
THE PRIVATE COMPETITION ENFORCEMENT REVIEW

THIRD EDITION

EDITOR

ILENE KNABLE GOTTS

LAW BUSINESS RESEARCH

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EDITOR'S PREFACE

Private antitrust litigation has been a key component of the antitrust regime for decades in the United States and reflects the societal views generally towards the objectives and roles of litigation. The United States litigation system is highly developed – using extensive discovery, pleadings and motions, use of experts, and, in a small number of matters, trials, to resolve the rights of the parties. As a result, the process imposes high litigation costs (in time and money) on all participants and promises great rewards for prevailing plaintiffs. The usual rule that each party bears its own attorneys' fees is amended for private antitrust cases such that a prevailing plaintiff is entitled to its fees as well as treble damages. The costs and potential rewards to plaintiffs has created an environment in which a large percentage of cases settle on the eve of trial. Arbitration and mediation are still rare, but not unheard of, in antitrust disputes. Congress and the US Supreme Court have attempted to curtail some of the more frivolous litigation and class actions by adopting tougher standards and ensuring that follow-on litigation exposure does not discourage wrongdoers from seeking amnesty from the competition authorities. Although these initiatives may, on the margin, decrease the volume of private antitrust litigation in the United States, the environment remains ripe for high litigation activity in the near-term, particularly involving intellectual property rights and cartels.

Most of the other jurisdictions discussed in this book have each sought to initiate or increase the role of private antitrust litigation recently (in the past few years, for instance, in Brazil and Israel) as a complement to increased public antitrust enforcement. In April 2008, the European Commission published a White Paper suggesting a new private damages model for achieving compensation for consumers and businesses who are victims of antitrust violations, noting that 'at present, there are serious obstacles in most EU Member States that discourage consumers and businesses from claiming compensation in court in private antitrust damages actions [...]. The model is based on compensation through single damages for the harm suffered'. The key recommendations include collective redress, in the form of representative actions by consumer groups and victims who choose to participate, as opposed to class actions of unidentified claimants; disclosure of relevant evidence in the possession of parties; and final infringement

decisions of Member States' competition authorities constituting sufficient proof of an infringement in subsequent actions for damages. Commissioner Kroes was unable to achieve adoption of the legislation on private enforcement before the end of her term. Commissioner Almunia plans to enter into a new round of consultations and is likely to combine the initiative with forthcoming legislation on consumer protection. Both proposals will likely contain some form of collective redress.

Even in the absence of the issuance of final EU guidelines, however, states throughout the European Union (and indeed in most of the world) have increased their private antitrust enforcement rights or are considering changes to legislation to provide further rights to those injured by antitrust law infringement. Indeed, private enforcement developments in many of these states have supplanted the EU's initiatives. The English and German courts are emerging as major venues for private enforcement actions. Collective actions are now recognised in Sweden, Finland and Denmark. Italy also recently approved legislation allowing for collective damages actions and providing standing to sue to representative consumers and consumer associations, and France and England are currently also contemplating collective action legislation. Some jurisdictions have not to date had any private damages awards in antitrust cases, but changes to their competition legislation could favourably affect the bringing of private antitrust litigation seeking damages (e.g., Lithuania or Romania).

Almost all jurisdictions have adopted an extraterritorial approach premised on 'effects' within their borders. Canadian courts may also decline jurisdiction for a foreign defendant based on the doctrine of *forum non conveniens* as well as comity considerations. In contrast, some jurisdictions, such as the UK, are prepared to allow claims in their jurisdictions where there is relatively limited connection, such as where only one of a large number of defendants is located. In South Africa, the courts will also consider 'spill-over effects' from antitrust cartel conduct as providing a sufficient jurisdictional basis. Jurisdictions also vary regarding how difficult they make it for a plaintiff to have standing to bring the case. Most jurisdictions impose a limitation period for bringing actions that commences only when the plaintiff knows of the wrongdoing and its actors; a few, however, apply shorter, more rigid time frames without a tolling period for the commencement of damages (e.g., Brazil or Canada with respect to Competition Act claims) or injunctive litigation. Some jurisdictions base the statute of limitations upon when a final determination of the competition authorities is rendered (e.g., Romania or South Africa) or from when the agency investigation commences (e.g., Hungary). In other jurisdictions (e.g., Australia or Chile), it is not as clear when the statutory period will be tolled.

