COMPLIANCE AS A TOOL TO FIGHT CARTRIDGE CREATION IN PUBLIC BIDDING AND CORRUPTION

O *COMPLIANCE* COMO FERRAMENTA DE COMBATE À CRIAÇÃO DE CARTÉIS EM LICITAÇÕES PÚBLICAS E CORRUPÇÃO

EMERSON ADEMIR BORGES DE OLIVEIRA[1]
GUILHERME PRADO BOHAC DE HARO[2]
NAYARA IRAIDY MORAES FERRAS[3]

ABSTRACT

The present article aims to weave a critical analysis about the performance of cartels in bids in Brazil, when associated with corruption and political-governmental collusions, under the prism of what was elucidated from the Police Operation called "Jaleco Branco"It happened in the State of Bahia, in 2007, which found the illicit, practiced by private companies, associated with public agents. Through the case study and literature review, using the deductive-inductive method, it is intended to analyze the formation of cartels in the scope of bids in the national field, as well as the negative consequences of such an institute and the country's panorama to combat anti-competitive practices, as well as corruption, pointing out Compliance as a prevention tool to be used, including by the *Public* Administration.

KEYWORDS: The cartel. Bidding. Competition. Corruption. *Compliance.*

RESUMO

O presente artigo tem por objetivo tecer uma análise crítica acerca da atuação de cartéis em licitações no Brasil, quando associada à corrupção e conluios de ordem político-governamental, sob o prisma do que elucidou-se a partir da Operação Policial denominada "Jaleco Branco", deflagrada no Estado da Bahia, no

1 Post-Doctor in Democracy and Human Rights from the University of Coimbra. PhD and Master's degree in State Law from the University of São Paulo. Adjunct Coordinator and Permanent Professor of the Master's and Doctorate Program in Law of the University of Marília. Lawyer and reviewer. ORCID iD: http://orcid.org/0000-0001-7876-6530. E-mail: emerson@unimar.br.

2 PhD student in Law at the University of Marília. Master's degree in Business Law from the State University of Londrina. Specialist in Civil Law and Civil Procedure and Labor Law, Labor Process and Social Security Law by the University Center Antonio Eufrásio de Toledo de Presidente Prudente. Professor at the Antonio Euphrásio University Center in Toledo. Lawyer. ORCID iD: http://orcid.org/0000-0001-9551-2671. E-mail: guilherme.pbh@hotmail.com.

3 Master's student in law at the University of Marília. Public Servant of the Court of Justice of Mato Grosso. ORCID iD: http://orcid.org/0000-0003-0090-1442. E-mail: nayara.ferras@tjmt.jus.br.

How to cite this article/Como citar esse artigo:
OLIVEIRA, Emerson Ademir Borges de; HARO, Guilherme Prado Bohac de; FERRAS, Nayara Iraidy Moraes. Compliance as a tool to fight cartridge creation in public bidding and corruption. Revista Meritum, Belo Horizonte, vol. 15, n. 2, p. 317-335, May/Aug. 2020. DOI: https://doi.org/10.46560/meritum.v15i2.8162.

ano de 2007, que apurou ilícitos desta monta, praticados por empresas privadas, associadas a agentes públicos. Por intermédio do estudo de caso e revisão bibliográfica, utilizando-se o método dedutivo-indutivo, pretende-se analisar a formação dos cartéis no âmbito das licitações na seara nacional, bem como as consequências negativas de tal instituto e o panorama do país para combate às práticas anticoncorrenciais, bem como a corrupção, apontando o Compliance como uma ferramenta de prevenção a ser utilizada, inclusive, pela Administração Pública.

PALAVRAS-CHAVE: *Cartel. Licitação. Concorrência. Corrupção. Compliance.*

MERITUM MAGAZINE• v.15 • n.2 • p. 317-335 • May/Aug. 2020

INTRODUCTION

The defense of a system of fair competition, both for the benefit of a legal-republican system that is guided by the prism of free enterprise, and in the public interest, is of paramount importance for the socioeconomic development of a nation, and to this end, contemporary tools and mechanisms must be put in place, once and for all, to prevent competitive conduct that may clash with the loyalty that capitalism proclaims as an economic regime, as well as confronting State interests and resulting in negative impacts on society.

In this way, economic power, lato *sensu, in consonance* with the constitutional precepts pátrios, must always be used to ensure to all a dignified existence, according to the dictates of social justice, isonomy and dignity of the human person.

That said, it is of paramount importance to highlight that, as disclosed in the Transparency Portal (2020), the Federal Republic of Brazil, in the year 2019, had a budget of R $ 3,26 trillion reais to manage its core activities, and part of this resource was transferred to private agents, through public bidding, which, as a rule, is the procedure used by the Public Administration to perform their contracts and other legal business.

The simple analysis of the bidding data at national level is sufficient to draw the conclusion that discuss mechanisms that result in the best way to apply public resources, in order to ensure the constitutional foundations, Also fulfilling the republican objectives, foreseen in article 3 of the Major Charter, it is of salutary importance. Then there is the justification for this study.

In this sense, as will remain outlined in the course of this article, one of the greatest challenges for building a bidding system that reaches the constitutional and republican purposes, is basically respect for the fundamental principles of the economic order, in particular with regard to anti-competitive repression and prevention.

The formation of the notorious cartels is an example of anti-competitive conduct, par excellence, and this is even one of the most harmful - if not the most harmful - to the entire economic and capitalist system that governs a democratic rule of law.

Therefore, this article will analyze what was evidenced and determined from the outbreak of "Operation Jaleco Branco", which investigated, in addition to the formation of cartel in bidding processes, the collaboration, directly or indirectly, public officials to carry out the offence, through uncontested acts of corruption.

Initially, it is necessary to bring the data of Operation White Coat and the conduct practiced by those involved, who violated both constitutional precepts of economic order, as the free competition, as well as the fundamental principles of the Public Administration.

In the sequence, the cartel phenomenon is brought to light, so that it is evidenced, first, as an infringement of the constitutional economic order, for later specific cut as to its practice in bidding processes.

