/2016-19; 08700.004137/2017-12.

financial contributions deriving from signed agreements that reached over BRL 4 billion, and imposed sanctions that prohibited on contracting with the government, on receiving government loans, and even on selling assets – all done according to law.

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 organizations 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.

Compliance programs can be authentic autoregulation policies when they suggest that organizations 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.

III. WHY COMPLIANCE? MARKET PLAYERS' PERSPECTIVE

From the perspective of companies, compliance programs ensure their sustainability, i.e. their long-term viability, and provide clear reputational gains, which increase companies' capacity for influence and power. Moreover, it may reduce pressure on the regulatory agenda. 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, among 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.

To prevent unforeseen events resulting from regulatory disagreement, exemplary compliance programs 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 organization.

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

Under the Agent-Principal Theory, the economic literature studies the dissonance among the interests of agents and the roles expected from them by the principal. The theory considers that a person acting 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 organization (principal).

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

The actions taken to ensure the agent optimize 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, revising the organizational culture is a possibility, to bring new values or impede the recurrence of distorted values in an organization. To the extent that alignment objectives are precisely the objectives aimed by compliance programs, they are attractive to organizations deeply engaged in integrity cultures.

Although compliance programs 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.

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.

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:

1. Adopting a clear Code of Conduct and offering regular training for positions more likely to commit antitrust violations to raise awareness on organizational ethics.

2. Enhancing oversight, which reduces the asymmetry of information between the organization 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.

3. Giving high compensation. Well-paid workers usually avoid opportunistic behavior as, if caught, they may not find such a high-compensating job again.

4. Giving late compensation. Especially by postponing the performance-related pay given to upper management employees, the organization 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 organization later.

5. Finally, the costs of an antitrust compliance program may be more easily borne when the topic is part of the organization's actions for ensuring global integrity instead of being restricted to a part of the organization. This generates economies of scale and scope and, thus, saves resources.

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]

IV. CONVERGENCE OF COMPLIANCE AND LENIENCY PROGRAMS

CADE's experience has shown that good integrity programs give rise to better leniency agreements. That is because a good integrity program has mechanisms to detect and address misconduct, allowing for identifying red flags more swiftly, therefore leading to faster internal investigations, as they start at an earlier stage.

Moreover, successful compliance programs usually draw risk maps to predict where a violation is more likely to occur; thus, if it comes to pass despite the program's control and mitigation tools, the investigations can be carried out faster and more effectively. On the one hand, a successful leniency application offers the government the opportunity to detect violations it was completely unaware of or that lacked evidence. On the other hand, the signatory organization and representatives who helped disclose the violation are entitled to great legal benefits, which can go as far as total immunity from administrative prosecution.

From its launch in 2000 to October 2021, CADE's leniency program examined 394 applications. Out of these, 106 became agreements. The remaining applications were not approved because the immunity marker was granted to an earlier applicant (121) or due to relinquishment or insufficient evidence (167). Nonetheless, regardless of an application rejection, an organization can still join a compliance program in the future, after due preparation. Through earlier detections, one is more likely to receive the immunity marker; by documenting risk-prone routines, one ensures the application has sufficient evidence.

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

1. In meetings with competitors, financial advisers, and unions, have at least two agency employees and routinely document all proceedings. Record and minute every meeting and prepare its agenda in advance. 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. Etc.

2. Adopt channels to receive questions and complaints.

3. Regularly audit risky areas.

4. Regularly review and assess the efficiency of risk maps and the actions to address these risks. To prevent violations, detect them,

3 See https://www.escolavirtual.gov.br/curso/513 (in Portuguese).

and align corporate policies with the legislation in force, it is useful to have at least one monitoring action for each objective. For instance, if the goal is having hotline detections, one could perform anonymous testing, measure the number of complaints against the number of employees, categories the complaints, log the investigation period and response time, make a survey on the dissemination of the investigation results, etc.

5. Have consistent and documented accountability for violations of internal rules (even if not illegal), with consequences for the supervisors in charge. Consistent accountability means that managing positions should be as accountable for infractions of the same kind as every other employee.

6. From time to time, publish reports with statistics of the violations committed and the actions the organization took in response (e.g. every year).

7. Document the justifications given for joint bids in tenders.

8. To make leniency applications more predictable and effective, CADE has recently released guidelines that detail the types of evidence to be used in these applications.[4] The guidelines include a list with the evidence CADE considered sufficient and insufficient over time, which can serve as a basis for improving documentation processes; this has the twofold effect of preventing violations and facilitating their detection and assisting in the collection of evidence for disciplinary actions or cooperation with government authorities.

4 The document is based on precedents of CADE's Tribunal, and is available in Portuguese at: https://cdn.cade.gov.br/Portal/centrais-de-conteudo/publicacoes/guias-do-cade/Guia-recomendacoes-probatorias-para-proposta-de-acordo-de-leniencia-com-o-Cade.pdf.

CPI COMPETITION POLICY INTERNATIONAL

CPI Subscriptions

CPI reaches more than 35,000 readers in over 150 countries every day. Our online library houses over 23,000 papers, articles and interviews.

Visit competitionpolicyinternational.com today to see our available plans and join CPI's global community of antitrust experts.