Administrative Council for Economic Defense

GUIDELINES

COMPETITION COMPLIANCE PROGRAMS

Guidelines on the structuring and benefits of adopting competition compliance programs

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CADE
Conselho Administrativo de Defesa Econômica

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GUIDELINES FOR COMPETITION COMPLIANCE PROGRAMS

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I. Introduction

Law 12.529/2011 (Competition Law) established a new structure for the Brazilian Competition Protection System (BCPS) in Brazil, of which the Administrative Council for Economic Defense (CADE) is part, and set out its functioning and powers. This Law was a milestone in the consolidation of Brazilian antitrust law, bringing about various innovations – such as the launch of a new institutional design, more efficient in carrying out the authority's objectives – and reiterating the importance of fulfilling its provisions.

Due to this renewed focus, one subject that has gained space on the competition agenda is compliance programs. Economic agents are becoming increasingly aware of the need to implement practices that do not infringe the Competition Law and that demonstrate a proactive attitude on the part of private entities. Due to these factors, the implementation of Compliance programs has been multiplying.

The purpose of these Guidelines is to address this reality and to **establish non-binding directives for companies and other private entities regarding these programs**, specifically in the field of competition, such as what they consist of, how they can be implemented and what the benefits of their adoption are. These are *suggested guidelines* (or a "menu" of options, to use the terminology of the International Chamber of Commerce[1]), which can be accepted or not based on the reality of each organization.

In that sense, CADE understands that medium and small-sized entities may implement Compliance programs, albeit smaller in scope and with a reduced budget when compared those of large companies.[2]

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[1] The International Chamber of Commerce is an international organization that developed one of the most complete guides about compliance, and a reference in the subject in the international scenario. The material is available on: http://www.iccwbo.org/Advocacy-Codes-and-Rules/Document-centre/2013/ICC-Antitrust-Compliance-Toolkit/

[2] SCCE – A Compliance & Ethics Program on a Dollar a Day: How Small Companies Can Have Effective Programs. SCCE's CEO, in the introduction of the guide developed by the society specifically for compliance programs with reduced budgets states: "Of course you could, if you wanted to spend any amount of money on compliance and ensure your efforts are expensive. Some have indeed created expensive compliance programs. However, the idea that any company that wants a compliance program must spend a lot of money is without merit. The claim that some companies – those that are small and medium sized – are too small to implement a compliance program is not accurate. Anyone with any business experience and who is being honest knows that any business operation can be managed efficiently or inefficiently. Compliance is no different. You can implement an effective compliance program with a small investment if you know what you are doing."

1.1 The Role of the Administrative Council for Economic Defense

CADE's role, as established by the law, is to ensure free competition. To achieve this goal, CADE exercises its preventive functions (merger analysis and consultations), its repressive functions (investigation and punishment of anticompetitive conducts), and educational functions (raising awareness of the importance of maintaining a healthy competition environment.)

The main focus of these guidelines are the practices subject to CADE's repressive functions. Compliance programs aims primarily at hindering companies, organizations, and persons from violating the Competition Law, that is, at preventing them from adopting practices that may constitute infractions to the economic order, thus subject to severe penalties to be applied by CADE. Such practices may be (i) horizontal, put forward by agents that compete among themselves; (ii) vertical, carried out by agents acting in different levels of the same chain of production; or (iii) unilateral, practiced by agents with a dominant position.

I.2 Practices within the scope of these Guidelines

These guidelines will tackle anticompetitive practices, as the recommendations on good practice in merger review were largely dealt with in the *Guidelines on Gun Jumping*. For further explanations on the subject, the reading of the aforementioned *Guidelines* is recommended.

Here, the orientations will be directed at the creation of programs within private organizations that can be effective to avoid practices that may be understood as collusive or unilateral infringements of the competition law.

I.2.1 Incentives for compliance with Competition Law

Before entering into further detail regarding what is a Compliance program, what its specific benefits and structure are, it is important to highlight the reason why economic agents, be they large, medium or small, should be concerned with complying with the Competition Law. There are two responses, the first related to liability derived from non-compliance, and a second related to the benefits that compliance with the law brings to society and to economic agents themselves.

As described in Articles 37 and 38 of the Competition Law, private entities are subject to severe sanctions following the finding of such infringements. Furthermore, companies may be subject to prosecution in the civil sphere and individuals in the criminal sphere, by force of Law 8.137/1990. Also, with CADE's growing enforcement activity, which has been increasing the number of investigations and judgments of administrative proceedings, the aim is to minimize the incentives for companies to engage in infringements. Some of the applicable sanctions are:

- **Companies**: penalties of 0,1% until 20% from the amount of the gross income in the branch of corporate activity in which the infringement took place;
- **Administrator** (directly or indirectly) responsible for the infringement, when her liability is confirmed: penalty of 1% until 20% from that inflicted on the company;
- **Persons** (employees, consultants, accountants, etc.) or **Entities** (public or private/associations/with or without the character of a legal entity, even if temporarily constituted) that do not exercise corporate activities: penalties of R$ 50,000 until R$ 2,000,000,000;
- **Repeated infringement**:
    - Company or persons: the penalties will be imposed in double;
    - Continuity of the acts or practices that constitute an infringement to the economic order, after final judgment by the Tribunal determining its discontinuance: daily penalties fixed in a minimum of R$ 5,000, going up to 50 times that amount, if so recommends the offender's economic standing and the gravity of the infringement;
- **Criminal Proceeding**: the persons involved in anticompetitive conducts can also be criminally charged and punished in penalties amounting to 2 till 5 years of imprisonment plus pecuniary charges.

Notwithstanding, there are other benefits that derive from complying with competition law besides avoiding sanctions. The most elementary of them is the guarantee of a fair competition environment. One other benefit is the good reputation of companies in the market and their good standing in public opinion, as will be shown in more detail in item 2.3. As society becomes increasingly aware of the importance of healthy competition, and news on

anticompetitive practices gain space in the media, the incentives to cooperate with authorities and to systematically comply with the law goes beyond merely not being subjected to the applicable sanctions and extends to the guarantee of a good image.

2. Compliance

2.1 What is Compliance

Compliance is a set of internal measures, adopted by a given economic agent, which enables it to prevent or minimize the risks of competition law infringements derived from its activities and from the practices of its partners and employees.

Through compliance programs, economic agents reinforce their commitment with the specific values and goals put forward in the program, and, primarily, their commitment to complying with the law. This goal is ambitious and, consequently, requires not only the development of a set of procedures, but (and especially) a change in the corporate culture. A compliance program will have positive results when it manages to raise awareness among the organization's employees on the importance of doing the right thing.

Since such employees may present different motivations and degrees of tolerance to risks, the purpose of the program is to implement common values and goals, ensuring they are permanently observed. Compliance programs can encompass many similar areas related to the economic agent's activities, such as corruption, governance, fiscal or environmental matters, and competition, among others, in an independent or aggregated manner.

2.1.1 Integration of several areas in compliance programs

A compliance program will rarely focus on the normative diplomas pertaining solely to one area or sector, or address only one type of concern. The most common is for programs to tackle several aspects and legal concerns simultaneously. For that reason, each economic agent must take into account its own characteristics when implementing a compliance program. In cases in which compliance risks touch several areas, greater effectiveness will be guaranteed as far as competition compliance is developed and implemented not on its own, but as part of a wider and broader program of corporate integrity and ethics.

