

# BUSINESS STRATEGIES TO IMPROVE ANTITRUST COMPLIANCE IN BRAZIL AND THE APPROACH OF CADE TO ADVOCACY: THE CAR WASH INVESTIGATION\*

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Summary: 1. Introduction. 2. A brief history of competition law and compliance in Brazil. 3. Car wash investigation as the true turning point of corporate culture in Brazil.

## 1. INTRODUCTION

This brief article presents a more practical aspect on the current relevance of Competition Law regarding the business strategies to improve antitrust compliance in Brazil and the advocacy approach of CADE, the Brazilian Competition Authority. For doing that, the present brief article is divided in two items. The first one, a brief history of Competition Law and compliance in Brazil, where is explained briefly the beginning of compliance in the 2000's and the new demands imposed by the current Competition Law. The second one, the Car Wash investigation (Car Wash Operation) as the true turning point of corporate culture in Brazil, which shows that the Law does apply to everyone and has fostered a cultural change from the top of the companies and has demanded well-structured compliance programs.

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## 2. A BRIEF HISTORY OF COMPETITION LAW AND COMPLIANCE IN BRAZIL

Since the beginning of the 2000's Competition Law started to become an important issue in Brazil for companies, trade unions and associations, especially with the increase of the enforcement against cartels. At that time the so-called Secretariat for Economic Law, a type of General Superintendence of CADE, promoted a campaign and developed a compliance program to certify companies that had adopted the program. But not one company accepted the terms of the program and it completely failed due to its excessive rules and uncertainties.

Notwithstanding, the increase of procedures opened by CADE, most of them by leniency agreements, and CADE's decisions which imposed more severe penalties for antitrust violations, worked as an efficient competition advocacy tool. Stakeholders happened to pay attention to competition matters and competition lawyers started to disseminate to the market the compliance with Competition Law.

In 2012, when the current Competition Law came into force (Law # 12.529/2011)<sup>1</sup>, compliance became an even more important issue for companies. Pre-merger filings became mandatory and CADE pursued the goal of enhancing the repression of antitrust violations. Cartel offences would now carry a sentence of 5 years of incarceration (Law # 8.137/1990, art. 4º)<sup>2</sup>.

CADE developed two guidelines, which have become a valuable tool for competition advocacy. The first one is related to Gun Jumping<sup>3</sup> that has become an important issue in compliance programs to avoid high fines for companies and even the nullity of the deal. The other guideline is related to compliance<sup>4</sup> whose purpose is to address the new reality initiated by the Competition Law since 2012 and to establish non-binding directives for companies and other private entities regarding compliance programs; in what they consist of, how they can be implemented and what the benefits of their adoption are.

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1 <http://www.cade.gov.br/assuntos/internacional/legislacao/law-no-12529-2011-english-version-from-18-05-2012.pdf/view>

2 [http://www.planalto.gov.br/ccivil\\_03/Leis/L8137.htm](http://www.planalto.gov.br/ccivil_03/Leis/L8137.htm)

3 [http://www.cade.gov.br/aceso-a-informacao/publicacoes-institucionais/guias\\_do\\_Cade/guideline-gun-jumping-september.pdf](http://www.cade.gov.br/aceso-a-informacao/publicacoes-institucionais/guias_do_Cade/guideline-gun-jumping-september.pdf)

4 [http://www.cade.gov.br/aceso-a-informacao/publicacoes-institucionais/guias\\_do\\_Cade/compliance-guidelines-final-version.pdf](http://www.cade.gov.br/aceso-a-informacao/publicacoes-institucionais/guias_do_Cade/compliance-guidelines-final-version.pdf)

Many companies started to implement compliance programs and Competition Law stood out in the company's code of ethics. This has promoted a shift in the cultural values of companies, but we still have a long path to go down.

According to KPMG, "Compliance Maturity Survey in Brazil"<sup>5</sup>, by 2015 only 36% of the companies in Brazil had a structured compliance program. A 2017 Report from KPMG entitled "Compliance Maturity Survey in Brazil, 2º edition"<sup>6</sup> asked several large and medium-sized companies throughout the Country how many years their compliance area has existed. Three years was the maximum for 50% of the companies. When asked about the maturity of the compliance culture, only 13% considered it highly performing. The figures could be even worse since the research conducted by KPMG considered compliance in general, not only related to competition compliance.