The litigation system in each jurisdiction to some extent reflects the perceptions of what private rights should protect. Most of the jurisdictions view private antitrust rights as an extension of tort law (e.g., Canada, France, Hungary, Israel, Japan, Korea, Norway, the Netherlands or the UK), with liability arising for actors who negligently or knowingly engage in conduct that injures another party. Some jurisdictions treat antitrust concerns as a defence for breaching a contract (e.g., Norway or the Netherlands), others (e.g., Australia) value the deterrent aspect of private actions to augment public enforcement, while others are concerned that private antitrust litigation might thwart public enforcement and may require what is in essence consent of the regulators before allowing the litigation or permit the enforcement officials to participate in the case (e.g., in Germany the President of

the Federal Cartel Office may act as *amicus curiae*). A few jurisdictions believe that private litigation should only be available to victims of conduct that the antitrust authorities have already penalised (e.g., Spain, until legislation loosened this requirement somewhat). Interestingly, no other jurisdiction has chosen to replicate the United States system of treble damages for competition claims, taking the position that damages awards should be compensatory rather than punitive (Canada does, however, recognise the potential for punitive damages for common law conspiracy and tort claims), neither does any other jurisdiction permit the broad-ranging and court-sanctioned scope of discovery permitted in the United States. Only Australia seems to be more receptive than the United States to suits being filed by a broad range of plaintiffs – including class-action representatives and indirect purchasers – and to increased access for litigants to information and materials submitted to the antitrust authorities in a cartel investigation. Finally, in almost all jurisdictions, the prevailing party has some or all of its costs compensated by the losing party, discouraging frivolous litigation.

Varying cultural views also clearly affect litigation models. Jurisdictions such as Germany or Korea generally do not permit representative or class actions, but instead have as a founding principle the use of courts for pursuing individual claims. In Japan, class actions are not available except to organisations formed to represent consumer members. Jurisdictions that are receptive to arbitration and mediation as an alternative to litigation (e.g., Germany, Hungary, Korea, the Netherlands or Spain), also encourage alternative dispute mechanisms in private antitrust matters. Some courts prefer the use of experts and statements to discovery (e.g., in France, where the appointment of independent experts is common; in Japan, which does not have mandatory production or discovery except in narrowly prescribed circumstances; and in Germany, which even allows the use of statements in lieu of documents). In Korea, economic experts are mainly used for assessment of damages rather than to establish violations. In Norway, the Civil Procedure Act allows for the appointment of expert judges and advisory opinions of the EFTA court. Other jurisdictions believe that discovery is necessary to reach the correct outcome (e.g., Canada, which provides for broad discovery, and Israel, which believes ‘laying your cards on the table’ and broad discovery are important). Views towards protecting certain documents and information on privilege grounds also cut consistently across antitrust and non-antitrust grounds (e.g., no attorney–client, attorney work-product or joint work-product privileges in Japan, limited recognition of privilege in Germany; extensive legal advice, litigation and common interest privilege in the UK, and Norway), with the exception that some jurisdictions have left open the possibility of the privilege being preserved for otherwise privileged materials submitted to the antitrust authorities in cartel investigations. Interestingly, Portugal, which expressly recognises legal privilege for both external and in-house counsel, nonetheless provides for broad access to documents to the Portuguese Competition Authority. Some jurisdictions view settlement as a private matter (e.g., France, Japan or the Netherlands); others view it as subject to judicial intervention (e.g., Israel or Switzerland). The culture in some places, such as Germany, so strongly favours settlement that judges will require parties to attend hearings, and even propose settlement terms. In Canada, the law has imposed consequences for failure to accept a reasonable offer to settle and, in some jurisdictions, a pre-trial settlement conference is mandatory.

Private antitrust litigation is largely a work in progress in most parts of the world, with the paint still drying even in the United States several decades after private enforcement began. Many of the issues raised in this book, such as pass-on defence and the standing of indirect purchasers, are unresolved by the courts in many countries and our authors have provided their views regarding how these issues are likely to be clarified. Also unresolved in some jurisdictions is the availability of information obtained by the competition authorities during a cartel investigation, both from a leniency recipient and a party convicted of the offence. Other issues such as privilege are subject to proposed legislative changes. The one constant cutting across all jurisdictions is the upwards trend in cartel enforcement activity, which is likely to be a continuous source for private litigation in the future.

Ilene Knable Gotts

Wachtell Lipton Rosen & Katz

New York

September 2010

Chapter 2

BRAZIL

*Bruno L. Peixoto**

I OVERVIEW OF RECENT PRIVATE ANTITRUST LITIGATION ACTIVITY

Antitrust private litigation has significantly developed in recent years, as courts issued the first decisions in groundbreaking civil actions either challenging single-firm conduct or demanding injunctive relief and compensation for injury caused by collusive schemes. In addition, the first collective actions against cartelisation in Brazilian legal history have been filed, seeking injunctive relief and damages from overcharge.

The first private antitrust action for collecting damages and lost profits attributable to cartelisation, *Cobraço Group v. ArcelorMittal*,¹ was filed in 2006. The action followed a decision by the Administrative Council for Economic Defence (“CADE”), which ruled against steel producers ArcelorMittal, Barra Mansa (Votorantim Group) and Gerdau for consumer allocation, resale price maintenance and collusion for fixing prices of steel rebars used in the civil construction industry for concrete reinforcement.² The private action was brought by independent steel distributors allegedly allocated by the producers and injured by (1) price squeezes resulting from the combination of cartel prices in the upstream and resale price maintenance downstream, and (2) boycott and price discrimination as defendants established their own distribution system. In a landmark decision, the state judge of first instance granted preliminary injunctive relief, ordering defendants to sell steel rebars either for the pre-cartel prices, adjusted for inflation (*status quo ante*), or the prices the firm currently sells to its controlled distributors.³

On appeal, the Court of Justice of Minas Gerais considered the opinions of CADE, the Secretariat for Economic Monitoring (“SEAE”), and the Secretariat of

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1 Civil Court of Belo Horizonte, Case No. 0024.06984815-8.

