

COMPETITION COMPLIANCE IN BRAZIL: RETROSPECTIVE AND PERSPECTIVE



BY MARIANA TAVARES DE ARAUJO & GABRIELA COSTA CARVALHO FORSMAN¹



¹ Mariana Tavares de Araujo is a partner with Levy & Salomão Advogados. Gabriela Costa Carvalho Forsman is an associate with Levy & Salomão Advogados.

CPI ANTITRUST CHRONICLE NOVEMBER 2021

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CPI Antitrust Chronicle November 2021

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Competition Compliance in Brazil: Retrospective and Perspective

By Mariana Tavares de Araujo & Gabriela Costa Carvalho Forsman

CADE has been one of the lead authorities in Brazil to disseminate a compliance culture through its rules, guidance, and case law, which evolved considerably since 2004 and in particular over the past five years. Its enforcement policies and procedures made public in guidelines and proposed regulations confirm that the agency is aware that ensuring legal certainty and transparency is a work in progress. Its approach to competition compliance over the years does as well. This article discusses CADE's efforts to promote competition compliance programs and considers the impact of its 2016 Guidelines to business activities, as well as points to potential areas of improvement.

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I. INTRODUCTION

Most compliance-related efforts by Brazilian authorities in the spotlight today are related to anticorruption enforcement, as a result of the legal framework in place since 2014, which introduced investigative tools that enforce corruption and promote the adoption of corporate compliance programs, and of the overall attention received by the *Car Wash Investigation*, in Brazil and abroad. Interestingly though, anticorruption compliance was the not the first area - and most certainly is not the only one - where compliance initiatives have prospered in Brazil.

Over twenty years ago, the National Monetary Council issued Resolution No. 2,554/1998 promoting the adoption of compliance programs to prevent money laundering, terrorism financing and systemic and prudential risks. And only a few years later in 2004, the competition authority in charge of investigations at the time (Secretariat of Economic Law or “SDE”) issued Ordinance No. 14/2004 that for the first time set forth guidelines for competition compliance programs in Brazil.²

Twelve years later in January 2016, the Council for Economic Defense (“CADE”) issued its “Guidelines on the Structuring and Benefits of Adopting Competition Compliance Programs” (“2016 Guidelines”)³ further detailing the requirements for a corporate compliance program to be viewed as effective and with that enhancing legal certainty and transparency in this area.

This article discusses CADE’s efforts to promote competition compliance programs and considers the impact of its 2016 Guidelines to business activities during the past five years, as well as points to potential areas of improvement.

II. BRAZIL’S COMPETITION COMPLIANCE LEGAL FRAMEWORK AND INITIATIVES

Article 36 of Law No.12,529/11⁴ (Brazil’s Competition Law) sets forth the basic framework for anticompetitive conduct in Brazil. It addresses all types of anticompetitive conduct other than mergers. The law prohibits acts “that have as purpose or effect to” (i) limit, restrain or, in any way, adversely affect open competition or free enterprise; (ii) control a relevant market of a certain good or service; (iii) increase profits on a discretionary basis; or (iv) engage in abuse of monopoly power.

The law was broadly drafted to apply to all forms of agreements and exchange of sensitive commercial information, formal and informal, tacit or implied. Cartels, as an administrative offense, may be sanctioned with CADE-imposed fines⁵ against the companies that may range from 0.1 to 20 percent of the company’s or group of companies’ pre-tax turnover in the economic sector affected by the conduct, in the year prior to the beginning of the investigation.

Officers and directors⁶ liable for unlawful corporate conduct may be fined an amount ranging from 1 to 20 percent of corporate fines; unlike the previous law, CADE must currently determine fault or negligence by the directors and executives in order to find a violation. Other individuals (i.e. employees with no decision-making authority), business associations and other entities that do not engage in commercial activities may be fined from approximately BRL 50,000.00 to BRL 2 billion.⁷

2 Prior to Law No. 12,529/11, there were three competition agencies in Brazil: the Secretariat for Economic Monitoring of the Ministry of Finance (SEAE), the Secretariat of Economic Law of the Ministry of Justice (SDE) and the Council for Economic Defense (CADE). SDE was the chief investigative body in matters related to anticompetitive practices and issued non-binding opinions in connection with merger cases. SEAE also issued non-binding opinions related to merger cases and issued opinions in connection with anticompetitive investigations. CADE was structured only as an administrative tribunal, responsible for final rulings in connection with both merger and anticompetitive conduct cases. The current competition law consolidated the investigative, prosecutorial and adjudicative functions into one independent agency: the Council for Economic Defense (CADE).