In the following chapter, it will be analyzed how *Brazil has acted to combat anti-competitive practices, such as the cartel, as* well as pointing out the compliance phenomenon, if applied to the Public Administration, as a potential mechanism for contributing to the prevention of corruption and, as a consequence, hampering the formation of cartels in public tenders, thereby contributing to better budgetary implementation, which ultimately comes from the population's own capital, from tax collection in general.

The method used for research was deductive-inductive, with the presence of constant doctrinal, conceptual and casuistic analysis, seeking to resolve the controversies presented through the elucidation of minutiae that involve the theme discussed, in order to reach an adequate and legally plausible conclusion on the issue addressed.

1. "OPERATION WHITE COAT" AND THE CARTEL PHENOMENON

The criminal investigation proposed as the object of central casuistic analysis for the purposes for which this work is intended, as cediço, is the so-called "Operation Jaleco Branco", held, in inquisitorial headquarters, in the State of Bahia, startingan initial investigation into a suspected fraudulent scheme involving servants of the National Institute of Social Security (INSS), which, by receiving fees, altered the computerized system of the Federal Municipality, for insertion purposes, modification or deletion of data that would allow the issuance of Negative Debit Certificates in favor of private companies participating in the collusion, which would use such documents to participate in bids, even if they had contracted debt to their detriment.

According to the investigation, the entrepreneurs involved used the Certificates provided by INSS, which are: Debit Negatives - CND; and Positive Debit Effect Negative (CPD-EN), obtained fraudulently, to participate in bids in the public services of that State.

The companies benefiting from the false certificates were debtors of large amounts to Social Security. As stated in accusatory piece (complaint) offered by the Federal Public Ministry (MPF), in the face of those involved, the fraud was subtle, but left visible traces and indicious, since all access to the computerized systems of the INSS were registered in the platform itself.

From the course of the investigation, however, the facts and elements brought to light realized that, in fact, the fraudulent collusion was practiced by a complex, sophisticated and well structured gang, composed of a web of entrepreneurs, employees, as well as lobbyists

and civil servants, who dedicated themselves, as a team, to obtaining profit through fraud in bidding processes

Among other behaviors, the group was accused of defrauding the bidding processes to influence the hiring and agreement of legal business involving public services, to companies owned by it; prevent the carrying out of bidding processes, in order to keep the emergency contracts overpriced with their companies; and enter into new, overpriced emergency contracts.

As narrated the complaint, the organization was composed of almost 100 (one hundred) members, among them, a Attorney of the State of Bahia and the President of the Court of Auditors of the State of Bahia, at the time, thus revealing link between economic agents (private companies) and public officials (representatives of the Public Administration).

Some companies, inclusive, They had date of constitution and operation dating back to dates that translated more than 20 (twenty) years of operation, element from which it was extracted that the criminal organization acted in a stable and coordinated, for some time, with fraudulent purpose rooted in its purposes.

At a certain time, as stated in the complaint, in Criminal Action 510, before the Superior Court of Justice, mentioned group was defined as:

> Network of people, companies and institutions involved in directing service contracts in the state of Bahia. It is the structure on which the OC is based with its own rules, predefined behavior patterns, systems for the distribution of illicit profits and coordinated defense of its members.

The gang had about 20 (twenty) companies that worked in the area of cleaning, conservation, surveillance and ordinance, all linked to the entrepreneurs who were members of the criminal organization. The records before the Board of Commerce of the members of the corporate and administrative board of legal entities were also given in different names of the real administrators of the scheme.

According to police calculations, during the period of its activity, the criminal organisation had made extremely voluptuous profits, which, according to a report drawn up by the State Comptroller, based solely on the period 1997 to 2000, reached R$ 1,379,252,584.65 (one billion, three hundred and seventy-nine million, two hundred and fifty-two thousand, five hundred and eighty-four reais and sixty-five cents).

In view of the various criminal conduct carried out by the gang, which includes, in addition to the practice of the cartel (infringement of economic order), acts of corruption, CADE would not have legal competence to conduct the investigation, calling for the action of the control bodies and the Public Ministry, as it happened.

This is also available to the Administrative Council for Economic Defense (CADE), within the scope of its guidelines:

> However, it is important to differentiate the bidding cartel from other frauds to the competitive character of the bidding contests. There are several cases in which CADE does not have the legal competence to conduct the investigation, with the role of control bodies and the Public Prosecutor. For example, when several bidding companies are owned by the same owner, or when there are joint managing partners among bidding companies, we would not be faced with an agreement between competing companies, because in both

> cases such companies would be part of the same economic group in fact. There are also cases where a competitive bidding could be promoted, but the public administrator unlawfully included restrictive clauses of competition in the edict or even performed an illegal direct hiring. These practices are not, in the same way, the competence of CADE, but object of administrative control by the Public Ministry and Audit Courts. (CADE, 2018)

The practices imputed to the gang, as stated above, include the practice of cartel and corruption, such as:

> a) insertion of illegal clauses in the notices to justify the filing of lawsuits, more specifically warrants of security, for the purpose of preventing the execution of bids, invoking the nullity that they themselves have inserted;
>
> b) co-optation of potential competitors through payment of securities or delivery of goods, in general vehicles, in order to remove them from the competition and ensure the choice of their companies in bidding processes or in contracting for emergency services;
>
> c) corruption of public servants to obtain information relevant to the achievement of the criminal objective;
>
> d) forgery and use of false documents;
>
> e) the purchase of vehicles as a means of concealing the illicit origin of profits from criminal activity. (BRASIL, 2007, p. 6)

The bids, in the group's area of operation, They were always preceded by adjustment between them to decide who would figure as a competitor and who would win the event, affecting, so to extinguish the public event, the free competition.

The winner chosen by the gang, as consideration for having been contemplated with the hiring by the Government, made the payment in cash or the delivery of goods, usually vehicles, to competing entrepreneurs and dropouts of the event.

In this way, all those involved ended up being benefited from the public contract, in greater or lesser value, depending on the potential of their companies and the effective participation to complete the fraud.

The cartel practice in public procurement has been identified several times in recent years, which has resulted in a large number of police operations seeking to combat this illicit, including: Vampiro [2004], Sentinela [2004], Sanguessuga [2006], Carta Marcada [2006], Fox [2006], Alcaides [2006], Jaleco Branco [2007] and Castelo de Areia [2009].