2 CADE, Administrative Process No. 08012.004086/2000-21.

3 Civil Court of Belo Horizonte, Case No. 0024.06984815-8.

Economic Law ('SDE') as 'unequivocal evidence' of the anti-competitive practices⁴ and unanimously upheld the preliminary injunction. Analogous actions by steel distributors have followed.

Moreover, associations of construction companies have filed a collective action seeking injunctive relief against allegedly recidivistic and continuous overcharges as well as resulting damages and lost profits.

Another major collective action for injunctive relief and damages attributable to cartelisation was filed by associations of hospitals against suppliers of medical gases, following an investigation by the SDE, which recommended that White Martins Ltda, Air Liquide Brasil Ltda, AGA SA and Air Products Brasil Ltda be fined 30 per cent of their gross turnover – the upper limit – for market division and bid rigging in the medical gases market, as well as vertical restraints aimed at sustaining the scheme.

With respect to unilateral conduct, a major action was brought by a leading steeling company against the world's largest iron ore mining company, *CSN v. Vale*,⁵ for halting the supply of pellets of iron ore. The state judge of first instance granted injunctive relief, ordering Vale to sell the quantities of pellets demanded by CSN. CSN had argued that:

- a* Vale is a quasi-monopolist company in the national market dealing with the pellets of iron ore;
- b* pellets of iron ore are an essential input for producing pig iron;
- c* Vale competes with CSN in several markets; and
- d* Vale has refused to deal with CSN and unilaterally terminated a long-term commercial relation, impairing CSN's ability to effectively compete.

In an appeal filed by Vale, the Court of Justice of Rio de Janeiro, issued a preliminary decision limiting the compulsory sale of iron ore pellets to 56,229 tons per month, based on past dealings.⁶ The parties have recently reached a settlement.

Finally, it is worth noting that the Courts of Justice of at least four different states have confirmed that both unilateral and coordinated conducts challenged by private actions must be assessed under the rule of reason and from the point of view of economic theory, pursuant to Act 8,884/94 ('the Antitrust Act').⁷

4 Court of Justice of the State of Minas Gerais (TJMG), Case No. 1.0024.06. 984815-8/001.

5 Civil Court of Rio de Janeiro, Case No. 2008.001.027120-4.

6 TJRJ, Case No. 2008.014.00040.

7 TJMG Cases No. 2.0000.00.443280-0/0001; No. 1.0702.02.002684-6/001; 2.0000.00.514885-2/000(1); 2.0000.00.342408-2/0001; Court of Justice of the State of São Paulo (TJSP), Cases No. 196.793.49; 152.096.46; Court of Justice of the State of Rio Grande do Sul (TJRS) Case No. 70010005544; Court of Justice of the State of Santa Catarina (TJSC) Case No. 2005.030277-2.

II GENERAL INTRODUCTION TO THE LEGISLATIVE FRAMEWORK FOR PRIVATE ANTITRUST ENFORCEMENT

Article 29 of the Antitrust Act, the central provision regarding private actions for damages, establishes that:

Injured parties, by themselves or through the legitimate representatives as defined by the Code of Consumer Protection may bring a lawsuit, in defence of its individual interests or homogeneous individual interests, to halt infringements of the economic order and receive compensation for losses and injury suffered, independently of the administrative process, which shall not be stayed as a consequence of the filing.

There is no requirement of previous or current administrative adjudication. Parties may file standalone antitrust actions directly before state courts, pursuant to Article 5 (XXXV) of the Brazilian Constitution, which establishes that ‘the law shall not exclude from judicial examination violations or threat of violations of a right’.⁸ Courts have construed it broadly, affirming the autonomy and supremacy of the judiciary in applying and interpreting the laws.⁹

Plaintiffs suing for injunctive relief or damages must assert that the defendant’s conduct has generated or may generate (besides of private losses) harm to competition or free enterprise, dominance of a relevant market, arbitrary increase in profits or abusive exercise of a dominant position. Private parties, thus, must assert antitrust injury in the sense defined by the US Supreme Court in *Brunswick*.¹⁰

Infringements of the economic order (i.e., anti-competitive practices) are defined by Article 20 of the Antitrust Act as ‘any act or conduct, regardless of fault, having as its object or being able to’:

- a* lessen, restrain or in any way harm competition or free enterprise;
- b* dominate a relevant market of goods or services;
- c* increase profits arbitrarily; or
- d* abuse a dominant position.

Sections 1 to 3 of Article 20 elaborate on the definition of infringements of the economic order. Section 1 establishes that ‘the conquest of the market resulting from a natural process based on the higher efficiency of a firm in comparison with its competitors shall not be considered unlawful [dominance]’. Dominant position is defined by Section 2 as the factual situation in which ‘a firm or a group of firms controls a substantial share of a relevant market as supplier, trader, acquirer or financial sponsor of a product, service or related technology’. Section 3 clarifies the preceding one by establishing a rebuttable presumption of dominance whenever a firm or group of firms controls 20 per cent or more of a relevant market. In addition, it permits CADE to establish different presumptions of dominance based on market share for specific industries.