3 English version available at <https://cdn.cade.gov.br/Portal/centrais-de-conteudo/publicacoes/guias-do-cade/compliance-guidelines-final-version.pdf>.

4 Under Article 2 of the Competition Law, conducts that take place outside the Brazilian territory are subject to CADE’s jurisdiction provided they produce actual or potential effects in Brazil.

5 Individuals and companies may also be fined (a) for refusing or delaying the provision of information, or for providing misleading information; (b) for obstructing an on-site inspection; or (c) for failing to appear or failing to cooperate when summoned to provide oral clarification.

6 Under Article 32 of the law, directors and officers may be held jointly and severally liable with the company for anticompetitive practices perpetrated by the company. Considering the strict sanctions that have been imposed to legal entities by CADE to date, this provision has nearly been forgotten as virtually no individual would be in a position to be held liable for the sanctions imposed against the company.

7 Approximately USD 9,067.83 to USD 362,713,093.94 (exchange rate of USD 1.00 = BRL 5.51).

Under Article 45 of the Competition Law, the following shall be taken into account by CADE when setting fines: (i) level of seriousness of the infringement; (ii) good faith of the defendant; (iii) gain obtained or aimed by the defendant; (iv) whether the conduct has been consummated or not; (v) level of actual or potential harm to competition, Brazilian economy, consumers or third parties in general; (vi) detrimental economic effects caused by the conduct in the market; (vii) economic situation of the defendant; and (viii) recidivism.⁸

Apart from being an administrative offense, cartel is a crime in Brazil, punishable by criminal fine and imprisonment from two (2) to five (5) years. According to the Economic Crimes Law (Law No. 8,137/90), this penalty may be increased by one-third to one-half if the crime causes serious damage to consumers, is committed by a public servant or relates to a market essential to life or health. Also, the Public Procurement Law (Law No. 8,666/93) specifically targets fraudulent bidding practices, punishable by criminal fine and imprisonment from two (2) to four (4) years. There is no criminal corporate liability for cartel crimes in Brazil.⁹

The first initiative targeting competition compliance dates to 2004. Pursuant to Ordinance No. 14/2004, public and private legal entities were encouraged to adopt compliance programs and to submit such programs for review by the competition authority.¹⁰ In return, companies with compliance programs that met certain requirements would be granted a certificate and became eligible for fine reductions in case of an investigation.

In May 2012, the Competition Law entered into force and introduced key legal changes, including revised administrative and criminal sanctions to cartel conduct. Over the past 9 years, important enforcement policies were set, and others revised. Price-fixing, bid-rigging and other conducts also treated as hard-core in other jurisdictions remain a priority. During this time, CADE has turned its attention also to exchange of information cases, which in Brazil are not so clearly distinguished from cartels and may also be subject to criminal enforcement. Increasingly so, to unilateral conduct cases as well, particularly in the digital and the payment sector markets.

Since 2018, CADE opened over 100 cartel investigations, most initiated through leniency agreements and over 300 executives currently face criminal proceedings in Brazil. Criminal courts of first instance have decided at least 20 cases so far, and all criminal cases are pending appeal in court.¹¹ The investigative timeline in criminal cases tends to be longer and less predictable than investigations conducted by CADE.¹²

In the midst of its enforcement activity, in January 2016 CADE invigorated its approach to promoting effective corporate compliance programs and published the 2016 Guidelines reflecting the view shared by agencies worldwide that effective compliance and prevention generally are more important than ever.¹³ The 2016 Guidelines provisions set forth the following pillars for an effective compliance program: (i) tone from the top, (ii) training, (iii) oversight, (iv) sanctions for non-compliance and (v) tailoring the program to the specific business. Essentially, a program will be considered effective by CADE if it enables the company to detect conduct, cease it, and self-report.