### 3. CAR WASH INVESTIGATION AS THE TRUE TURNING POINT OF CORPORATE CULTURE IN BRAZIL

Despite the new Era of Competition Law in Brazil, the Car Wash Operation showed that some very huge conglomerates including construction companies were performing as they had comfortably done for years. Cartels and bribery were commonplace and culturally embedded in companies even being a legal offence. This secured those companies to valuable government connections, which allowed them to continue their businesses in a non-compliant way.

William Kovacic, as reported in *Global Competition Review*<sup>7</sup>, defined the Car Wash Operation as "the most important active antitrust case in the world" and "it is one of the most important cases any agency has brought in the history of antitrust".

The case began as a money-laundering investigation, but revealed serious corruption and then anticompetitive behavior. There are currently 11 procedures initiated by leniency agreements underway at CADE<sup>8</sup>. It is highly possible that CADE is in the process of negotiating or has already executed other leniency agreements that are not yet public.

5 [https://www.editoraroncarati.com.br/v2/phocadownload/pesquisa\\_compliance\\_no\\_brasil.pdf](https://www.editoraroncarati.com.br/v2/phocadownload/pesquisa_compliance_no_brasil.pdf)

6 <https://assets.kpmg.com/content/dam/kpmg/br/pdf/2017/01/br-kpmg-pesquisa-maturidade-2a-edicao.pdf>

7 <http://globalcompetitionreview.com/article/1149468/kovacic-lava-jato-is-the-world%E2%80%99s-most-important-antitrust>

8 <http://www.cade.gov.br/noticias/cade-investiga-cartel-em-licitacoes-da-prefeitura-do-rio-de-janeiro-no-ambito-da-operacao-lava-jato>

But what really calls attention from a competition compliance perspective is that most of the companies had a type of compliance program in place at the time of the violation. Even those who signed the leniency agreements. Nevertheless, in general most of those companies had poor compliance programs, with generic or protocol language, with little concrete allusions to the competition rules.

So, it is easy to conclude that they were fake compliance programs. Even if those companies detected an antitrust violation, the message sent from the top was that cartels and bribery were accepted and considered normal in business activity.

The Car Wash Operation is still underway and far from a conclusion, but the partial results are already astonishing and somehow unthinkable for an outdated and traditional Brazilian mindset. High fines have been paid by companies and individuals. Huge companies have been blacklisted. Very powerful and rich businessmen and politicians have been incarcerated.

Car Wash can be considered, without a doubt, as the true turning point of corporate culture in Brazil to comply with the Law. The Law does apply to everyone is the message being sent by the Operation. This has fostered a cultural change from the top of the companies and has demanded well-structured compliance programs.

Tailor made programs sprung up to cover the various sized companies. A compliance cultural revolution started. Big companies now demand compliance from the small and medium companies they do business with. The stakeholders actually promoted the advocacy of competition and the competition compliance in Brazil.

A survey conducted by Deloitte, “Towards transparency: The evolution of the pillars of corporate governance”<sup>9</sup>, showed an increase from 30% to 65% of companies in Brazil that had adopted a compliance program between 2013 and 2016.

Beyond the role played by public enforcers such as CADE to promote the competition advocacy and compliance, there is the role of private enforcers. The ICC Antitrust Compliance Toolkit<sup>10</sup> and the ICC SME Toolkit<sup>11</sup> are

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9 <https://www2.deloitte.com/content/dam/Deloitte/br/Documents/governance-risk-compliance/Acaminho datransparencia.pdf>

10 <https://iccwbo.org/publication/icc-antitrust-compliance-toolkit/>

11 <https://iccwbo.org/publication/icc-sme-toolkit-complying-competition-law-good-business/>

useful examples of tools to help companies to comprehend the competition issues and to develop a tailor-made compliance program in accordance with the necessities and reality of the company.

Brazil is now sounding the alarm that business activities must comply with the rules of competition. Companies must share the same high standards of ethical values. Competition compliance is no longer an option.