The broader strategy must be to incorporate compliance into the company's business culture so that it would not be possible to separate its commitment to compliance with law from its internal rules. From this point, the program will be less exposed to the risk of being seen as an obstacle to the achievement of performance goals and will be considered and integrated as part of the fundamental rules of the business.

To exemplify a compliance relevant area other than competition, but that can be integrated to competition compliance, it is worth mentioning anticorruption compliance, which in Brazil is explicitly addressed in Law 12.846/2013.

This integration is important for two main reasons: (i) the establishment by the economic agent of a program composed of internal mechanisms and processes aimed at detecting and avoiding risks in several areas, including competition, may be more efficient and effective than the creation of a single structure developed only for competition compliance, and (ii) if the main objective of compliance is to create a culture of respect for the law, it is evident that the fulfillment of all laws must be aimed for, not only the compliance with one legislative instrument.

Notwithstanding, though competition ethics is part of a broader compliance agenda, it is vital to adopt competition specific material that takes into consideration the specificities of the law and policies for competition defense, as well as the adequate flow of resources to the competition area, especially in those cases in which the exposure to Competition Law is high. In short, integration should be aimed for without losing the specific features required of the fulfillment of each law.

2.2 Who can benefit from Compliance

Organizations of all sizes can benefit from a Compliance program. However, the risks - especially in the field of competition - to which an organization is exposed vary according to its size, position in the market, sector, objectives, etc. For this reason, there is no unique model for a compliance program. Each program must respect the particularities of each industry. Also, it should be constantly reviewed in order to include new risks that may eventually emerge, such as the ones derived from a merger transaction, from the introduction of a new product in the market or from the entry into a new geographic market with a history of competition infringements.

These Guidelines do not intend to exhaust the subject of competition Compliance programs, but rather to point out common elements to programs considered robust, as well as particularities of specific cases relevant to their structuring.

In addition to the organizations themselves, the adoption of Compliance programs benefits third parties, among them investors, consumers and commercial partners, insofar as it guarantees that markets will remain competitive, prevents infringements and its subsequent damages from occurring, and avoids loss in the value of the company. Furthermore, to the authorities, prevention is always preferable than repression as it represents a smaller cost to society.

Generally speaking, society, the economy, and competition as a whole benefit from compliance programs.

2.3 Benefits of the Compliance program to companies

As these guidelines focus on the implementation and strengthening of compliance programs in private organizations, the benefits derived from them will be described in greater detail.

2.3.1 Risk prevention

The adoption of Compliance programs helps in identifying, mitigating and remedying the risks of infringing the law, as well as and its adverse consequences. In addition to the fines, the Brazilian Competition Law provides several other sanctions for infringements to the economic order, such as the publication of the judgment decision in a newspaper of wide circulation, the prohibition to enter into contracts with official financial institutions and to participate in public tenders for a five-year period, registration of the infringer

Even if competition risks are more frequently associated with larger companies, small and medium-sized companies, as well as other organizations, can and should be concerned with complying with Competition Law, and consider the implementation of Compliance *programs.*

in the National Consumer Defense Registry, recommendation of compulsory license of intellectual property rights owned by the infringer, denial of payment by installment of federal taxes and cancellation of tax incentives or public subsidies, the division of the company, transfer of corporate control, sale of assets or partial suspension of activities, and prohibition to carry out commercial operations on their own or as a representative of a legal entity for up to 5 (five) years.

In addition to the financial damages and to the activities of the infringing organizations, there is also the negative impact on the individuals involved, who may be prevented from performing management activities in other companies and are subject to criminal liability.

2.3.2 Anticipated identification of problems

The awareness that compliance programs raise of undesired conduct enables the identification of competition law infringements more quickly, which favors a prompt response by the company. Among the benefits derived from the fast identification of infringements is the greater possibility to negotiate agreements with the authorities, including leniency agreements, which may lead to a substantial reduction of sanctions and, in some cases, criminal immunity for the individuals involved. The specific effect of anticipating the identification of problems for purposes of enforcement of the Competition Law will be dealt with in item 3.3.

2.3.3 Identification of infringements by other companies

The awareness raised by Compliance programs enable employees to identify signs that other companies, such as competitors, suppliers, distributors or clients, may be infringing the law. Such identification is relevant as the interaction with third parties infringing the law may be harmful to the economic agent. In such cases, when analyzing the infringements, the authority will be prone to see the organization in a less favorable light, especially depending on the level of involvement of the parties.

A close relationship between organizations suggests a close alignment of commercial activities. Thus, it is very important to be capable to act if an illicit action of a third party with

whom there is an intense relationship is identified, so there will be no doubt about the good faith of the company.

2.3.4 Reputational benefit

Affirmative actions to promote compliance with the law are an essential part of an ethics culture in business, which results in benefits to the organizations' reputation and to their attractiveness for promotional objectives, for recruitment and retention of employees. These actions tend to increase the satisfaction and commitment in the workplace and the feeling of belonging and identification with the group. The commitment to complying with the law also inspires trust in investors, commercial partners, clients and consumers that value companies that operate in an ethical way, and that would feel deceived in case of an infringement.

Infringements of the law lead to the questioning of the entity's ethics and business model. The possible economic impact derived from the damage to reputation - enhanced by media coverage - may be larger than the damage resulting from the sanction, as it may lead to losses that are not only financial, but also of business opportunities. Organizations that have implemented compliance programs are increasingly attractive as commercial partners and as institutions in which to work.

2.3.5 Employee awareness

Employees aware of the "rules of the game" are in a better position to do business without fear of infringing the law, and also less afraid to seek assistance if they identify possible sensitive competition matters. Subjects related to competition frequently appear in commercial negotiations; well-developed compliance programs enable employees to make decisions with more confidence. The fear of infringing the law - especially when there is the risk of criminal prosecution - may intimidate the employees and eventually discourage tougher and perfectly legitimate competition.

2.3.6 Reduction of costs and contingencies

The adoption of a Compliance program can prevent organizations from incurring in costs and contingencies due to investigations, fines, negative publicity, interruption of activities, unenforceability of contracts or illegal provisions, compensations, prohibition of access to public funds or of participating in public tenders, etc.

In addition to judicial and administrative expenses, investigations require the allocation of human and financial resources that could be otherwise applied in the core activity of the entity. Furthermore, in addition to the administrative proceeding, companies and individuals may be liable on a civil and criminal basis for the infringement occurred.

Damages to reputation can be felt even before the outcome of the proceeding, merely for being under investigation, reflecting in loss of clients, business opportunities, investments, market value, etc.

3. Competition Compliance

An organization should adopt and renew a competition compliance program when it identifies that it has potential risk under the Competition Law. That will be the case of most, if not all, companies. Below, the difference between a competition compliance program and programs pertaining to other areas (of Law) will be outlined.

3.1 What is competition compliance

The main difference regards the scope of the program: competition compliance is aimed, first and foremost, at minimizing the risk of competition violations, and, secondly, in offering mechanisms so the organization may readily detect and deal with anticompetitive practices that were not avoided.