According to the 2016 Guidelines, effective compliance programs with “*damage control measures*” that meet the five requirements mentioned above may be considered evidence of companies’ good faith and of reduction of negative economic effects arising from the investigated conduct (Article 45, II of the Competition Law). Under such circumstances, CADE’s Tribunal may consider its existence as a mitigating factor when calculating fines or as a criterion in the calculation of pecuniary contributions in the context of settlements, resulting in discounted fines.

8 Apart from fines, CADE may also: (i) order the publication of the decision in a major newspaper, at the wrongdoer’s expense; (ii) debar wrongdoers from participating in public procurement procedures and obtaining funds from public financial institutions for up to five (5) years; (iii) include the wrongdoer’s name in the Brazilian Consumer Protection List; (iv) recommend tax authorities to block the wrongdoer from obtaining tax benefits; (v) recommend the intellectual property authorities to grant compulsory licenses on patents held by the wrongdoer; and (vi) prohibit individuals from exercising market activities on his/her behalf or representing companies for five (5) years. The law also includes a broad provision allowing CADE to impose any “*sanctions necessary to terminate harmful anticompetitive effects,*” whereby CADE may prohibit or require a specific conduct from the wrongdoer. Because of the quasi-criminal nature of the sanctions available to the antitrust authorities, CADE’s wide-ranging enforcement of such provision may prompt judicial appeals. Finally, in case of recidivism fines will be doubled.

9 Brazilian Federal and State Prosecutors are in charge of criminal enforcement in Brazil, and act independently from the administrative authorities. Also, the Police (local or the Federal Police) may start investigations of cartel conduct and report the results of their investigation to the prosecutors, who may or may not file criminal charges against the reported individuals. The administrative authorities (former SDE and current General Superintendence) set a framework for the relationship with the criminal authorities, which reduces legal uncertainty and creates a healthy competition among the different criminal enforcement authorities.

10 Companies should submit, for instance, evidence regarding compliance with competition law, mechanisms that allowed them to identify and apply disciplinary measures to individuals in violation with such law, monitoring systems and due diligences carried out by independent third parties. (Art. 4 of Ordinance 14/2004).

11 The data does not include cases related to the *Car Wash Investigation* that focus on bribery and money laundering practices.

12 As a result of the use of more aggressive investigative tools, CADE has been imposing extremely high fines on both companies and individuals found liable for hardcore cartel conduct. The record fine imposed by CADE in connection with a cartel case was of roughly BRL 3.1 billion, approximately USD 778.9 million, in 2014. The level of fines imposed is considerably higher when the case is supported by direct evidence (average of 15 percent of the annual gross sales of the defendant in cases with direct evidence, as opposed to an average of 1 percent of the annual gross sales of the defendant in cases without direct evidence).

13 English version available at: <https://cdn.cade.gov.br/Portal/centrais-de-conteudo/publicacoes/guias-do-cade/compliance-guidelines-final-version.pdf>.

The burden of proof regarding the effectiveness of a program lies exclusively upon the company under investigation, which must keep up-to-date paper trails regarding compliance measures to be in a position to meet the standard.

In September 2017, CADE revised its “Guidelines for Settlement in Cartel Cases” (“Settlement Guidelines”) to include a detailed chart ranking the specific weight that will be granted to each aspect of cooperation.¹⁴ The chart comprises a non-binding method for discount calculation, based on a point-system that further details weight of each aspect of the cooperation requirement (e.g. documents and information that are evidence of the reported misconduct and cover additional aspects of the conduct reported by leniency applicants are considered more valuable and will lead to greater discount).¹⁵ A scale of discounts is applicable to the settling sum defendants who wish to settle and pay.¹⁶

The Settlement Guidelines sets forth that the “*existence of compliance programs that relate directly to the decision to propose a TCC [settlement agreement] and/or result from cooperation presented within the scope of the TCC*” is a mitigating circumstance, but it did not introduce specific rules on the calculation of such discounts.