8 The Constitution of the Federal Republic of Brazil, Article 5 (XXXV).

9 See *Federal Public Prosecutor’s Office v. Steel Rebars Cartel*, interlocutory decision (TRF1, Public Civil Action No. 2005.38.00.010174-2).

10 See *Brunswick Corp v. Pueblo Bowl-O-Mat, Inc*, 429 US 477 (1977).

Plaintiffs suing for injunctive relief should traditionally provide evidence of injury or threat of injury, irreparable or hardly repairable (*periculum in mora*). After a series of amendments to the Code of Civil Procedure, courts have gradually changed their interpretation of the applicable requirements for granting injunctive relief and have ruled that it is sufficient to demonstrate a violation or threat of a violation of the law. In order to grant injunctive relief, judges must weigh alleged facts and presented evidence, and find a probable violation or threat of violation of the law.¹¹ Furthermore, plaintiffs suing for damages or lost profits must provide evidence of a causal nexus between the defendant's practice and the actual losses.

Pursuant to Article 89 of the Antitrust Act, in every action regarding the application of the Antitrust Act, CADE must be notified in order to assess the necessity of intervening at its discretion. In practice, CADE has often intervened in follow-on litigation, but rarely in standalone actions.

State courts have jurisdiction to enforce antitrust laws. However, when CADE, a federal agency, intervenes, the lawsuit is transferred to a federal court. Appropriate venue is defined by Article 100(V)(a) of the Code of Civil Procedure as the place in which the illicit conduct took place (*forum delicti commissi*).

The Civil Code imposes a three-year statute of limitations on claims for monetary damages;¹² however, in cases of continuous infringement the limitation period starts to run only when the infringement ceases. In addition, in cases of criminal offences such as cartelisation, the limitation period begins only after the final criminal sentences are issued.¹³ Moreover, a traditional rule establishes that the limitation period does not start to run when plaintiffs are unable to act, as in cases of covert violations or concealment by defendants (*contra non valentem agere nulla currit praescriptio*).

III EXTRATERRITORIALITY

Brazilian antitrust law explicitly embraces the effects doctrine. Foreign companies are subject to jurisdiction in Brazil when anti-competitive practices 'produce or may produce effects' in the country.¹⁴

Additionally, the Antitrust Act establishes that foreign companies are considered to be located in Brazil and, thus, also indisputably subjected to Brazilian antitrust law, if they operate or have any 'branch, agency, office, establishment, agent or representative in the country'.¹⁵

The filing of a private antitrust lawsuit in a foreign country does not impede Brazilian courts in adjudicating the same case or related lawsuits,¹⁶ provided that the anti-competitive conduct produced or may produce effects in the Brazilian territory or defendants were located in the country according to the aforementioned criteria.

11 TJMG Case No. 1.0024.06. 984815-8/001.

12 Article 206 of the Civil Code.

13 Article 200 of the Civil Code.

14 Article 2 of the Antitrust Act.

15 *Id.*

16 Article 90 of the Code of Civil Procedure.

Plaintiffs may file lawsuits for injunctive relief or monetary damages before Brazilian courts even when a foreign court has issued a final decision, which shall not be considered by domestic courts unless it has been homologated in Brazil by the Superior Court of Justice.¹⁷

In order to request injunctive relief, plaintiffs need to assert that the foreign anti-competitive conduct may violate the Brazilian Antitrust Act and injure their interests in the country.

Under Brazilian law, foreign sovereign states are granted immunity from Brazilian courts' jurisdiction when they act in official matters and in direct relation with the Brazilian state (*iure imperii*).¹⁸ Private parties, nevertheless, may sue foreign states for their acts in private matters, involving 'questions of [a] civil, labour and commercial nature'.¹⁹ The Superior Court of Justice has further mentioned that the immunity does not apply in cases of actions filed for recovery of damages caused by illegal civil conduct.²⁰

IV STANDING

Pursuant to Article 29 of the Antitrust Act, any person injured or potentially injured by an anti-competitive practice may bring a private antitrust action. Injured or potentially injured persons may be represented by the following:²¹

- a* the Public Prosecutor's Office ('PPO') in the defence of 'collective or diffuse interests'. The PPO may request injunctive relief and application of remedies to halt anti-competitive practices, but is not allowed to sue for monetary damages representing private parties;
- b* union, states, municipalities, and the Federal District;
- c* administrative agencies or departments; or
- d* associations legally established at least for one year, provided that representing the injured class is one of its primary legal objectives; lawsuits filed by recently established associations may be allowed to proceed in cases in which there is 'a clear social interest demonstrated by the dimension or nature of the injury or by the relevance of the value to be safeguarded'.²²

The provisions concerning lawsuits for damages are broad and there is no limitation on classes of plaintiffs, such as competitors, suppliers, purchasers, consumers, shareholders

17 Article 105(I)(i) of the Constitution of the Federal Republic of Brazil, as amended by Amendment No. 45/2004.

18 Supreme Court (STF) Case No. ACO 522 (2001).

19 STF Cases No. AgRg 139.671 (1995) and Ag 222.368 (2002); Superior Court of Justice (STJ) Cases No. RO 45 (2005) and RO 42 (2007).