In this perspective, Lira (2012, p. 24) adds that: "The damage caused to the Brazilian state by this practice can be estimated in the order of hundreds of millions of reais, considering that the purchases of goods, services and the construction of public works by the state represent an expressive share of its GDP".

The numbers brought by the Superior School of the Public Ministry of the Union demonstrate that, the year the operation was triggered in analysis, other 47, related to economic crime and corruption, They were also held:

> In 2007, 188 operations were carried out, resulting in 2,876 arrests, 310 public servants and fifteen federal police officers. Of this quantity, 48 related to economic crime and corruption, which resulted in 1,094 arrests: Passe Livre, Aliança, Rio Nilo, Antídoto, Testamento, Malha Sertão, Ouro Verde, Kaspar,

> Lacraia, 274, Cacique, Paraíso, Navalha, Contranicot, Hiena, Brussels, Checkmate, Zaqueu, Caipora, Russia, Slaughterhouse, Reluz, Columbus, Deep Water, Alliance, Seal, Zebu, Ratchet, Bet, Zebra, Faxina, Persona, White Gold, Metastasis, X-9, Alquila, Rodin, Kaspar II, South Wind, Metamorphosis, Carranca, Chess, Short Circuit, Jaleco White, Casa Nova, Eighth Plague, Prey and Al Capone. (ESMPU, 2016, p. 108)

Therefore, it is important to deepen the present study. Thus, in the following items, we begin to analyze the illicit phenomenon called by cartel, its incidence in bidding and how the country acts to combat such a practice that affronts the economic order and brings great harm, either to the particular, whether for the State, or for the public interest as a whole.

2. THE CARTEL AND ECONOMIC ORDER

Before going into the analysis of the cartel institute, it is necessary to highlight the context in which it is inserted, in consideration of the main constitutional principles that shape the national economic order, namely, free initiative and free competition.

At first, it is necessary to clarify that the Brazilian Economic Order, understood here as a "set of all norms (or rules of conduct), whatever their nature (juridical, religious, moral, etc.), which concern the regulation of the behavior of economic subjects" (MOREIRA, 1973, p. 67-71, apud GRAU, 2003*, p. 55/56)It is governed by* several basic principles, the central pillars of which are the principles of free initiative and free competition.

The first of them is even, stamped by the Federal Constitution as the foundation of the Democratic State of Law, in the wake of its article 1, item IV, which is, "the social values of work and free initiative", repeated principles, specifically, by the Article 170 Caput as the basis *of the* economic order. In addition, the same article still indicates "free competition" as one of its basic principles.

For Silva (2000, p. 767), "freedom of initiative involves freedom of industry and trade or freedom of enterprise and freedom of contract". Grinding the concept, Almeida (2004, p. 98) believes to be, the free initiative, a constitutional principle that exists to ward off state interference in economic activity, with the aim of avoiding monopolies and conferring on the individual the freedom to exercise any activity that is not prohibited by law.

Free competition, on the other hand, cannot be understood as synonymous, or as the equivalent of free enterprise, but rather as an aspect of this normative postulate. It is, therefore, a principle enshrined in the Federal Constitution of 1988, whose non-compliance characterizes infringement of the economic order, causing prejudice to the collectivity.

In this sense, for Grau (1991, p. 228), "free competition is by the 1988 Constitution erected to the condition of principle. As such contemplated in Article 170, IV, it is composed, along with others, in the group of what has been referred to as the 'principles of the economic order'".

Still, according to the reasoning aligned, Almeida (2004, p. 110) understands that free competition has, as purpose, "seek equal chances for fair and equal dispute in the exploitation of any activity".

It fits with this understanding:

> The economic order outlined by art. 170, IV, of the Federal Constitution, in addition to being founded on the valorization of work and on free initiative, aims to ensure to all a dignified existence, according to the dictates of social justice, provided that a number of principles are respected, including free competition, consumer and environmental protection, private property and the social function of property. (BONFIM, 2011, p. 171)

The principle in comment aims to guarantee to the economic agents, who act in the market, conditions of equality, more precisely isonomia regarding the opportunity to compete.

> Free competition, therefore, has the aim of guaranteeing to all those who wish to operate in the market a condition of entry, seeking to win the share of consumers, that is, the guarantee of performance, under equal conditions, among other economic agents. (BONFIM, 2011, p.177)

However, it should be emphasized that it is not only about protection of the subjective right of economic agents, but also of consumers and the collective, who end up becoming, in a contemporary definition of the fundamental principles of the economic order, the final recipients covered by the standard, who have achieved their practical purpose:

> The definition of the scope of the principle of free competition therefore requires the identification of the legal asset under supervision, taking into account that there is no more room in the juridical order for the principle of free competition to be understood only as a subjective right of economic agents, as once prevailed during economic liberalism.
>
> As stated by BERNARD DUTOIT, "in contemporary society, the protection of competition can no longer be dissociated from that dedicated to consumers and the collective in general".
>
> According to Law No. 884/94, the community is the owner of the legal assets protected by the law of the defence of competition, and it is imperative that the principle of free competition be recognised as an instrument for the realisation of a greater good, which is the preservation of an adjusted market that has the power to promote the achievement of the objectives of the economic order. (BONFIM, 2011, p.178)

To Bonfim (2011, p. 179), moreover, the principle of free competition should be seen as an instrument of reaching a free market that brings reflexes to society and the development of economic agents, since the economic order is created with the aim of assuring everyone a dignified existence, according to the dictates of social justice.

As long as there is no irregular exercise of the right of free enterprise, there may be the control of a given market by the economic agent, which, of course, must result from its efficiency (art. 36, §1º, Law 12,529/2011). See:

> The legal system allows the victory, so to speak, of a certain economic agent, provided that the rules of the game are followed. There may be overlap of a particular agent in a given relevant market. The search for larger market shares is stimulated by the ordering, since it manages improvement in the products or services offered and lower prices, all in function of the competi-

> tion between economic agents. Victory is rejected when achieved by means not approved by the system as, for example, the practice of predatory prices and the creation of cartels. (BONFIM, 2011, p.181)

It follows that the objective of the practical applicability of the principles of the economic order is, in effect, to ensure the real existence of competition, starting from a free initiative, which is ultimately beneficial to the market and to society as a whole. Any practice that confronts such principles, must be combated, as is the case of the cartel, which is regarded as the most serious of all infractions to the economic order.