More recently, in July 2020, CADE put out for public consultation draft “Guidelines for Cartel Penalties” on the methodology followed to calculate such fines, reflecting once again the agency’s efforts to enhance transparency on the matter. The draft was published the same month CADE’s Working Paper No. 004/2020 on International Benchmarking on Antitrust Sanctions,¹⁷ which outlines experience from relevant authorities and includes references to discounts granted to defendants that are able to show that they have effective compliance programs in place. Interestingly, though, CADE’s draft Guidelines for Cartel Penalties does not introduce similar provisions. The final version of the Guidelines for Cartel Penalties is still to be published and may ultimately include details on the assessment criteria and levels of discount a company may be eligible to due to the existence or further adoption of an effective compliance program.

In 2021, CADE remained active in the dissemination of compliance, having promoted webinars with panels on competition compliance, especially focusing on prevention of cartel and bid rigging practices.¹⁸

III. ENFORCEMENT TRENDS OVER THE PAST FIVE YEARS

The OECD¹⁹ lists as key pillars of a corporate compliance program: (i) risk assessment, prioritization and abatement, (ii) strong leadership and management commitment, (iii) transparency, communications and documentation, (iv) auditing, monitoring, evaluation, (v) training, (vi) reporting, and (vii) *ex post* review. All such pillars have been included in the 2016 Guidelines and have been the focus of CADE’s review when assessing corporate compliance programs.

The 2016 Guidelines were an additional sign that CADE acknowledges companies’ efforts to implement compliance programs but materially did not go beyond the rules already in place. There is no data available on the impact Ordinance No. 14/2004 (or the 2016 Guidelines) had in the dissemination of compliance programs, but its existence combined with the outreach initiatives carried out by the Brazilian authorities

¹⁴ Cooperation may include submitting documents and information in the possession, custody or control of the settling party; using the settling party’s best efforts to secure the cooperation of current and former employees; and appearing for interviews, court appearances and trials.

¹⁵ The English version of the Guidelines for Settlement in Cartel Cases is available at: http://www.cade.gov.br/aceso-a-informacao/publicacoes-institucionais/guias_do_Cade/guidelines_tcc-1.pdf.

¹⁶ Reductions may vary between (i) 30 percent and 50 percent for the first party to propose the settlement; (ii) 25 percent to 40 percent for the second in; and (iii) up to 25 percent to the other parties that follow. For settlement proposals submitted after the GS has concluded the investigation, reductions are limited to 15 percent. Theoretically based on the fine that would apply to the parties under investigation for cartel, such discounts are supposed to vary according to (i) the order in which the parties come forward; and (ii) the extent and usefulness of what the parties provide in cooperation with the authorities.

¹⁷ Portuguese version available at: <https://cdn.cade.gov.br/Portal/centrais-de-conteudo/publicacoes/estudos-economicos/documentos-de-trabalho/2020/documento-de-trabalho-n04-2020-benchmarking-internacional-sobre-dosimetria-de-penalidades-antitruste.pdf>.

¹⁸ For instance, in September CADE issued Guidelines on Evidentiary Recommendations for Leniency Agreements Proposals and even though it does not address compliance-related matters directly, when announcing such Guidelines in CADE’s LinkedIn account, CADE explained that the Guidelines would be helpful for parties initiating internal investigations or adopting compliance programs; and Luiz Hoffman, CADE’s Commissioner’s took part in CADE’s podcast in which he shared his view on CADE’s fight against cartels and important tools such as compliance programs and CADE’s Leniency Program. Also, in October, CADE promoted the “National Cartel Prosecution Week” which had a panel on competition compliance to prevent bid rigging. Available at: https://www.linkedin.com/posts/cadegovbr_cade-lan%C3%A7a-guia-sobre-recomenda%C3%A7%C3%B5es-probat%C3%B3rias-activity-6845725922809655296-jM6X, https://www.linkedin.com/posts/cadegovbr_sncc2021-podcast-combatecartaezisempauta-activity-6846468781976502272-tMYy and https://www.linkedin.com/posts/cadegovbr_semana-nacional-de-combate-a-cart%C3%A9is-2021-activity-6846814976317915137-dQMx.