3.1.1 Limitations

The most elementary point about the functioning of a competition compliance program is the understanding that its adoption does not guarantee competition violations will not take

place. Actually, if the program functions correctly, the tendency is that no effects will be readily visible. After all, the entire logic of compliance is to promote and preserve a healthy competition environment, meaning the company should be able to carry on its daily routine. On the other hand, the greatest advantage is visible when violations do in fact happen: the program allows for quick identification and for the company to take adequate action.

3.1.2 Sham programs

A concern when it comes to compliance enforcement is the creation of sham programs, structured solely to simulate commitment. The mere formal adoption of a program does not mean that the organization is effectively concerned and committed to complying with the Competition Law, or that the implemented program is in fact effective in attaining that goal.

Entities may adopt superficial compliance programs, - and/or programs without real commitment to maintaining a healthy competitive environment, with the intention to make use of the program as a mitigating factor in case of conviction. They may also create programs that, from the outside, look extremely well structured, have been set up by specialists, and may even result in high costs for the company, but nevertheless do not resonate with the corporate culture and are, as such, systematically ignored by employees.

For those reasons, concrete measures should always be part of the implementation of a program, so that the program is not determined to be a sham program. Some fundamental elements regarding the structure of a robust competition compliance program will be presented below.

3.2 Structuring Robust Programs

It is important to reiterate that competition compliance programs are always dependent on the particular characteristics of the organizations implementing them. Nonetheless, these programs must aim at incorporating general characteristics deemed essential for its efficiency and robustness, which will be systematically set out in item 3.2.1. The risks which follow from each company's specific activities will be addressed in item 3.2.2.

3.2.1 General Criteria

Though it is possible to structure a competition compliance program in many ways, the following characteristics are common to robust programs. It should be mentioned that despite being common, in the sense that they should somehow be incorporated into the program, they do not require identical incorporation, that is, it is possible to incorporate and approach them in more than one way.

3.2.1.1 Commitment

An organization's genuine commitment is the basis for any successful program. Without seriousness and effective intention to conduct business in an ethical manner, the program is doomed. In practice, commitment is substantiated through the following: tone from the top, adequate resources, and autonomy/independence for the Compliance Leader (CL).

How to ensure commitment?

An alternative that some companies adopt in order to ensure involvement of the governing bodies in compliance initiatives is to guarantee their impact on employee salaries, including management.
Such alternative can be viable specially when decentralization is acute and keeping unified control over the company's entire structure is not feasible.
Another persuasive incentive is the media. Highlighting the damage to managers' careers following from antitrust violations results in more commitment.

Tone from the top

By "tone from the top" one should infer that compliance is a fundamental value in the corporate culture, which is safeguarded by its inclusion on the agenda of the company's governing bodies or of the highest-level person responsible for steering the business of the company and approving its financial statements. In including compliance as a strategic priority, the governing bodies guarantee the very existence of the program, that (i) communicates its relevance to all employees, (ii) ensures its inclusion in the company budget, allowing for discussion on the need for additional resources, (iii) monitors its development, through periodic updates from the Compliance Leader (or similar), and (iv) sets goals, objectives, and methods for controlling the competition compliance program, which must be followed in practice.

Such involvement by the governing bodies should also be visible in daily activities. It is essential, in order for compliance programs to be an effective part of the corporate culture,

that employees are not held to "bottom line" only financial standards, and that there is no incentive or tolerance of illicit behavior that nonetheless brings positive results in the short-term. The standard to be applied comes from the top, thus the need for the administration to be serious about compliance rules.

When it comes to multinational companies, in which decentralization tends to be prevalent and the number of individuals in managerial capacities high (marketing management, sales management, regional management, national direction, etc.), establishing a coherent tone that will ensure compliance rules are upheld is an even bigger challenge. For that reason, it is common for companies to adopt Codes of Conduct, which tend to offer general parameters for employees on a global scale. If that is the option, it is important for the Code to somehow address competition law compliance themes, even if more specific antitrust issues are omitted and conveyed at a later point.

Appropriate Resources

The resources designated for competition compliance programs should have as parameters (i) the organizations' particularities (size, market where it runs its business, etc.) and (ii) how compliance represents avoided costs in potential investigations and convictions. Once properly implemented, the program represents a powerful defense against fines substantially larger than their implementation and maintenance costs, plus reputational consequences. When it comes to particularities, one should note a program will be ever less credible the bigger the gap between available resources and perceived risks.

In that scenario, it is advisable that companies intending to invest in building or strengthening their compliance programs take into consideration:

Monitoring strategies for big businesses

One of the possible monitoring strategies for compliance programs is the adoption of periodic field research, by an external agent, with a view to understand the perception of employees that interact directly with the public or with third parties that acquire goods and services. The goal of such field research is to verify whether the main compliance rules are uphold by the sales personnel.

(a) Whether the budget designated for structuring and maintaining the program is sufficient;

(b) The relationship between the number of employees entirely or partially dedicated to compliance, the company's size and the competition risks to which it is exposed;

(c) The allocation of staff dedicated to compliance, so that they are able to act independently, and effectively impact the decision-making process within the firm; and

(d) If there are enough resources in order to hire and empower the compliance team.

It is essential to stress that appropriate funding does not mean all programs must be expensive. Since compliance strongly depends on each company's particular structure, there is nothing stopping a firm from adopting a program with little expenditure – as mentioned above, compliance should not be limited to huge corporations, which means it must be possible for small and medium firms to develop programs suited for their needs. The aspect that must be taken into consideration is adequacy: so long as resources are sufficient, they will be deemed appropriate.

Autonomy and Independence

It is fundamental to nominate an individual or team of individuals to lead the compliance activities. That person should occupy a position compatible with her responsibilities. In addition to having deep knowledge in technical aspects relating to competition law, the CL should be able to influence the organization's decision-making processes, which is only possible if that person occupies a position of relevance.

CADE recognizes that each entity has its own peculiarities and, for that reason, it is entirely up them to adequately position the CL in their organizational structure. Nevertheless, it is their responsibility to ensure them sufficient autonomy and independence so they can, in an informed manner, adopt measures that may not be in line with convictions by top management.

"Appropriate resources" is not a synonym for "expensive programs". They must be ***sufficient.***

The option selected by some companies has been to establish a schedule of meetings between the compliance team and the

governing bodies (be that the Board of Directors and/or Executive Board, the specific committees by them designated, such as the Auditing Committee or the Compliance Committee, or even the company's director) in order to discuss and deliberate on themes that involve competition risks.

Big companies might decide to dedicate an entire division to compliance, thereby creating a group of employees to deal with compliance. If the company is simultaneously active in several countries or economic sectors, then the possibility of designating national and regional compliance leaders should also be considered. However, if the company is small or medium sized, such big teams may not be needed. Once again, the most important aspect about compliance leadership is ensuring that the individual coordinating the program and monitoring its implementation is sufficiently independent so that his or her decisions get to the governing bodies and are effectively given due consideration.

3.2.1.2 Risk Analysis

Well-structured compliance programs are usually preceded and followed by a profound risk analysis. Among other factors, risks generally vary owing to a company's size, economic sectors in which it runs its businesses, position occupied in the market, the reach of its activities, the number of employees and the level of training such employees have received. For example, a company that holds a 60% market share and operates in an environment of extreme rivalry with its competitors is less subject to the risk of collusive practices than companies that operate in homogeneous product markets, have similar cost structures and interact frequently with competitors. In the first case, the greatest risks are related to unilateral and vertical practices. In the latter, the greatest concern relates to the risks associated with collusive behavior and exchange of sensitive information with competitors.