By way of introduction, it is imperative that the classical definition of unfair competition is made explicit so that the study can then move to the focal point at which it is intended:

> It consists of unfair competition, in short, in the practice of acts of commerce and in a reprehensible procedure aimed at diverting the parish from the competitor; this is why the text stressed to the injured party the right to have losses and damages in compensation for damage caused by other acts of unfair competition not provided for in it, which harm reputation, the business of others, to create confusion between commercial or industrial establishments or between products and articles put into trade.
>
> These acts are not considered crimes and are not subject to penalty; but are criminal from the point of view of Commercial Law, unlawful acts that create the obligation to compensate for losses and damages. (FERREIRA, 1960, p. 354)

It is therefore extracted that, since the classical definition, the acts of unfair competition would not even be considered, but only from their specific analysis as crimes, since they deal with damages incurred between economic agents, which do not have the capacity to cause damage to the economy as a whole.

However, infractions to the economic order, due to the level potentially harmful to the entire capitalist economic-social system, are characterized as acts of qualified unfair competition, and may even be typified as crimes. In consonance, let's see:

> Economic dominion, like every domain, generates power for its holders. This economic power has to be used normally to assure everyone a dignified existence, according to the dictates of social justice (cf, art. 170). When the use unfolds in abuse, the Constitution itself imposes its repression (art. 173, §4) (MEIRELLES, 2014, p. 757).

The police operation mentioned in the previous item reveals a cartel scenario, which had, as a target of collusion, fraud in bidding processes that affected, directly, the Government and the Exchequer. The cartel, a serious violation of the economic order, has the power to extinguish competition, or makes it fanciful, to the point of being identified by many as pseudo-competition, before the prior agreement between the economic agents involved in order to dominate the market.

In this sense, the precise concept of cartel:

> Cartel - This is an agreement between companies that adopt common decisions or policies regarding all or a certain aspect of their activities. Because it is an agreement, the companies involved in it do not lose their autonomy or their individuality. They only submit to the terms of the agreement in its particular scope (NUSDEO, 2015, p 222).

The economic agents, who unite for the formation of the cartel, choose to cooperate among themselves, either by combining price, restricting the varieties of products or even dividing the market, resulting in an arbitrary increase in profitability to the detriment of the self-regulation of the economy itself as the essence of its development.

It is noted that the Antitrust Act does not distinguish between cartel species. In fact, the Law does not even use the expression "cartel", bringing, among the exemplifying list of conduct harmful to the economic order, the agreement between competitors for price fixing, reduction of quantities, division of markets or fraud in public bidding (art. 36º, § 3º, I).

As highlighted by Almeida (2012, p. 219), for faithful configuration of this violation, it is essential the agreement between the agents involved in the economic activity, in order to characterize the abuse.

For doctrinal classification purposes, cartels can be divided into two species, according to the sector in which collusion between economic agents is verified, whether private or public.

The former, market cartel, when identified in the private sector, characterised by the agreement, combination, manipulation or adjustment between competitors of the prices of goods or services offered individually (price fixing, buying or selling cartel)the limitation of the production or marketing of goods or services (quantity reduction cartel) and the division of median markets into customers, suppliers, regions, periods or other (market division cartel). Such hypotheses are provided, for example, in art. 36, § 3º, I, "a" to "c", of the Law of Defense of Competition.

the second, cartel in bids, provided for in paragraph "d" of the aforementioned provision and characterized from the agreement, combination, manipulation or adjustment of prices, conditions, advantages or abstention, within a bidding process, by bidders, with or without the participation of the Public Administration.

In the international context, it was agreed to call the cartel formed in bids Bid rigging, which according to the OECD (2009), "occurs when Businesses, that would otherwise be expected to compete, secretly conspire to raise prices or Lower the quality of Goods or services for purchasers who Wish to Acquire products or services through a bidding process".

This practice gains greater notoriety when identified in the private sector, having as a typical and common example the fuel sector. However, the public sector is also a target, as we saw in the course of the casuistic analysis made possible by this study, and its fight has been increasingly intense in recent years.

Thus, without disregarding the importance that market cartels assume in the judicial system (contemplated in the criminal, civil and administrative fields), integrates the specific object of this work the analysis of cartels in public tenders and how its formation can be mitigated by the phenomenon of compliance.

It then goes on to analyze the cartel in bidding and its harmful consequences.

2.1. CARTELS IN PUBLIC TENDERS AND ITS CONSEQUENCES

The need to contract works, services, purchases and disposals, carried out by the Public Administration, through a bidding process that ensures a level playing field to all competitors, comes from a constitutional guideline, included in item XXI, of Article 37 of the General Law.

According to Pestana (2013, p. 33), bidding is an administrative process, promoted by the Public Administration, prior to certain hires, in order to identify the suitable proposal to be hired.

The author also points out possible reasons for choosing the bidding process. See:

> The reasons that gave rise to its creation can be the most diverse: to curb offenses to the expensive principle of isonomy; to prevent the exercise of personality and preference, by the Public Administration, in the choice of certain suppliers and service providers; identify the proposal that is most advantageous for the Public Administration, etc. All these reasons, in some way, are aimed at preserving and protecting the public thing, an expression that we use to represent the acquis of the Public Administration integrated by assets, rights, assets and interests, as well as charges, liabilities and duties assumed to the detriment of the Public Administration (PESTANA, 2013, p. 1).

The constitutional directive in comment was regulated, in the infraconstitutional field, by Law 8.666, of June 21, 1993, which is intended to establish thoroughly all conditions, assumptions and procedures to be respected in the context of a bidding process.