20 STJ Case Non. RO 39 (2006).

21 Article 29 of the Antitrust Act; Article 82 of the Code of Consumer Protection.

22 Article 82 of the Code of Consumer Protection.

or employees.²³ However, plaintiffs have the burden of demonstrating a casual relation between the anti-competitive conduct and the alleged injury.²⁴

There is no provision barring indirect purchasers from filing suits for recovering damages. Defendants might face simultaneous actions from direct and indirect purchasers. In such cases, the actions will be consolidated and analysed by the same judge, who must apportion damages between classes to avoid undue multiple compensation.²⁵ Indirect purchasers may also intervene in actions filed by direct purchasers and assert their rights.²⁶

V THE PROCESS OF DISCOVERY

Evidence is produced under strict judicial control and is presented or requested from other parties before a judge. Parties may request testimony of the opposing parties as well as compulsory exhibition or disclosure of any documents and tangible things, indicating the facts to be proven and the purpose of the request.²⁷ If the judge finds that a party has refused to disclose requested documents on illegitimate grounds, she shall deem as true the facts the opposing party intended to prove through the compulsory disclosure.²⁸ The scope of compulsory disclosure is quite broad and judges generally approve it if the requested documents are relevant for meeting the parties' burden of proof. Plaintiffs bear the burden of proving the alleged facts and the constitutive elements of their rights while defendants bear the burden of proving alleged facts that impede, alter or extinguish plaintiff's claims.²⁹

Additionally, parties may request that third parties testify or be required to disclose relevant documents or tangible things. If the third party refuses on illegitimate grounds, the judge may order a seizure of the evidence.

Plaintiffs may present documentary evidence attached to the complaint and defendants with their answer. After a preliminary hearing, the judge decides what the disputed facts are and sanctions requests for production of evidence according to the allocation of the burden of the proof.

Parties or third-parties may legitimately refuse to disclose requested evidence when the exhibition may expose a party's family life, violate a duty of honour or a professional duty of confidentiality, or result in a criminal action. Moreover, the judge

23 Article 29 of the Antitrust Act; Article 947 of the Civil Code.

24 See Federal Regional Court for the 4th Region (TRF4) Case No. 2000.04.01.004115-1.

25 Notice that this is the regime advocated by the Sections of Antitrust Law, International Law and Business Law of the American Bar Association in their comments to the EC White Paper on antitrust actions for damages. See Joint Comments of the American Bar Association Section of Antitrust Law, Section of International Law, and Section of Business Law on the Commission of the European Communities' White Paper on Damages Actions for Breach of the EU Antitrust Rules (2008), pp21-22.

26 Article 56 of the Code of Civil Procedure.

27 *Id.*, Article 356.

28 *Id.*, Article 359.

29 *Id.*, Article 333.

may waive the obligation to disclose if she finds that other serious reasons justify the party's refusal.³⁰

Parties may request early or immediate production of evidence,³¹ such as expert analysis, compulsory exhibition of documents and objects, and witness examination, in situations where their rights may be harmed during the course of time taken by the ordinary process.³²

VI USE OF EXPERTS

Expert evidence may be used to prove several aspects of private claims, such as relevant markets and market shares, the overcharges or amount of damages including lost profits, and, crucially, whether the defendant's conduct lessened competition, and, thus caused antitrust injury pursuant to article 20 of the Antitrust Act in cases of standalone actions.

Following a justified request for expert evidence by any party, courts appoint an impartial expert who must have specialised knowledge in the field in question and must present unbiased, scientific opinion. Both plaintiffs and defendants submit questions to be answered in a written opinion by the impartial expert and may name assistant experts to assess the independent expert opinion and, if necessary, present a totally or partially divergent opinion. Judges, nonetheless, are not bound either by the court-appointed expert opinion or assistant expert opinions and may reach a final decision based on the other produced pieces of evidence.³³

VII CLASS ACTIONS

Two types of collective actions may be filed to halt or remedy anti-competitive practices: collective actions for defence of 'homogeneous individual rights' and public civil actions. The former aims at obtaining injunctive relief or monetary damages (or both) for a class of plaintiffs, besides specific behavioural or structural remedies. The latter aims at halting or remedying illegal conduct that affects collective or diffuse interests, not specifically individualised.

Collective actions for defence of homogeneous individual rights may be filed by trade associations, the PPO, the Union, the states, municipalities, the Federal District, administrative agencies or departments. Following the filing, courts publish a notice in the official gazette to interested parties to intervene and join the plaintiffs. Parties that have already filed individual actions may request that their actions be stayed to wait for the final decision of the collective action, which will be binding with regard to their claims only if it is decided in favour of plaintiffs. Otherwise, the individual processes are resumed. The PPO shall join collective actions since the action has a social dimension

30 *Id.*, Article 363.

31 *Id.*, Article 798.