For that reason, it is extremely important for companies to undergo an individualized analysis of the risks associated with their activities, to classify those risks and prioritize compliance activities in those areas where the associated risk is the highest.

But, after all, what is risk analysis? According to the ICC, analyzing risks implies taking into consideration the aforementioned external conditions to which a given company is subject and analyzing these conditions based on two factors: the probability that hypothetical events

become reality and the effect those events would have once they occur.[3] There is no one methodology for such analysis, but a well-renowned method is the one established by the Committee of Sponsoring Organizations of the Treadway Commission (COSO) in the United Kingdom, in place since 1992[4], and another relevant reference is the Global Compact Risk Analysis Guide of the United Nations. However, the most important is to clearly specify the criteria of any given methodology.[5]

How to introduce compliance into an organization's daily routine?

In big businesses, the mentioning of the competition compliance policy by the high administration at all meetings which gather employees, as well as the propagation of videos about the program in the intranet, recorded by the CEO and vice-presidents. In smaller companies, the constant reinforcement of the relevance of the program for the success of the endevors.

When it is self-evident that the company is facing high risks, and that it has a widespread organizational structure, one option is to ask for the assistance of external specialists. These specialists can contribute not only with their technical expertise and practical knowledge, but also with an outside perspective, not embedded in the company's routine, and/or subject to internal pressures.

It is also advisable for risk analysis to not be solely based on perceptions from the Compliance Team or on assessment of written documents. On the contrary, those responsible for the program should deeply investigate how the organization's activities are carried out. In order to do so, one must know the details about the firm's functioning to properly analyze which areas are exposed to lower or higher risks. Some suggestions in that regard are: (i) interviews with employees from different areas, who occupy different hierarchical levels; (ii) visits to operational units and to the market; (iii) constant review of strategies and risk

[3] ICC Toolkit, pp. 17-18.
[4] Commitee of Sponsoring Organisations of the Treadway Commission – http://www.coso.org/IC.htm.
[5] Once again, noting that the burden of proof of the program's effectiveness falls on the company itself, it is advisable to clarify the methodology adopted for risk calculation, in order to assist the company itself if anticompetitive investigations are established and require the analysis of the compliance program, and to demonstrate the company's good faith, ensuring it did not seek to establish unclear mechanismsfor the assessment of risk.

assessment methodology; (iv) open communication channels with employees, especially those exposed to greater competition risks, etc.

As a result of the risk analysis, the resources for the compliance program should be adequately allocated, prioritizing areas and topics of greater risk.

3.2.1.3 Risk Mitigation

Once the potentially problematic areas have been identified in each particular case, the following initiatives are alternatives aimed at mitigating the risks associated with anticompetitive practices.

Training and Internal Communication

The training offered to employees is a proper way to transmit the rules and objectives of the compliance program. It is also through training that employees understand the fundamental role compliance plays in a company and are able to ask questions regarding compliance processes, which usually results in greater commitment to the overall program.

The most effective training commonly adopts different strategies, depending on the hierarchical position and the level of exposure to competition risks of those subject to it, and takes place periodically. This is because, for the most part, employees who directly interact with competitors or whose field of action is sales or marketing tend to be subject to higher risk than those whose activities are concentrated in other areas.

Regarding the type of training, the two most frequent methods are on-site and online. Both are relevant: on-site training, inasmuch as it allows employees to be face-to-face with the Compliance Leader, enables greater freedom and flexibility so that employees may ask questions and make comments; online training, on the other hand, can strengthen messages already transmitted in person, as well as reach a larger number of employees at a lower cost. In both instances, it is advisable for training to be carried out by experienced professionals, and that the employees who took part in the training sessions are subject to some form of

> High-level personnel should be a part of training directed at lower staff workers, in order to demonstrate the administration's commitment to the program and the relevance of training itself.

evaluation, in order to verify how much of the program was effectively absorbed by them, thereby guaranteeing a minimum level of effectiveness.

What kind of training is the most appropriate? As a general rule, relying on online training alone is not advisable. This mechanism is usually selected by big companies, which have difficulties gathering all their employees in one place, at one time, to provide them with explanations regarding compliance. As mentioned, the electronic method is efficient in that sense. However, it is desirable that employees have the opportunity to interact with the compliance team more directly, in order to gain confidence in the program and in the people responsible for it, not only so they can effectively report anticompetitive practices, but also so they are aware there will be no retaliation regarding their complaints on anticompetitive behavior, on the contrary, that coming forward with this information is the behavior expected of them.

Reinforcing employee training, namely of those involved in implementing compliance, through professional internships and post-graduate programs in that area, not only in Brazil, but also abroad.

This situation is all the more critical for new employees, or employees who never had any contact with competition compliance. The natural tendency is for them to have more doubts, questions and be more insecure. Personal contact can be more effective in conveying the idea that it is safe to raise concerns, thus the suggestion for on-site training. However, given that digital mechanisms have evolved considerably over the past years, it is possible that the concerns brought about by the interaction between employees and compliance team can also be addressed by online training. Once more, the most important thing is to guarantee effectiveness, as much as possible, regardless of which mechanism one chooses to adopt.

In addition to training, it is also important to provide constant communication about the compliance rules through different forms of communication between the organization and its employees, so these rules effectively become a part of the corporate culture. Some of these methods include conferences, videos, pocket guides, pamphlets, e-mails, intranet sites, and apps, which should include leadership involvement. Without prejudice to these initiatives, it is also appropriate to include the main competition compliance rules in the company's Code of Conduct, when such a code exists, as well as in internal communications related to that document. Thereby, the company transmits to all its employees the message that involvement

in any practices that violate the Competition Law will also be considered a violation to the Code, resulting in the disciplinary penalties described therein.

In drafting written materials, be it a Code of Conduct, guidelines or specific orientations for compliance, a company should take into consideration the reality of its business. A toolkit or booklet, a code, guidelines and orientations that adopt unreal objectives, describe situations in an idealized manner or present issues in a way excessively distant from the daily routine of the company usually fail to resonate with employees – and, in some cases, that strategy even results in adverse effects, since employees start questioning the validity of a program that does not comprehend the reality experienced by them.

A well-known and common mechanism is the creation of a hotline (or equivalent), which allows any employee to have direct and anonymous contact with the Compliance Leader. These hotlines bring two sorts of benefits: (i) since they protect anonymity, they also ensure security and safety to employees, who consequently participate more actively in the program, for they can report misconduct not to their superiors, but to a team or a compliance person specialized in that task; (ii) compliance with the rules is greatly incentivized, because potential offenders are aware that any given employee is a potential whistleblower.

Equally relevant is the treatment given to compliance processes. It is important that employees can report to the compliance team in case they have questions, and that the team can contact all employees directly, in order to properly guide them. Communication should be a two-way street and, for it to run smoothly, the ideal is for employees to be fully aware of what the processes are and how they work, even when those processes are extremely simple.