As Carvalho e Carvalho (2014, pp. 7-8), the above-mentioned legislation emerged to standardize the bidding procedure and requirements of an administrative contract, requiring, in its terms, the observance of the normative provisions by all direct administrative bodies, special funds, municipalities, public foundations, public companies, mixed-economy companies and other entities controlled, directly or indirectly, by the Union, States and Municipalities.

In addition, the authors bring to light a synthetic and precise concept about the bidding process:

> The bidding aims to ensure compliance with the constitutional principle of isonomy, the selection of the most advantageous proposal for Administration and the promotion of sustainable national development, provided for in Article 3 of Law 8666/93 (BRAZIL: 2010). The provision of these objectives in the Bidding Law assists the doctrinators and jurists of Administrative Law to outline the concept of bidding. (CARVALHO; CARVALHO, 2014, p. 8).

What is expected is that the contracts made by the Public Administration are the most advantageous according to the public interest itself, having products and services at the lowest price and of better quality. The conduct of a fraudulent bidding process, as is the case of the cartel assessed by the work casuistically, causes serious damage to the Treasury and, consequently, to society as a whole (taxpayers and consumers as final recipients of the principles of free initiative and free competition).

According to Niebuhr (2011, p. 33), the bidding is an administrative procedure that has the conclusion of an administrative contract, by the Public Administration, as an intention, and from there, interested third parties offer proposals to be evaluated in the public interest.

Lira (2012) points out that "to achieve this goal, the institute is governed, in Brazil, by a normative plexus that leaves little freedom for the public manager to choose who he will hire".

As envisioned in the course of this item, the cartel in bids occurs when the companies participating in the event enter into agreement to define who will be the winner, or join efforts in trying to manipulate the outcome of the bidding process for any purpose.

To this end, such companies use various strategies, such as the joint definition of the value of bids, the reduction of the number of bidding companies in the contests, the submission of bids without the intention of winning the bid, among others, including with rotating schemes of predefined winners to simulate a non-existent competition.

The consequence is that the Public Administration ends up purchasing products and services at extremely disadvantageous conditions and the public resources derived from the taxes paid, which should be used for the benefit of society, are transferred to the companies that are members of the cartel, which derive illicit profits from the absence of effective competition.

In this sense, the "Guide to Combat Cartels in Bidding", prepared by CADE, states that:

Such conduct alters the normal and expected situation of effective competition of the event, allocating to the State less favourable conditions in the procurement of goods and services, such as higher prices, products and services of lower quality or acquisition of less than desired quantity. In other words, the bidding cartel undermines the efforts of the Public Administration to use its resources efficiently and effectively to provide the necessary goods and services to the population and promote the development of the country, is therefore detrimental to society as a whole. (2019, p.11)

The Federal Government's purchasing panel reveals that in 2019, 80,632 purchasing processes were carried out, totaling the expressive value of R$ 45,902,704,189.85, including several bidding, dispensing and unenforceability (PORTAL OF TRANSPARENCY, 2020).

having regard to the information provided by CADE (2019, p. 14), on the basis of data from the Organisation for Economic Cooperation and Development (OECD), cartels generate an estimated 10-20% excess of price in a competitive market, causing annual losses of hundreds of billions of reais to consumers.

There are many consequences of this practice, which undermines free competition. The damage reflects directly on the collective, owner of the legal well-being protected, strongly impacting the economic-social development of the country.

In addition, on the consequences of cartel practice in bidding:

> [...] the recent cases investigated in the context of Operation Lava Jato and also cleared in the Administrative Council of Economic Defense (CADE, 2017) make evident the potential economic damage, the shocks to the competition structure and, ultimately, the damage to public confidence, caused by the cartels in bidding (LACERDA, 2019, p. 112).

It is cediço that the acts of corruption and formation of cartel in the public tenders are distinct illicit. However, it is not uncommon that they occur together, in a complementary way and with the same purpose, exactly as calculated in Operation Jaleco Branco, a casuistry

evaluated by the present study, and it is recommended that the fight against such practices be done in an integrated way.

It goes on to analyze how the country has acted to combat, or at least reduce, harmful practices to the economic order and, consequently, to national development.

3. THE FIGHT AGAINST CARTELS IN BRAZIL IN BIDDING PROCESSES

In the face of globalized contemporaneity, with regard to modernized illicit, when public contracts are analyzed through bidding processes, more and more effective mechanisms should be sought to mitigate the damage caused to the Public Administration, against the favorable scenario of bidding for cartel practice and corruption conducts.

Brazilian legislation provides for three spheres of punishment for anti-competitive conduct, such as the cartel.

As an administrative offense, it is up to CADE to investigate and punish violations of the economic order, pursuant to Article 4 of the Law of Defense of Competition. In 2019, of the 707 cases judged by CADE, 74 had cartel practice as proven conduct (CADE, 2020).

In the civil sphere may also be filed action that has as a cause to claim compensation for losses and damages suffered arising from practices that constitute infringement of the economic order. Civil liability is supported by both the Civil Code and the Competition Defense Law.

In the criminal sphere, the classification results from Law 8,137/1990, which defines crimes against the tax order, economic and against consumer relations. The cartel, within the public administration, will also be subject to Law 8.666/1993.

In harmony with the other legal provisions, the most recent legislative creation was Law 12,846/2013, known as the Anti-corruption Law, which regulates the administrative and civil accountability of legal entities for the practice of acts against the public administration.

In this tuning fork, this is the purpose and instruments brought by the Anti-corruption Law:

> The Anti-corruption Law (Law 12,846 of 2013) comes to fill a legislative gap that remained in Brazilian law until its enactment, that is, to determine the objective responsibility of the legal entity. Although there were doctrinal positions on the subject, the law had not been edited until then. Inspired by the American Foreign Corrupt Practices Act and the Bribery Act, originating from the United Kingdom, and attending the Convention on the Fight against Corruption of Foreign Civil Servants in International Commercial Transactions, the novel diploma emerged.
>
> In other topics, the Anti-corruption Law brings the compliance institute, which can mitigate penalties under the law itself, the leniency agreement, punishments involving fine, extraordinary publication of the decision, forfeiture of property and compulsory dissolution of the legal entity (CEREN; CARMO, 2018, p. 38).