¹⁹ Available at: <https://www.oecd.org/daf/competition/competition-compliance-programmes-2021.pdf>.

at the time presumably encouraged Brazilian companies in general to adopt such programs. The rules set forth under Ordinance No. 14/2004 are similar to the ones established in the 2016 Guidelines and already determined that companies with effective programs were eligible for discounts over applicable sanctions.²⁰

In fact, only a few years later CADE began recommending the adoption of compliance programs to companies convicted for anticompetitive conducts and providing for such obligations under settlement agreements.²¹ This happened for instance in 2007 to defendants found guilty of entering into agreements to fix commercial conditions and of unilateral conducts in the medical segment.²² One of the defendants then filed a motion requesting CADE to clarify which companies should adopt such programs, since such defendant already had a compliance program in place. CADE ruled that the recommendation applied to all defendants and that each could decide whether to follow it or not since it “*was not an order to the defendants, [...] but was rather a recommendation.*”

Similarly, in a 2007 settlement agreement executed in connection with a cartel investigation in the cattle industry, the defendant was required to adopt a corporate compliance program. Such program should have the goal to prevent its employees and related third parties to enter into anticompetitive conducts. It was the first time that CADE made clear its expectation that compliance obligations should also extend to related third parties.²³

An important change regarding CADE's enforcement practice took place after 2016 Guidelines were introduced, when it effectively began rewarding companies that commit to implement robust compliance programs, following a trend introduced by Brazil's Clean Companies Law (Law No. 12,846/13) and consistently with other jurisdictions. For instance, in at least 10 (ten) cases over the past five years, CADE granted 2 percent to 4 percent discounts to defendants active in the construction, healthcare, mail and real estate brokerage sectors for committing to implement robust compliance programs under settlement agreements.²⁴ Pursuant to publicly available information, all such discounts were granted to defendants due to obligations of future adoption or enhancement of compliance programs rather than in view of existing effective compliance programs. CADE's ruling reflects the understanding that as soon as effective compliance programs are put in place, the likelihood of recidivism would be reduced and, therefore, such compliance programs would assist the parties in complying with the obligations set under the settlements.

CADE has also been more active in monitoring such obligations including by requiring that settling parties retain external monitors to assist in this role, by submitting periodic status reports and expert opinions.²⁵ CADE has mostly focused its review on the scope of compliance manuals, and on whether defendants have published such manuals online, provided training sessions, lectures to employees from external consultants, and put in place internal and external hotlines.

Based on publicly available information, differently than what has been its approach in the context of settlements, CADE has never granted discounts over fines imposed to defendants convicted for anticompetitive conducts, which reported having compliance programs at the time of conviction (i.e. *ex ante* compliance programs). In its guilty verdicts, the sanctions imposed have been a combination of fines and the obligation to introduce a corporate compliance program (e.g. the *Liquefied Petroleum Gas - LPG and type C pasteurized milk*, cartel cases).²⁶ Specifically, in the type C pasteurized milk cartel case, the determination consisted in the adoption of a corporate compliance program covering competition and antibribery policies, going therefore beyond its statutory authority.

20 The fact that companies with programs did not file for certification under Ordinance No. 14/2004 was ultimately viewed by the agency at the time as positive, because it would have lacked necessary resources to receive, review and certify programs and, in parallel, carry on with all its enforcement work.

21 For instance, Administrative Proceeding No. 08012.009088/1999-48; and Settlement Cases No. 08700.002906/2007-68, 08700.004221/2007-56, 08700.003240/2009-27).

22 Administrative Proceeding No. 08012.009088/1999-48.

23 Settlement Case No. 08700.002906/2007-68.

24 Settlement Cases No. 08700.002176/2020-72, 08700.004137/2017-12, 08700.001200/2016-70, 08700.003188/2018-08, 08700.004337/2016-86, 08700.007077/2016-09, 08700.008159/2016-62, 08700.004341/2016-44, 08700.005078/2016-19 and 08700.008158/2016-18. Obligations set forth in these agreements included, for example, the adoption of compliance programs that adequately addressed competitive concerns by the parties, their affiliates and subsidiaries within ninety (90) days of the homologation of the agreements matters, periodic revisions of such programs until the pecuniary contribution obligation is not met, submission of monitoring reports to CADE regarding the adoption of such programs.