Monitoring

The success of the compliance program is also highly dependent on an organization's capacity to monitor implementation. In general, monitoring activities can be directed at two areas: (i) adequate functioning of processes and controls; and (ii) evaluation of effectiveness.

How to guarantee effective monitoring?

In big companies exposed to high competition risks, one option is resorting to periodical external consultations with specialists who will elaborate an opinion regarding competition risks. That document is prepared using internal and external documents, market data, interviews with employees in marketing and sales, etc.

In the first category, the monitoring is focused on individual behavior, in order to verify if the processes are followed by employees. The goal is, for example, to measure if the proposed percentage of employees effectively underwent some type of training; if only employees previously trained in competition compliance have represented the company; if the approval processes for commercial measures have been followed; if the rules established are in line with international better practices.

One way to reinforce that monitoring is by certifying training. Certification is the assurance provided by employees themselves that they took part in sessions in which the compliance program's rules and processes were clearly set out and are, therefore, well aware of the company policy in that regard, along with personal commitment to uphold such rules. This certification is usually written, taking the form of a declaration.

In the second category, of greater complexity, the program's effectiveness and efficiency will be analyzed. There are many alternatives: the firm can hire an auditor to verify, for instance, if the trained employees have in fact understood and internalized best practices and are applying them in their day-to-day work. Depending on available budget, it is also possible to hire periodic market research to be conducted by specialized personnel, who will interview third parties (consultants, suppliers, distributors, sales agent) in order to ensure those acting for the company have been acting according to the compliance program standards.

Communication channels between the company and its employees, as well as between the company and third parties involved in its business, also play an important role in monitoring compliance. It is indispensable to provide and disseminate the existence of such channels. As for the form they may assume, one option is the aforementioned hotline – some companies adopt models alternative to hotlines, such as apps – or simply an operation carried

out by a single person, available to provide clarifications, be it by e-mail, person-to-person or by phone.

Additionally, this channel should incorporate the possibility of receiving complaints and reports from employees and third parties, in order to identify competition risks, always ensuring anonymity and confidentiality of all information provided.

The input received, be it simple questions regarding the functioning of compliance or reports on illicit behavior, must be handled appropriately. Firstly, it is essential that anonymity is guaranteed. Special attention should be given in case the company opts for documenting the complaints of employees. Secondly, all information made available by the entity about the reporting system has to be extremely clear: it is not advisable to present materials in only one language if the firm is active in several countries, nor is it wise to make the use of the channel too complex, in need of long and highly detailed training, etc. Those responsible for answering the calls (or answering the e-mails) must be prepared to do so and aware of how to proceed if facing serious and potentially problematic accusations. It is also advisable, in order to reinforce the two-sidedness of communications and strengthen the trust of employees, that the employee reporting to the channel has the chance to anonymously follow up on her request.

Reporting Channels

Companies that interact constantly and intensely with sales personnel may adopt a monitoring strategy by engaging its commercial partners, instructing them in regard to the compliance program, clarifying the rules adopted by the company, and opening up a reporting channel to be used in case infringements are detected.

Lastly, it is extremely important that the company has the ability to process all the complaints it receives, providing answers to employees' concerns (even if those answers are negative, in the sense that the Compliance Team has come to the conclusion that the conduct is not an infringement, or in the sense that the request is not properly related to compliance, rather to a different area within the company, since it is not uncommon for the compliance area to receive information better suited to other departments). To attain such a goal, internal investigation processes must be well delineated and transparent.

Unaddressed complaints have two main effects, one of which is loss of confidence from employees, which results in disuse of the communications channel. Another is the potential

negative effect for the company in case of antitrust investigations. After all, if the channel exists, employees do report to the company and the organization does not provide adequate answers to those reports, the impression is that the firm neglects competition issues. For that reason, resource allocation is once again fundamental: it must be sufficient to fulfill the goals that the company intends to achieve. Implementing a vastly complex and expensive communications channel might not be the best alternative if the company cannot properly deal with all the information brought forward through it.

Documentation

Each of the initiatives related to competition compliance must be properly documented by the organization. Proper documentation allows for continued evolution of the program, based on improvement on the commitments previously made and shared among the areas. This, in turn, ensures continuity of the rules and processes, regardless of the changes made to the group of people involved in implementation.

Compliance Committee

A suggestion for the insertion of compliance and simultaneous guarantee of effective autonomy and monitoring is the reinforcement of the competition compliance structure by means of a Committee linked to the Board of Directors, composed of legal and economic external experts, with the task of monitoring the development of the program.

Moreover, adequate documentation of competition compliance activities can be of great value in case the company is called to provide information regarding its conduct before the competition authorities. As an example, if the company keeps records of the solid and detailed orientation given to a specific individual regarding price coordination among competitors, one could conclude, depending on the evidence available, that the employee's involvement in collusive conduct represents an individual failure. That is, the case of one violator who failed to comply with corporate culture, not a coordinated effort from the organization in disregard of the Competition Law. Consequently, the good faith of the company could be presumed, diminishing the severity of fines and of the conduct itself.

Internal discipline and incentives

Part of monitoring consists of applying penalties to employees that violate competition compliance rules. Independently from investigations that may be pursued by the competition authorities, having an internal mechanism for punishment is an important step in strengthening the program in the eyes of employees and in promoting a corporate culture which embraces competition as one of its pillars.

The penalties should be applied to all employees, regardless of hierarchical position. It is also important that they are clearly outlined, public and in line with the legislation (not only competition, but also labor law). Decision-making regarding who, when and how to punish must go through a process of careful thought and consideration. It is advisable that the final word is not delegated to one single individual, but rather to a group of individuals. Alternatively, an appeal mechanism for individual decisions could be implemented.

In terms of what penalties should be attributed to which individuals, the ideal is for the company to take into consideration the degree of involvement in the conduct, its severity, the employee's previous participation in compliance training, her cooperation with the investigative proceedings and also her good faith, hence it can determine which factors mitigate or aggravate the punishment.

Another careful analysis concerns the disclosure of information gathered, not only internally (to the individual subjected to investigations and to the other employees), but also externally. As competition violations might result in the signing of leniency agreements and settlement agreements, data should not be disclosed prematurely, at a time when the company knows about a violation but is unable to provide evidence that it did in fact take place, nor too late, given that (i) other companies may contact the authorities in order to ensure a marker for the "first place in line" and (ii) excessive delay may indicate to the authorities an unwillingness to cooperate, and even an intention of never coming forward with the information, which is extremely damaging to the program's credibility.

3.2.1.4 Reviewing the Program

Another important characteristic is related to the compliance program's ability to be revised and adapted over time. Since compliance should be concerned with competition risks for a given company and those risks are constantly being altered due to the market dynamic activity, the program should be periodically revised.

Competition conditions may change following from the entry of new players in the market, new acquisitions, new commercial activity implemented by the company, or even elimination of barriers to entry. Therefore, CADE believes there is no ideal periodicity for revision of the rules, although it does recommend that companies establish an agenda in order to constantly evaluate the need for change connected to each particular company and circumstance.

It is important for the governing bodies to be aware of the need for alterations through time. As mentioned, the involvement of high-level employees is very meaningful in ensuring the success of the program, thus it is equally important for them to be informed of topics the compliance team has highlighted as in need of change. This kind of information can be transmitted in many forms, depending on the company's characteristics. If the budget dedicated to compliance is substantial – which usually is the case in big companies – then an option is to have a periodic report aimed at analyzing those activities. If, however, the budget is not sufficient for such a measure, the reports may be simpler, shorter, but provided more regularly in meetings with the Board.