Yet:

> The core of the law is precisely the objective administrative and civil responsibility of legal entities if they engage in inappropriate acts (which contradict the systematic national and foreign public administration), that is, there will be administrative and civil penalties, regardless of intent or guilt; if the injury is found, the appropriate sanctions may be applied. It is interesting to note that when the legal personality is used to carry out illicit practices, its disregard will be allowed (art. 14 of LAC) (OLIVEIRA; CEREN, 2019, p. 188).

Before the National Congress, the Senate Bill n° 283, 2016, which aims to amend Law 12.529, of November 30, 2011, which structures the Brazilian System of Defense of Competition, in order to, among other measures, to institute double compensation for the competitive damage caused to the injured parties who take legal action, thus encouraging the bringing of redress proceedings. Below, transcription of the PLS menu:

> Amends Law No 12.529 of 30 November 2011, which structures the Brazilian System of Defense of Competition and provides for the prevention and repression of infringements against economic order, to make the fine to cartel practice by company or economic group, proportional to the duration of the infringement to the economic order; institute the indemnification in double to the injured who enter in court, except the defendants who sign leniency agreement or term of commitment of cessation of practice, in addition to other incentives to the leniency agreement, provided that this is done upon submission of documents that allow CADE to estimate the damage caused; determines the limitation of the term of limitation during the duration of the administrative process; and makes the decision of the Plenary of the CADE able to substantiate the granting of protection of evidence.

Note that the current legal framework is the result of many advances over time. In the meantime, it is necessary to recognise the need for continuous improvement, as they weigh the efforts of the competent bodies, often because of procedural legislation, which slows down the process, among other factors, the conviction of the guilty is not achieved and the law is impossible to attain the pedagogical and punitive character for which it was created.

Despite the above, there is also an increase in the efforts of the bodies responsible for combating the cartel, such as CADE (2020), which, in the period 2015-2019, for the practice of cartel conduct, shows a significant increase in the amount of fines imposed, as shown in the table analysis.

Ano	Conduta	Total de Multas Aplicadas (R$)
2015	Cartel	R$ 173.242.274,51
2016	Cartel	R$ 136.263.526,19
2017	Cartel	R$ 95.014.064,74
2018	Cartel	R$ 621.501.253,85
2019	Cartel	R$ 784.521.604,95
Total		**R$ 1.810.542.724,24**

TABLE 1 - Fines imposed by CADE - Cartel (CADE, 2020)

However, not always the repressive action, through the application of a fine, the criminalization of conduct and the legal provision of reparation of damages is sufficient for the economic agents and Public Administrators corruptible abstain from the practice of the illicit acts in question.

You see, one cannot deny the need for repressive control of infringements of the economic order and of corruption itself in its essence. However, more than punishing, it is imperative to change a pattern of conduct, to promote the change of negative culture on the practice of illicit acts that plagues Brazil.

The recurrent link of cartels in bidding, with cases of corruption from the aid of Public Administrators, is an example of that one can not think only of the punishment that, depending on the procedural rules, is often not even able to the end that should achieve - guarantee the protection of the public interest -, as well as there is reasonable reparation to the Exchequer.

It is necessary, therefore, to reflect on measures that awaken the commitment to change culture, so that the constitutional precepts are fulfilled and then we can think about social justice, as provided for in the Magna Carta.

In this perspective, one can think of compliance as a modern mechanism allied to the reach of an ethical and just society, as will be shown below.

3.1 CARTELS AND COMPLIANCE

It cannot be forgotten that the crimes committed against the Public Administration, in particular the practice of the cartel, often involve public officials, as seen at the beginning of this article, thus associating themselves with corruption.

Meirelles (2014, p. 123) states that "the act most affronted to the basic principles of administration and causing harm to society is corruption in the exercise of the civil service". Thus, it is necessary that a change of posture has as its objective not only the private sector, but also the Public Administration itself.

In this fork, as a concession, Law 12,846/2013 was responsible for taking a leap in the Brazilian anti-corruption policy by establishing the compliance mechanism (integrity program) and also include it as a mitigating measure of possible sanction in the determination of administrative and civil liability of legal entities for the practice of acts against the Public Administration, because, in a way, it encourages the company to join the program, thus initiating the desired change, towards a more ethical and unencumbered standard of conduct.

The terminology, of English origin, in the literal translation, means "to be in agreement with". Compliance for being understood as being in conformity. "In general, it is the duty of companies to promote a culture that stimulates, in all members of the organization, the ethics and the exercise of the social object in accordance with the law". (ASSI, 2018).

The compliance program does not mean only being in compliance with the legislation, respecting methods and procedures alone, a perspective that proves reductionist, "since mere compliance with regulations and codes of conduct does not correspond to their real proficiency" (GERCWOLF, 2019, p. 31). More than that: "In general, compliance involves one,

consists in the duty of companies to promote a culture that stimulates, in all members of the organization, the ethics and the exercise of the social object in accordance with the law". ASSI, 2018).

In fact, compliance can be understood as a set of mechanisms that promote the adoption of cultural standards in the organization - corporate or not - that adheres to it, which must conform to ethics, the integrity, legislation and internal rules that guide the expected conduct of all employees of the organization, without exception, so much so that one of its pillars is the so-called tone from the top, that is, the involvement from the highest management of the company:

> Compliance is about people, whether they are decision-makers, managers or collaborators, who must guide their actions in corporate responsibility, always choosing to do what is right until this behavior becomes naturalized - whether in the simplest behaviors (related to habits and clothing), or in those that directly impact the operation. [...] (ASSI, 2018).

In this sense, disserta Fernanda Santos Schramm (2018, p. 207):

> [...] more than legal compliance, the compliance program involves strategies that enable a change in the company's cultural patterns in relation to the ethics and guidelines that guide the regulatory environment, avoiding the risks inherent in the business activity and the penalties legally provided for, with the consequent damage to the image of the organization.