32 *Id.*, Articles 844 to 851.

33 *Id.*, Article 436.

that extends beyond aggregation of individual claims, aiming also at remedying the violation of the law.

In such collective actions for monetary damages, courts issue a general and broad ruling establishing that defendants must pay monetary damages (e.g., for overcharges imposed) to injured parties according to the extent of the injury individually suffered, which shall be subsequently calculated and recovered through the specific procedure of liquidation.³⁴

Following the general ruling in favour of plaintiffs, any injured party may file an action for liquidation of damages individually suffered. In the liquidation procedure parties must prove the amount of damages and the causal relation between the damages and the antitrust violation.

Importantly, any of the representatives mentioned above may liquidate monetary damages not claimed by individual firms after one year from the decision against the defendants. In this case, defendants must pay the compensation to a public fund.

Public civil actions³⁵ are often filed either by consumer associations³⁶ or the Public Prosecutor's Office ('PPO'), although the Union, the states, municipalities, the Federal District and administrative agencies or departments also have standing. Plaintiffs in public civil actions cannot recover monetary damages, although defendants may be ordered to pay compensation to a public fund in order to redress the harm.

Recently, CADE's president indicated that CADE also might start to file follow-on collective actions in cartel cases. Finally, Congress is considering a bill to establish a Code of Collective Actions which might introduce US-style class actions.

VIII CALCULATING DAMAGES

Damages shall reflect the actual extent of the injury³⁷ caused by defendant's antitrust violations.³⁸ Multiple damages are not awarded in antitrust cases. Corrective justice is a founding principle of Brazilian law, though it has increasingly embraced deterrence as a legitimate goal as indicated in recent decisions adding punitive damages to judgments.

Currently, plaintiffs in antitrust actions may claim damages for:

- a* past and present actual losses;
- b* reasonable lost profits according to a 'pre-post' approach, including projected sales and estimated growth; and
- c* injury to plaintiff's reputation, goodwill and image

Plaintiffs have the burden of proving that the anti-competitive conduct was an 'important'³⁹ or 'efficient'⁴⁰ cause of the damages. When defendants prove the harm was also caused by

34 *Id.*, Articles 95 to 98.

35 See Act 7,347/1985.

36 See Section IV, *supra*.

37 Article 944 of the Civil Code.

38 Article 29 of the Antitrust Act.

39 STJ, Case No. REsp 102.231.

40 TRF4, Case No. 2000.04.01.004115-1.

the plaintiff's fault, courts shall weigh the defendant's conduct and plaintiff's fault when deciding the amount of damages.⁴¹ Courts have yet to detail the measure of damages for overcharges, single-firm conducts, and exclusionary practices.⁴²

Successful plaintiffs are awarded court costs, lawyers' fees, interest on actual damages and, post-judgment interest. With the exception of collective action plaintiffs,⁴³ losing parties bear the burden of litigation costs and statutory lawyer's fees.

IX PASS-ON DEFENCES

There is no statutory provision or judicial decision barring defendants from asserting pass-on defences, despite the arguably positive effects of such a determination on deterrence and consumer welfare, when combined with a ban on indirect purchasers actions.⁴⁴

Nevertheless, pursuant to the rule established by the Code of Civil Procedure, defendants bear the burden of proving facts that impede, alter or extinguish a plaintiff's claimed right.⁴⁵ Therefore, in order to successfully assert a pass-on defence, defendants must prove that plaintiffs have effectively passed on the claimed overcharges.

Consequently, direct purchasers may recover full damages if they prove both the antitrust violation and actual payment of overcharge and defendants fail to produce evidence that plaintiffs have passed it on.

Indirect purchasers, which have possibly borne part of or the entire overcharge, may intervene or subsequently sue the successful plaintiffs and recover their share of the damages collected.⁴⁶ Indirect purchasers always bear the burden of proving that damages have flowed through the chain.

X FOLLOW-UP LITIGATION

Apart from considering opinions from the SEAE and the SDE and findings made by CADE as 'unequivocal evidence' of the anti-competitive practices, for the purposes

41 See, for example, the law on unlawful enrichment by public officials, which establishes a penalty of three times the amount illicitly obtained (Act 8,429/1992).

42 See, for example, Sections of Antitrust Law, International Law and Business Law of the American Bar Association, Joint Comments of the American Bar Association Section of Antitrust Law, Section of International Law, and Section of Business Law on the Commission of the European Communities' White Paper on Damages Actions for Breach of the EC Antitrust Rules (2008), pp12-15.

43 Article 87 of the Code of Consumer Protection.

44 See William M Landes & Richard A Posner, 'Should Indirect Purchasers Have Standing to Sue Under the Antitrust Laws? An Economic Analysis of the Rule of Illinois Brick', 46 *U Chi L Rev* 602 (1979); William M Landes & Richard A Posner, 'The Economics of Passing On: A Reply to Harris and Sullivan', 128 *U Pa L Rev* 1274 (1980).