Even if the analysis ends up concluding that changes are not strictly necessary at a given moment, it is advisable for companies, especially those exposed to high competition risks, to commit to perfecting their compliance programs. Constant contact with rules and guidelines issued by national and international authorities, with those whose exposure to risks is the highest and with external consultants are examples of practices that tend to produce positive effects and help in elaborating new standards of excellence for the future.

3.2.2 Particularities of Individual Circumstances

When structuring competition compliance programs, besides the general criteria, it is important to observe the specifics from each individual circumstance, that is, the particular risks to be addressed by the organizations according to the market in which they carry out

their activities. Those risks can be of very different natures, and the aim of these guidelines is to highlight particularly relevant situations common to the competition environment and how compliance programs may be structured to address such particular situations.

The goal of the following items, therefore, is to (i) stress specific circumstances that create particular competition risks and (ii) suggest parameters for structuring a compliance program in case the company entered into one of these sensitive markets.

3.2.2.1 Cartels

Cartels are the most well-known, most discussed and certainly most punished anticompetitive practices. They are also the main aim of leniency programs, responsible for the larger part of authorities' investigative activities not only in Brazil, but all over the world[6]. Naturally, companies whose activities take place in markets where the risk of cartelization is high should pay special attention to that conduct.

The illicit behavior is explicitly provided in Article 36, §3, II and III of the Brazilian Competition Law and it consists of a collusion among competitors by way of manipulating the market in order to (i) increase prices or hinder their adjustment, (ii) restrict the amount of products in that market – that is, limit the offer, (iii) promote market division and (iv) coordinate their activities in public biddings.

Cartels usually appear in oligopolistic markets, those controlled by a small number of economic agents, since this conduct comes with high coordination costs. It is necessary to monitor if all companies are following the terms of the agreement, to coordinate activities between firms and, moreover, to create sufficient incentives to ensure none of the companies will report the cartel to the authorities, which is all the more challenging the bigger the group. Those costs will be lower the fewer companies are involved, for monitoring and coordination become easier.

[6] For more on the leniency program, see the Toolkit of the extinct Secretariat for Economic Law (SDE) at http://www.cade.gov.br/upload/Cartilha%20Leniencia%20SDE_CADE.pdf (Portuguese only) and the Leniency Guidelines at: http://www.cade.gov.br/upload/Guidelines%20CADE's%20Antitrust%20Leniency%20Program.pdf

The barriers to entry are also relevant in this analysis. After all, even when the market is structured as an oligopoly, if a new agent can easily access it, it is much harder for the cartel to maintain its controlling position. Homogeneity of goods and services also facilitates collusion. When each company offers consumers a product with distinctive characteristics, substitutability diminishes. Consequently, it is harder to promote an effective consumer market division.

As such, all market characteristics that contribute in minimizing monitoring costs within a cartel indicate that the costs for its creation are lower, although cartels have already been identified in markets that did not meet these characteristics and that, theoretically, have higher monitoring costs.

One point that deserves to be highlighted when discussing cartels and compliance programs is the heightened emphasis these practices must receive in the training process, since the conduct known as hardcore – that is, institutionalized cartels, with recurring and durable interaction among competitors and where unlawfulness is well-determined, for there is no possible efficiency running from the conduct that may mitigate anticompetitive effects – frequently go unquestioned by authorities and have their illegality easily assimilated by employees. That is not always the case for other types of infringements, because other anticompetitive practices require more complex and controversial economic and legal analysis, as will be seen below.

The tendency of authorities for condemnation in these cases is, therefore, stronger, since besides the legal criteria that determine the unlawfulness of the cartel, any possible good faith arguments that may demonstrate the conduct was a mishap and does not represent the company's corporate culture is much harder to make.

What should one do in such cases? How to create programs that address the problems resulting from cartelization? Firstly, senior management's involvement in the program is extremely relevant in order to avoid cartel formation, for starting and maintaining an infringement of this kind when the Board does not approve of it (or at least turns a deaf ear to it) is tremendously challenging, considering that the decisions necessary in order to sustain collusion are usually made by directors themselves.

Secondly, because cartels usually develop in oligopolistic markets, in which the number of competitors is significantly smaller, it is common for companies to constantly interact with one another. CADE recommends, however, that competitors avoid contact between each other and engage in direct exchange only in exceptional situations. In that sense, it is fundamental for the training of those employees who somehow interact with competitors to be severely strengthened, so they have precise knowledge of the information they are allowed to share and the information they should keep secret.

In order to give some examples, here is an illustrative list of some practices that should be avoided:

- Never share confidential or competitively sensitive information or data related to the company's strategies with competitors;
- Do not discuss, negotiate, make agreements with competitors on prices or promote market division and/or performance limits related to geographical area, products and/or customers;
- When in a conference call with competitors, if the call somehow addresses competitively sensitive information, refuse to discuss the matter and, if the other counterpart insists on the subject, turn off the phone. Do the same even if attending the call as a listener, and inform all attendees of your reason for discontinuing the conversation. Request your withdrawal from the call to be registered, along with your motivation for doing so;
- When in a meeting with competitors, if such meeting somehow addresses competitively sensitive information, refuse to discuss the matter and, if the counterpart insists on the topic, leave the room. Request your disallowance be registered in the minutes of the meeting. Do the same even if attending the meeting as a listener;
- Attend strictly necessary meetings where competitors will be present accompanied by a company's lawyer. The lawyer will serve not only for questions of clarification as to which topics may be addressed, but also to inspect and certify their legality;

  Immediately report to the Legal Department any improper conversation initiated by a competitor or the disclosure of competitively sensitive information, by

whatever means, undertaken by such competitor, for notice and possible further actions by the Department.

3.2.2.2 Bid Rigging

Bid rigging involves cartel formation in the specific context of public procurement. It deserves special attention for it presents particular characteristics as a result of the structure of public procurement. These characteristics will be highlighted below, keeping in mind that all that has been said about cartels in general in the previous item also applies to this item. The goal is to answer (i) what in public procurement contributes to cartel formation and (ii) how compliance programs can help companies address this risk.[7]

A first point to be raised is the publicity of public proceedings. Brazilian law requires there to be a bid invitation, which leads to wide knowledge of the competition conditions for the future contract. Furthermore, due to the nature of the proceedings, the identity of the bidders is also public, meaning competitors are fully aware of those who take part in the bid, facilitating collusion.

The second point relates to the recurrence of economic actors in bid proceedings. Depending on the market in which a company operates, the number of firms qualified to take part in procurements is relatively small (in some cases, very small, where only two or three companies are able to compete). The interaction between those companies is therefore constant, which, again, facilitates collusion. Also, the knowledge each company has of its competitors' *modus operandi* is considerable, making mirroring commercial practices all the more likely.

Thirdly, the homogeneity of goods and services should once again be stressed. It facilitates coordination in every cartel, but here it is taken to extremes due to the bid proceeding itself. What the government aims to attain with a public offer is a specific good or service, so it is evident there is close to full substitutability between what is offered by each bidder.