In short:

> One can distinguish the meaning of compliance from simple compliance with the law, suggesting that it is a dynamic state of legal observance and, therefore, a state of conformity added to a behavior orientation. [...]
>
> Such behavior guidelines become relevant to the extent that they are contractually established, usually through Codes of Ethics or Conduct, or set by law, as in the case of anti-wash compliance, may its failure to comply generate different legal consequences in the civil, administrative and criminal field.
>
> It is interesting to note that the national legal system has, in the context of criminal compliance, species with different formatting in the prevention of criminal offences, highlighting anti-washing compliance, anti-corruption compliance and antitrust compliance (CARDOSO NETO; CORDEIRO; PAES, 2019, p. 90-91)

Compliance is often seen in the private sector, since, on the one hand, the globalized economic context and technological advances impose transparency and security in commercial relations, mostly carried out at a distance and without personality (SCHRAMM, 2018, p. 196)On the other hand, the Anti-corruption Law brought some mitigating measures that encourage the adoption of the program, including the penalties applied.

The implementation of a compliance program by companies that operate in the private sector, but also relate to the Government in bidding processes, proves to be an important mechanism to prevent fraud in bidding, under various aspects.

It can be inferred, therefore, from the very notions previously outlined about compliance, in the sense that the formation of an ethical and integral cultural environment in companies leads, consequently, to less prone to the practice of corruption and fraud in bidding.

Fernanda Santos Charamm (2018, p. 102-114) points out that companies that adopt an effective compliance system contribute to prevent fraud in the bidding process, from the preparatory stage, through mechanisms that map and signal "prior to risk situations, alerting employees and employees to the possible consequences, individual and collective, of the practice of irregularities", during the external phase of hiring, It is up to the compliance program "prevent employees and representatives of companies from using subterfuges and illegal manoeuvres [...] to heal themselves winners at no cost'", until the course of the execution of the contract, avoiding "the involvement of the company in situations of disputed legality".

However, its applicability is not restricted to private companies. It must also be used by the Public Administration. So much so that, through Decree No 9,203/2017, there was the establishment of the integrity program within the Federal Public Administration.

After numerous scandals involving public officials, it is right to institute the integrity program also in the public initiative, so as to make it ethical and illiterate, or at least seek to achieve this goal. In this sense:

> The Public Compliance points to an innovative effectiveness to Brazil as an integrity mechanism, footwear in an accurate diagnosis, with risk assessment, monitoring, audits and denunciations that promote the promotion of a fair and lawful management in the hope that it may be the most correct and fast attitude to resume the country's policy, since Public Compliance is a program of public integrity (SOUZA; MACIEL-LIMA; LUPI, 2019, p. 17).

As in the business organizations, compliance is an important tool for changing the cultural patterns of public administration, direct or indirect, promoting the integrity of those who are in the exercise of public administration, so that their respective conduct may be manifested in accordance with ethics and, especially, constitutional dictates.

To the extent that the adoption of public compliance stimulates the culture of integrity, this proves to be an important instrument for the implementation of the constitutional principles that govern Public Administration, sculpted in art. 37 of the Magna Carta, being an important mechanism in the fight against corruption.

In addition, Susana Gercwolf (2019, p. 49-50) points out that the application of compliance in the public sector is able to "optimize public management in terms of improvement and speed in the quality and provision of services and economic and financial rationalization".

Compliance may not be the ultimate tool in the fight against corruption, but it is certainly a viable means of achieving cultural changes and a more dignified ethical standard, both in the private and public sectors.

4. CONCLUSION

Analyzing all the factors exposed, it is important to highlight the importance of studying the illicit phenomena of the cartel, having as allies the corrupt practices of assistance of Public Administrators, and, from a casuistic cut carried out on the "Operation Jaleco Branco"the

relevance and complexity of the actions of criminal organizations of this purpose, as well as the harmful potential of their conduct to the economic order, could be demonstrated.

Thus, it remains delineated that public purchases and bids generate a great economic impact and have high relevance in the budget and public spending; for this reason, the allocation of resources should be increasingly assertive and efficient.

Tracing the due conceptual and casuistic analyses, it remained explicit that the practices of cartels in public tenders are usually linked to institutionalized corruptive acts, which helps to maintain the longevity of the scheme and hinders the detection of fraud, like Operation White Coat.

In the face of the harmful potential of cartel conduct, allied to corruption, which end up injuring, even, constitutional precepts, basic of the Brazilian capitalist and republican system, legislative improvement and the creation of increasingly effective instruments, for both repression and prevention purposes, it has proved to be of paramount importance to eliminate or at least mitigate the vulnerabilities of Public Administration, thus protecting the interests of society at large.

Compliance thus appears as a beneficial mechanism of implementation in both private initiative and

Compliance thus appears as a beneficial mechanism of implementation both in the private sector, for the purpose of altering a corrupt and hidden culture of the Brazilian population, and for use in front of the Public Administration's own organs, so that the performance in favor of a standard of ethical and illiterate conduct is increasingly promoted, and the measures of repression are less necessary, so that the bidding processes reach their constitutional purpose, under the prism of equity, isonomy and social justice.

REFERENCES

ALMEIDA, Luiz Carlos Barnabé de. *Introduction to economic law*. 4. ed. São Paulo: Saraiva, 2012.

ALMEIDA, Marcus Elidius Michelli de. *Abuse of Law and Unfair Competition.* 1. ed. São Paulo: Quartier Latin, 2004.

ASSI, Marcos. *Compliance*: how to implement. São Paulo: Trevisan, 2018.

BONFIM, Diego. *Taxation & Free Competition.* 1. ed. São Paulo: Saraiva, 2011.

BRAZIL. *Superior Court of Justice*. Criminal Case 510 - BA (2007/0297050-1). Report. Available at: https://ww2.stj.jus.br/processo/reviseddocument/mediated/? Component=Atc&sequential=30480525&num_record=200702970501&data=20140317&type=1&format=PDF. Accessed on 08 Jan. 2020.

CADE - ADMINISTRATIVE COUNCIL OF DEFENSE OF COMPETITION. *Guide to Combat cartels in bidding*. Brasilia: 2019. Available at http://www.cade.gov.br/acesso-a-informacao/publicacoes-institucionais/guias_do_Cade/guia-de-combate-a-carteis-em-licitacao-versao-final-1.pdf. Accessed on: 08 Jan. 2020.