45 Article 333(II) of the Code of Civil Procedure.

46 Article 56 of the Code of Civil Procedure; Article 272 of the Civil Code.

of granting plaintiffs injunctive relief,⁴⁷ courts have not fully developed a doctrine concerning private litigation following administrative adjudication. However, in view of Article 29 of the Antitrust Act, the broad interpretation in effect of Article 5 (XXXV) of the Brazilian Constitution and the general rules of evidence established in the Code of Civil Procedure, some scenarios seem to be clear.

First, in cases in which CADE has found that defendants violated antitrust laws, courts must consider the administrative ruling as sufficient evidence of the anti-competitive practice and the plaintiff's burden of proving the antitrust violation will be manifestly met. Nevertheless, courts may allow defendants to assert arguments derived from new and previously unknown facts.⁴⁸ In every case, private plaintiffs must present evidence that they were in fact injured by the antitrust violation proved in the administrative process and liquidate the appropriate damages.⁴⁹

Second, in cases in which CADE has entered judgment in favour of the defendant, private plaintiffs may be allowed to reassert and relitigate all the issues in court pursuant to Article 5 (XXXV).⁵⁰ However, courts are expected to consider and weigh the administrative findings as important evidence, balancing them against the arguments or new evidence presented by the plaintiffs.

Third, in cases in which a CADE ruling against the defendants has been reversed by a final decision of a federal court,⁵¹ the Superior Court of Justice or the Supreme Court, plaintiffs will still be able to bring a private action provided that the administrative decision has been reversed on procedural grounds.

Finally, private actions do not need to rely on a prior finding of an infringement by the antitrust authorities.⁵² Courts adjudicating actions for damages in the course of administrative proceedings, however, may admit evidence produced in the administrative process provided that it has been produced according to rules of the adversarial system.

In conclusion, courts must consider the SDE's and CADE's rulings as pivotal and unequivocal evidence of the anti-competitive practices, although administrative findings are not a precondition for private actions.

Under the current Brazilian leniency programme, applicants may be granted immunity from administrative penalties and criminal prosecution,⁵³ but not from civil actions for recovering damages attributable to the anti-competitive scheme. Equally, administrative consent orders that halt or extinguish the administrative process⁵⁴ do not grant immunity from private actions or mitigate civil liability.

47 *Cobraço Group v. ArcelorMittal*, see Section I *supra*.

48 Article 397 of the Code of Civil Procedure.

49 *Id.*, Article 475-E.

50 Article 5 (XXXV) establishes that 'the law shall not exclude from judicial examination violations or threat of violations of a right'.

51 Federal courts of first instance and regional federal courts of appeal.

52 The Constitution of the Federal Republic of Brazil, Article 5 (XXXV) and Article 29 of the Antitrust Act.

53 Articles 35-B and 35-C of the Antitrust Act.

54 *Id.*, article 53.

XI PRIVILEGE

Under Brazilian law, a lawyer's files, data, post, communications, including phone calls, call logs, emails and other electronic communications relating to lawyer work are inviolable.⁵⁵ Communications between lawyer and client are privileged and confidential,⁵⁶ including communications between foreign clients and Brazilian lawyers.⁵⁷

Lawyers who counsel or have counselled parties shall refuse and be excused from testifying about facts related to clients' matters.⁵⁸

Lawyer's offices may not be raided unless ordered by a court of law⁵⁹ in cases in which the lawyer's conduct is the object of the investigation.⁶⁰ In any case, raids must be followed and overseen by a representative from the Brazilian Bar Association and information concerning clients must be safeguarded by authorities and shall not be used or disclosed for any purposes, except for information regarding clients also being formally investigated as participants or conspirators in the lawyer's conduct which motivated the raid.

Moreover, lawyers are prohibited from disclosing any information or communication obtained as a result of rendering legal services.⁶¹

Although provisions regarding lawyer–client privilege are broad and its logical and teleological interpretation would provide for the protection of lawyer work product from discovery, courts still have to develop an informative case law concerning the precise extent of the privilege.

The lawyer–client privilege may be deemed waived when information is voluntarily disclosed to governmental authorities or agencies, except when confidentiality is requested and explicitly granted by the governmental authority, according to the limits established by the applicable statutes.

XII SETTLEMENT PROCEDURES

Disputes by private parties concerning the amount of monetary damages derived from antitrust violations may be settled before or during the course of the judicial process. In the latter case, parties must present the settlement agreement in court to be homologated

55 Article 7(II) of Act No. 8,906/1994 (Attorneys and Brazilian Bar Association Act), as amended by Act No. 11,767/2008.

56 STF Cases No. MS 23452/RJ; MS 23864 MC/DF.

57 STF Cases No. MS 25005/DF.

58 See Article 7(II) and (XIX) of the Attorneys and Brazilian Bar Association Act; Supreme Court Cases No. HC 71231/RJ; HC 86429/DF.

59 See Article 7(II) of the Attorneys and Brazilian Bar Association Act, as amended by Act No. 11,767/2008.

60 See Article 7, Section 6 of the Attorneys and Brazilian Bar Association Act, as amended by Act No. 11,767/2008.

61 Articles 25 to 27 of the Code of Ethics and Discipline of the Brazilian Bar Association.

by the judge, and, thus, conclude the civil litigation.⁶² In general, courts accept settlements without analysing their merits.