[7] The toolkit of the extinct SDE also provides information on big rigging and public tenders in competition law. It can be found at: http://www.comprasnet.gov.br/banner/seguro/cartilha_licitacao.pdf (Portuguese only.)

Given those additional aspects, public procurement represents a focus of action for authorities – not only competition authorities, since depending on the sort of coordination between players, the Competition Law and Law 8.137/1990 (the economic crimes law) will not be the only applicable statutes. As examples of other diplomas, Law 8.666/1993, in its Article 93, determines that fraud, disturbance or hindrance in any act of the bid results in detention from six months up to two years, combined with fines, and Law 12.846/2013, in Article 5, IV, stipulates that fraud in the bid is an act harmful to the government and, as such, subject to penalties.

Companies can avoid being exposed to this sort of conduct if they adopt specific training for employees who actively participate in public proceedings, either by filling out the proposal submission, or by attending meetings for proposal submissions. Another effective way to prevent collusion is the detailed monitoring of every step taken during the bid, in order to offer precise information about how the process was carried out, if questioned.

3.2.2.3 Associations, Trade Unions, and Standard Setting Organizations (SSOs)[8]

Associations, including trade unions, are ruled by the Brazilian Civil Code and play a central role in society. It is through them that entire sectors and interest groups are able to organize themselves and take pleas to the government, publicize their ideas and discuss their common issues with other interested members of the community, aiming at finding solutions for them.

Nevertheless, precisely because the interaction between agents grows substantially in that context, associations also represent opportunities for collusion. For that reason, it is important to pay special attention to what is discussed in association meetings, to avoid having sensitive themes disclosed to competitors. SSOs, for their turn, are associations whose goals are to establish quality standards and to expedite certificates ensuring companies follow such standards. Inasmuch as they foster security and bring transparency to requirements for goods and services, SSOs are beneficial to consumers and also to competition – they bring down barriers to entry, for example. However, they may represent danger to the competitive

[8] The extinct SDE issue a toolkit dealing specifically with associations and trade unions. Available at: http://abpa-br.com.br/files/cartilha_sindicatos.pdf (Portuguese only.)

process when they impose excessively restrictive standards or standards whose implementation requires a disproportionate initial investment, for such measures might move new entrants away and hamper innovation.

Therefore, the recommendations for companies which are part of associations, trade unions, and SSOs are as follows:

- Never join associations whose goal is the coordination between competitors;
- Be careful when defining who will be the employees that will participate in meetings directly, avoiding, when possible, these persons to be commercial directors, sales managers, and other employees directly involved with the commercial strategy of the organization;
- The employees should be instructed on what can and cannot be discussed with competitors;
- Always and at all the times require for everything which took place during the meeting to be properly registered in the minutes, and especially, when the company believes a given topic to represent a competitive risk, it should immediately withdraw from the meeting, having its withdraw registered;
- Examine the agenda prior to the meeting, refusing in advance to take part in those in which the purpose of the meeting itself is to discuss competitively sensitive issues;
- When attending meetings in which competitors are present, do not engage in legally prohibited activities even if they are "officially approved" by the group that is promoting the meeting or by others who are already participating in them;
- Immediately contact the compliance team when facing any illegal activity in the association;

Always review and approve the content to be formally issued by the association.

The recommendations for the associations, trade unions, and SSOs themselves, on the other hand, are as follows:

- Be transparent about the agenda of the meetings, sending it in advance to the members;

- Disseminate the information collected from members in aggregated form, in order to avoid the identification of individual data;
- Hire audit services to follow up on data collection activities (black box);
- Always give preference to requiring historical data. Whenever possible, provide the data collected not only for members, but also to the public, even if only in exchange of payment, in order to eliminate any suspicion about the legality of the practice;
- Do not disclose current and future prices, costs, production levels, inventories, marketing plans, expansion plans, the discount policies of members, or any other competitively sensitive information pertaining to members;
- Request and receive competitively sensitive information from each individual member respecting confidentially. Make the requests to neutral persons who are not related to competitors, and never share such data with other members;
- Avoid to prepare and disclose tables, even non-binding ones, of prices and commercial conditions under which goods and services shall be provided;
- Always use non-discriminatory criteria for admission of new members.

It is equally advisable for practices recurrently punished by competition authorities to be avoided. One example in the case of associations is the expedition of price tables, which have been considered anticompetitive by Cade in a number of administrative proceedings.

3.2.2.4 Unilateral Conducts and Vertical Restraints

Unilateral conduct and vertical restraints are a challenge to competition authorities inasmuch as these types of anticompetitive practices are extremely varied, not always easy to detect and generally incorporate a discussion about their effects – the company engaging in the practice usually argues that it brings benefits to competition, despite also presenting risks. That is precisely why compliance is so relevant in such cases.

These practices will be all the more of concern the more significant the market power of the companies engaging in it. It is evident that a company with more power is also more capable of unilaterally influencing the market in one direction or the other, as well as engaging

in vertical concentrations of greater effects. Therefore, that is a relevant aspect of the analysis: the player should ask itself if it occupies a dominant position and must be aware that, if the answer is positive, it will be held to a higher standard when implementing commercial strategies.

Unilateral conduct is not *per se* illicit. As a rule, practices will be deemed anticompetitive once associated with the potential of excluding competitors or when they do not bring any benefits to consumers. It is in this sense that CADE, in line with the top competition authorities in the world, seeks to apply the so-called rule of reason in cases involving unilateral conduct. The same holds true for vertical restraints, which can have positive effects for competition, such as the reduction of transaction costs. However, depending on the market and the position occupied by the agents involved, they may also implicate competitive risks.

As regards the structuring of robust compliance programs, it is important for companies to create internal processes that, first and foremost, guarantee that commercial practices are validated by the compliance team before coming into force. Such validation may take different forms, but some aspects of an analysis that could be relevant within firms are the following:

1. *Holding a dominant position*. As mentioned above, the company should first analyze whether it holds a dominant position in the market where it intends to implement a given commercial practice. Having such a position is the most important element, though not a sufficient one, in unilateral and vertical analysis. Other relevant aspects include:
    a) Competitors' capacity to supply customers/clients who are the focus of the commercial practice by means of substitute goods and services; as a rule, the fewer competitors with those capacities, the greater the market power;
    b) The market share of other players, that is, the overall degree of concentration in the market;
    c) The level of vertical concentration on the market and the share detained by the particular economic agent;
    d) The capacity of other firms to enter the market (including through importations or transportation of products from other regions of the same country), or of the companies already in the market to expand their production/offer; as a rule, the harder any of those options are, the greater the market power;

e) The remaining rivalry in the market, that is, if other players are fierce competitors, to the point of being able to limit an eventual price increase; as a rule, if other competitors have such capacity, the company's market power is not as excessive.

2. *Possible effects of the exclusion of competitors*. It is wise to take into consideration the characteristics of the commercial practice in question in order to verify its potential exclusionary effects, especially those concerning the closure of the market to competitors due to excessive increase in the cost of rivals. These guidelines do not intend to establish objective analysis criteria, but only to highlight that the commercial practices of companies with a dominant position are all the less worrying:
    a. The shorter their duration;
    b. The lower the percentage of sales affected;
    c. The easier the reproduction of such practices by equally efficient competitors;
    d. The lower the potential anticompetitive effect.