CADE - ADMINISTRATIVE COUNCIL FOR DEFENSE OF COMPETITION. CADE in Numbers. Brasilia: 2020. Available at: http://cadenumeros.cade.gov.br/QvAJAXZfc/opendoc.htm?document=Painel%2FCADE%20em%20N%C3%Bameros.qvw&host=QVS%40srv004q6774&Anonymous=true

Accessed: 08 Jan. 2020.

CADE - ADMINISTRATIVE COUNCIL FOR DEFENSE OF COMPETITION. *Questions about violations of the economic order.* Brasilia: 2018. Available at: http://www.cade.gov.br/servicos/faq/questions-overinfractions-economicordem-economic. Accessed on 20 Jan. 2020

CARDOSO NETO, Lauro Pinto; CORDEIRO, Nefi; PAES, José Eduardo Sabo. *Criminal Compliance Anti-laundering*: criminal prevention by private agents and the right to silence. Revista da Faculdade de Direito da UFPR, Curitiba, v. 64, n. 2, p. 89-110, May. /Aug. 2019.

CARVALHO, Luciani Coimbra de; CARVALHO, Leonardo Chaves de. *Emergency Hirin*g: Analysis of the Union Court of Auditors' Vision. Revista da Faculdade de Direito da UFPR, Curitiba, v. 59, n.1, p. 7-34, 2014.

CEREN, João Pedro; CARMO, Valter Moura do. *Brazilian and Chilean anti-corruption l*aw: challenges in the fight against corruption. Revista da Faculdade de Direito da UFPR, Curitiba, v. 63, n. 3, p. 37-60, Sep. /Dec. 2018.

UNION PUBLIC PROSECUTOR'S COLLEGE. *The investigation and prosecution of corruption and economic crime*s: an empirical research in the federal justice system: Tomo I. Arthur Trindade Maranhão Costa, Bruno Amaral Machado, Cristina Zackseski (organizers). Brasília: ESMPU, 2016.

Available at: https://escola.mpu.mp.br/publicacoes/series/serie-pesquisas/a-investigacao-e-a-persecucao-penal-da-corrupcao-e-dos-delitos-economicos-uma-pesquisaempirica-no-sistema-de-justica-federal-tomo--1. Accessed at: 08/01/2020

FERREIRA, Waldemar. *Treaty of Commercial Law.* São Paulo: Saraiva, 1960. v.1.

GERCWOLF, Susana. *Compliance in Federal Public Administration*: instrument of governance, risk management and sustainability. Dissertation (Political and Economic Master) Mackenzie Presbyterian University, São Paulo, 2019.

GRAU, Eros Roberto. *The economic order in the 1988 constitution*: interpretation and criticism. 2. ed. São Paulo: Revista dos Tribunais, 1991.

GRAU, Eros Roberto. *The economic order in the 1988 constitution*: interpretation and criticism. 8. ed. São Paulo: Malheiros, 2003.

LACERDA, Natalia de Melo. *The emergence of public integrity programs as a tool to prevent bidding cartels.* Revista De Informação Legislativa RIL, Brasília, DF, v. 56, n. 221, p. 111-130, jan./mar. 2019.

LIRA, Bruno de Oliveira. *Cartels in bidding*: using the theory of auctions to evaluate national bidding legislation. Dissertation (Master in Law) - Federal University of Pernambuco, Recife, 2012. Available at: https://repositorio.ufpe.br/handle/123456789/10123. Accessed on: 18 Jan. 2020.

MEIRELLES, Hely Lopes. *Direto Administrativo Brasileiro.* 41. ed. São Paulo: Malheiros Editores, 2015.

MINISTRIES OF ECONOMICS, PLANNING, DEVELOPMENT AND MANAGEMENT. Panel Purchasing Processes. Brasília. Available at: http://paineldecompras.planning.gov.br/QvAJAXZfc/opendoc.htm?document=paineldecompras.qvw&lang=en-US&host=QVS%40srvbsaiasprd04&Anonymous=true. Accessed: 20 Jan. 2020.

MOREIRA, Vital. *The Legal Order of Capitalism.* Spark: Coimbra, 1973.

NIEBUHR, Joel de Menezes. *Dispensation and Inexligibility of Public Bidding.* 3. ed. Belo Horizonte: 2001.

NUSDEO, Fábio. *Economics course:* Introduction to economic law. 9. ed. São Paulo: Editora Revista dos Tribunais, 2015.

OECD (OECD) - Organisation for Economic Co-operation and Development. *Guidelines for Fighting Bid Rigging in Public Procurement:* helping governments to obtain best value for money. Paris: 2009. Available at: https://www.oecd.org/competition/cartels/42851044.pdf. Accessed on: 10 Sep. 2020.

OLIVEIRA, Emerson Ademir Borges de; CEREN, João Pedro. *Anti-corruption law and leniency agreement:* critical notes. Revista dos Tribunais, v. 1010, a. 108, p. 181-207, Dec. 2019.

PESTANA, Marcio. *Public Bidding in Brazil*: integrated examination of Laws 8,666/1993 and 10,520/2002. São Paulo: Atlas, 2013.

PORTAL OF TRANSPARENCY - COMPTROLLER GENERAL OF THE UNION. Annual Budget. Brasilia. Available at: http://www.portaltransparencia.gov.br/orcamento?ano=2019. Accessed in: 20 Jan. 2020

SCHRAMM, Fernanda Santos. *Compliance as an instrument to combat corruption in public contracts*. Dissertation (Law). Universidade Federal de Santa Catarina, Florianópolis, 2018.

SILVA, José Afonso da. *Positive Constitutional Law Course.* 17. ed. São Paulo: Melhoramentos, 767.

SOUZA, Silvia Regina; MACIEL-LIMA, Sandra; LUPI, André Lipp Pinto Basto. *Applicability of compliance in Public Administration in the face of the current Brazilian political moment. In:* I Ibero-American Congress on Corporate Law and Citizenship, 2018, Curitiba, Proceedings... Curitiba: Unicuritiba, v. 1, n. 24, 2018, p. 1-22.

Recebido/*Received:* 29.07.2020.

Aprovado/*Approved:* 26.09.2020.