Pursuant to the Code of Civil Procedure, judges shall schedule a preliminary hearing, before determining which questions of fact must be proven by the parties, and mediate a settlement agreement.⁶³

When a settlement agreement does not provide for litigation costs and lawyers' fees, the judge shall divide them equally.⁶⁴

Parties can either declare or recognise the others' rights, but are not allowed to transfer rights through settlement agreements.⁶⁵ Claims filed before the SEAE, SDE or CADE may not be object of private settlement agreements. Administrative authorities must proceed with the investigations when there is evidence of anti-competitive conduct, in spite of settling by private parties that may be notified by the SDE to provide information or testify.

Public civil actions or collective actions for defence of homogenous individual rights may be settled through a private agreement provided that the agreement effectively remedies the infringement and is, therefore, sanctioned by the PPO since such actions also aim at protecting comprehensive social and individual interests (*ultra partes*).

XIII ARBITRATION

Essentially, parties may not limit or extinguish either their general antitrust liability or applicable remedies through arbitration clauses or arbitral awards. Article 1 of the Antitrust Act establishes that society is entrusted with the rights protected therein. Thus, private parties may not limit antitrust liability through private agreements. Collective claims may not be resolved by arbitration due to their social dimension and the mandatory participation of the Public Prosecutor's Office. Only individual antitrust claims for monetary damages may be subject to arbitration.

XIV INDEMNIFICATION AND CONTRIBUTION

Plaintiffs may sue any of the participants in an antitrust violation and shall not be required to litigate against all of them.⁶⁶ The party sued by the plaintiff is severally liable and, thus, must pay full compensation for the harm caused by the joint conduct.⁶⁷

A party that has provided compensation for damages caused entirely or in part by others, nevertheless, has the right to sue for indemnification.⁶⁸ Additionally, there are no limitations on seeking contributions from participants in an antitrust conspiracy.

62 Article 269 (III) of the Code of Civil Procedure.

63 *Id.*, Article 331.

64 *Id.*, Article 26, Section 2.

65 Article 840 of the Civil Code.

66 *Id.*, Article 275.

67 *Id.*, Article 942.

68 Article 934 of the Civil Code.

An elected defendant may seek contribution from other participants in the anti-competitive scheme, either by filing a subsequent action or by giving them legal notice of the lawsuit during the period for presenting its answer.⁶⁹ In the latter case, the defendant will remain severally liable, but the decision will establish the amount of damages paid in excess, to be collected from the notified participants.⁷⁰

XV FUTURE DEVELOPMENTS AND OUTLOOK

The antitrust authorities are currently conducting nearly three hundred cartel investigations, several of which may lead to private actions for damages. As the number of actions increases and firms internalise their costs, private enforcement might substantially enhance deterrence. However, the Antitrust Act should be amended to limit the civil liability of successful applicants to the leniency programme, in order to avoid undermining it.⁷¹

With regard to single-firm conducts, although private parties still file most of their claims before the antitrust authorities, there is an inevitable trend toward filing antitrust actions directly before the judiciary for three main reasons. First, claims filed before the SEAE, SDE or CADE may not be settled through private agreements. Second, courts have started to develop case law and increase both legal certainty and private parties' confidence in judges' ability to assess economic evidence and properly enforce antitrust laws. Third, as a matter of law antitrust authorities' decisions are always subject to comprehensive judicial review by courts which may review the administration's findings of fact and law due to Article 5 (XXXV) of the Brazilian Constitution. Consequently, orders and rulings issued by either the SDE or CADE are often challenged and end up in courts anyway. As a result, an increasing number of antitrust claims challenging unilateral conduct are expected to be brought directly before the judiciary.

69 Articles 77(II), 78 of the Code of Civil Procedure.

70 *Id.*, Article 80.

71 See Commission of the European Communities, White Paper on Damages Actions for Breach of the EC Antitrust Rules (2008); Andrea Renda (ed.) *et. al.*, 'Making Antitrust Damages Actions More Effective in the EU: Welfare Impacts and Potential Scenarios', Report for the European Commission (2007); Sections of Antitrust Law, International Law and Business Law of the American Bar Association, Joint Comments of the American Bar Association Section of Antitrust Law, Section of International Law, and Section of Business Law on 'The Commission of The European Communities' White Paper on Damages Actions for Breach of the EC Antitrust Rules (2008); the United States Antitrust Criminal Penalty Enhancement and Reform Act of 2004.

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Bruno L Peixoto received his master of laws (LLM) degree from the University of Chicago Law School, is Vice-Chair of the International Antitrust Law Committee of the American Bar Association, Section of International Law, and head of the antitrust practice group of Lanna Peixoto Advogados.

Mr Peixoto successfully filed the first private actions in Brazilian legal history for damages caused by cartelisation, including the first collective actions. He has extensive experience in complex and multi-faceted antitrust litigation, having represented companies from a variety of industries in investigations concerning cartelisation and unilateral conduct before CADE and the SDE and obtained landmark decisions in actions in federal and state courts.

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