3. *Possible economic justification.* The analysis of such unilateral practices and vertical restraints can also take into consideration their economic benefits, that is, the productive efficiency they represent (i.e., lower production costs), the protection of investments needed in order to facilitate new goods and services, among other aspects. The company may also analyze if there are possible economic justifications for policy in question. As a rule, a practice will be all the more justifiable when:
    a. The more necessary and proportional its restrictive aspect (exclusivity, loyalty marketing, tie-in sales, etc.) to obtain the desired financial gains, especially those related to protecting the investment that will make those benefits viable;
    b. The bigger the benefits to end consumers, especially in terms of lower prices, better goods and services and more innovation.

The last of the aforementioned criteria is extremely relevant, considering the competition rules do not intend to protect one competitor or another, but rather the competitive process as a whole, so that the dispute between economic agents benefits consumers. In that sense, most of CADE's precedents regarding unilateral conduct and vertical restraints understood

there to be an infringement if either direct or indirect damages to consumers are observed, in terms of higher prices, lower quality or less innovation.

In light of the complexity of the factors involved in the analysis of these practices, it is advisable that compliance programs adopt some sort of prior evaluation of unilateral and vertical practices which companies intend to implement. Even if, in case of investigations, the analysis of competition authorities may differ from the one carried out by the company, it is important that the firm is able to demonstrate it submits each practice to an approval process, based on economic and legal parameters.

3.3 Impact on Administrative Penalties

Though initiatives in implementing compliance programs are increasingly seen as a way to foster good corporate governance, as they are a reliable tool in spreading the "culture of compliance" in the business community and also in promoting consumer welfare, the mere existence of compliance programs is not sufficient to hinder the application of administrative penalties, which include potentially substantial fines.

The hope, in fact, is that adopting a robust program prevents the company and its employees from engaging in commercial practices that may constitute infringements to the economic order. In other words, a well-adjusted program will maintain the *status quo*, when the company is already engaged in corporate culture that fosters compliance with the law, or modifies the internal configuration in order to promote this kind of culture. Nonetheless, adopting programs can have very positive impacts for organizations and employees investigated by CADE, be it in the context of single-firm or collusive conduct, even when those organizations cannot completely avoid infringements.

As seen in practice, the adoption of compliance programs is positive inasmuch as it helps to identify potential problems and provides a tool for rapidly solving them. In these terms, there are four potential main effects of compliance programs for companies, namely the subscription to the leniency program, the signing of settlement agreements, the submission of consultations to the Tribunal and the effects in sentencing.

3.3.1 The Leniency Program

Adopting a compliance program is an important tool in identifying competition violations and in carrying out the necessary measures to defend the interests of both the organization and its employees.

The first step after identifying violations is the possibility of applying for the Leniency Program. Such program allows for organizations and individuals that took part in a cartel or other concerted anticompetitive practice to report it to CADE and cooperate with investigations, in exchange for immunity in the administrative and criminal spheres, or reduction from one to two thirds of applicable penalties.

To be eligible for such benefits, the firm or individual must be the first to come to CADE with information regarding the conduct, and must also confess its participation. That is, the agility in identifying the problem and in contacting CADE is essential in granting partial or total immunity.

Such promptness is directly affected by compliance. Well-structured programs are capable, even when they cannot stop the conduct from taking place, of readily identifying distortions and becoming aware of the infringement, which enables the company to deal with the situation, turning to CADE to enter into a leniency agreement and therefore avoid severe penalties.

The compliance program does not guarantee that a leniency agreement will be celebrate, however it can increase the chances for an organization to apply for it.

3.3.2 Settlement Agreements

If the company or individual contacting CADE in order to report an infringement cannot sign a leniency agreement for not being the first in line, they still have the chance of negotiating a settlement agreement (or TCC, for the Portuguese acronym).

A TCC, differently from a leniency agreement, can also be used in case of unlawful single-firm conduct. Entering into this type of agreement with the Superintendence in the initial stages of an investigation ensures a reduction in expected fines for the proponents, on a first-

come, first-served basis, according to the criteria set out on Resolution no. 5/2013. In light of it, the compliance program or the commitment to its adoption/restructuring can influence the discount granted.

Once again, the promptness in identifying the infringement and acting on it, which is aided by having a compliance program, is essential in guaranteeing the best possible financial benefits under a TCC. The compliance program does not ensure the celebration of a settlement agreement, but, as in the case of leniency agreements, it may substantially increase the organization's chances of doing so.

3.3.3 Consultations

Article 9, §4 of the Brazilian Competition Law authorizes the Tribunal to answer consultations regarding the interpretation of the Law, including in terms of the legality of commercial practices, whether they are already in place or still in planning.

Awareness fostered by the adoption of a compliance program tends to facilitate initiatives such as these consultations. In the case of consummated collusive practices, compliance will increase the organization's chances of signing leniency agreements, whereas in the case of practices whose lawfulness is questionable, compliance helps companies in bringing those questions to the authorities. That is positive because the answer from the Tribunal, when allowing the conduct, is binding for a maximum of five years and prevents a different understanding from being applied retroactively to the party which presented the consultation. If the answer is in the negative, that is, if the company is advised not to proceed with the practice, there is also a palpable benefit. The firm has the opportunity to avoid engaging in anticompetitive behavior, thereby saving resources that could have been spent both executing the commercial strategy and in possible investigations which would challenge the legality of such practices.

In other words, the effects are significant and can generate many benefits to a company, especially when it comes to legal certainty regarding its commercial practices.

3.3.4 Sentencing

As shown in the previous items, although a Compliance program is not enough to avoid the possibility of imposition of sanctions by CADE, in some situations it can have favorable effects when these sanctions are established. For example, it can remove specific prohibitions or even reduce the amount of the applicable fine. This happens since, as foreseen in Article 45 of the Competition Law, when applying sanctions, CADE's Tribunal must take into consideration variables such as the good faith of the infringer, the extent of damage to free competition, to the national economy, to the consumers or third parties, the negative economic effects it produced in the market and recidivism.

The existence of a strong compliance program, with damage control measures, that meets the requirements set out in section 3.2 above, may be considered evidence of good faith on the part of the infringing company and of the reduction of the negative economic effects derived from the unlawful practice. Thus it is possible for the Tribunal to consider the compliance program as (i) evidence of good faith and a mitigating factor when stipulating the fine, resulting in its reduction or as (ii) criterion to be considered when calculating the pecuniary contribution to be paid by the company, in case a settlement agreement is signed, which could take the discount percentage to the maximum allowed. In addition, programs with those characteristics tend to reduce the risk of recidivism, which doubles the applicable fine imposed by CADE.

It should be emphasized that the burden of proof belongs solely to the investigated party, which must show the existence of a strong compliance program under which anticompetitive practices are contrary to the organization's policies and to the orientations of its managers and directors.

4. Final Remarks

As the idea behind competition compliance programs is that entities always act in accordance with the Competition Law, it is sensible that organizations have access to the widest possible range of information regarding the application of the law.

Thus, as a complement to this material, CADE recommends the reading of the other guidelines available at its website, as well as the constant monitoring of the authority's decisions and of the evolution of the debates on national and international spheres.