25 For instance, Settlement Case No. 08700.003188/2018-08.

26 Respectively Administrative Proceedings No. 08012.002568/2005-51 and 08012.010744/2008- 71.

Finally, CADE has also set obligations to adopt compliance programs in unilateral conduct investigations,²⁷ and under merger settlements in at least four (4) cases, two of which after the 2016 Guidelines were introduced.²⁸ In June 2021, in a merger case involving the cattle industry,²⁹ Commissioner Paula Farani emphasized the importance of having compliance programs and that its positive effects were expected to extend beyond the term of the agreement entered into between CADE and the parties. She also expressed the view that the corporate governance and compliance mechanisms set under the agreement would assist the parties in mitigating family influence in the business.³⁰

In parallel to CADE's initiatives on compliance, the Federal Comptroller's Office ("CGU"), Brazilian anticorruption agency responsible for the prosecution of corruption cases, has similarly encouraged the adoption of competition compliance policies. In at least fourteen (14) out of fifteen (15) leniency agreements entered into by CGU,³¹ the parties agreed upon specific obligations towards the enhancement of their respective compliance programs, covering anticorruption and competition compliance issues (e.g. specifically inquiring whether the parties have competition compliance policies, requiring that they conduct training sessions and adopt other means to ensure compliance with antitrust and public biddings laws, such as having employees issue compliance representations).

Also, a new public bidding law entered into force in April 2021 (Law No. 14.133/21), which provides that defendants may be eligible to discounted fines in case they agree upon adopting or enhancing current compliance programs (Article 156, paragraph 1, V). This law also provides that (i) winners of public bids concerning large scale public works must adopt robust compliance programs within six (6) months of the agreement's execution date and would be subject to penalties if they do not comply with such deadline (Article 25); and (ii) having an effective compliance program is a criterion in case of a tie break (Article 60). Such criteria underscore the need to comply with competition requirements as well.

IV. CONCLUDING REMARKS

CADE has been one of the lead authorities in Brazil to disseminate a compliance culture through its rules, guidance and case law, which evolved considerably since 2004 and in particular over the past five years. Its enforcement policies and procedures made public in guidelines and proposed regulations confirm that the agency is aware that ensuring legal certainty and transparency is a work in progress. Its approach to competition compliance over the years does as well.

As always, there is still room for improvement. Firstly, it seems important that CADE's Commissioners show a united front with respect to its compliance-related policies.³² CADE would also be taking a step ahead if it were to further clarify the methodology and ranges applicable to discounts on sanctions and settlement sums for companies that adopt or enhance effective compliance programs, including on whether such criteria take into consideration companies' size and business model.

Additional clarity on how CADE assesses the moment companies structure their compliance programs (i.e. *ex ante* or *ex post*), what is viewed as a "paper compliance program," other compliance-related obligations, and monitoring requirements would also be an improvement to the status quo. Finally, companies would also benefit from greater transparency regarding the criteria as to which settlement applicants must undertake compliance obligations.

27 For instance, Settlement Cases No. 08700.002176/2020-72, 08700.003188/2018-08 and 08700.005133/2017-43.

28 For instance, see Merger Cases No. 08700.007553/2016-83, 08700.001642/2017-05, 08700.010790/2015-41 and 08700.008607/2014-66.

29 Merger Case No. 08700.007553/2016-83.

30 Merger Case No. 08700.007553/2016-83. The settlement terms are confidential.

31 Available at: <https://www.gov.br/cgu/pt-br/assuntos/responsabilizacao-de-empresas/lei-anticorruptao/acordo-leniencia>. The most recent leniency agreement entered into with CGU is not public yet.

32 See, for instance, Settlement Cases No. 08700.004337/2016-86, 08700.004341/2016-44, 085700.008159/2016-62, 08700.007077/2016-09, 08700.008158/2016-18 and 08700.005078/2016-19, related to alleged cartel conducts in the context of *Car Wash Investigation* which were subject to joint confirmation in November 2018. Some Commissioners disagreed with the discounts applied to the settlement applicants having understood that such discounts could encourage the adoption of "paper compliance programs"; and that CADE should only require the adoption of compliance programs as a sanction, and not give credit to companies found to have violated the law for their efforts to "clean their house."

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