GCR INSIGHT

PRIVATE LITIGATION GUIDE

Editors
Nicholas Heaton and Benjamin Holt

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Brazil Overview

Cristianne Saccab Zarzur, Marcos Pajolla Garrido and Carolina Destailleur G B Bueno[1]

Private litigation in Brazil

As in other jurisdictions, the existence of a consistent public enforcement policy in Brazilian antitrust practice has played an essential role in the deterence of cartels. On a parallel basis, the development of private litigation initiatives has also become an important tool to strengthen enforcement of competition laws, complementing administrative deterrence.

In 2018, the Peer Reviews of Competition Law and Policy in Brazil, developed by the Organisation for Economic Co-operation and Development (OECD), described that while the fundamental elements of a successful private enforcement legislative framework are in place in Brazil, private actions are not a guaranteed consequence of public enforcement.[2] This is a fact, given that private litigation practice is still incipient in Brazil. Nevertheless, relevant developments in the past few years have fostered activity in this field.

The present chapter provides an overview of the development of private litigation in Brazil and is mainly divided into the following sections: the legal framework; private litigation in practice; relevant procedural aspects, such as territoriality, time and costs, eligible persons and evidence; and challenges and trends ahead.

1 Cristianne Saccab Zarzur is a partner, Marcos Pajolla Garrido is a senior associate and Carolina Destailleur G B Bueno is an associate at Pinheiro Neto Advogados.

2 OECD (2019), OECD Peer Reviews of Competition Law and Policy: Brazil www.oecd.org/daf/competition/oecd-peer-reviews-of-competition-law-and-policy-brazil-2019.htm.

Legal framework

The Brazilian Competition Act (Law No. 12,529/2011) establishes that injured parties may defend their individual or diffuse interests in court by way of measures intended to cease anticompetitive practices, and to seek redress for losses and damages suffered, irrespective of an administrative proceeding or inquiry to that effect, which will not be stayed in view of the lawsuit thus filed.[3]

Private lawsuits are also governed by the Brazilian Civil Code (Law No. 10,406/2002) and the Brazilian Civil Procedure Code (Law No. 13,105/2015), and those that occur by means of class actions are also governed by several other laws and regulations, such as the Brazilian Consumer Protection Code and the Public Class Actions Law.

There have been recent developments in this legal framework. First, the Brazilian Competition Authority (CADE) has issued Resolution No. 21/2018 to foster private litigation. It clarifies the procedures for interested parties to access documents and information obtained by CADE in its investigations of alleged anticompetitive conduct (including those arising from leniency agreements, settlement agreements and dawn raids).

Second, in 2018 SEPRAC, part of the Brazilian Treasury Ministry and responsible for promoting competition advocacy in Brazil, issued guidelines with detailed economic methodologies to detect cartels and quantify damages and overcharges (SEPRAC guidelines).

Finally, Bill of Law No. 11,275/2018 (former Senate Bill of Law No. 283/2016) proposed changes to certain provisions of the Brazilian Competition Act related to the deterrence of anticompetitive practices. It includes relevant mechanisms to foster private enforcement and acknowledges that, although CADE's final decision on alleged anticompetitive practices is not binding on the judiciary, it does have relevance to the court decision in related private litigation. Bill of Law No. 11,275/2018 is currently under consideration by the Constitution, Justice and Citizenship Commission at the Senate and shall be approved by the President soon.

Private litigation practice in Brazil

Private litigation is a recent and still incipient practice in Brazil. The first private claim seeking redress for damage caused by a cartel occurred in the context of the *Long Steel* cartel case[4] in 2006. The action was filed before the Minas Gerais State Court of Justice by the Cobraco Group against ArcelorMittal. As a result, the Cobraco Group obtained an injunction compelling ArcelorMittal to adopt the same prices practiced before the cartel period (adjusted by inflation).

In 2010, CADE started to take measures to encourage parties to file claims seeking damages in court. These measures included disclosing CADE decisions to third parties. In the *Industrial Gases* cartel case,[5]him for the first time CADE expressly recommended that a copy of the decision be sent to third parties whose interests could have been negatively affected by the conduct. In response, many of those parties claimed for damages in courts throughout the country. After that, many of the decisions issued by CADE's Administrative Tribunal included this recommendation and affected third parties commenced private claims for damages (both stand-alone and follow-on litigation).

3 This provision was already part of the former Competition Act, Law No. 8,884 of 1994.

4 Administrative Proceeding No. 08012.011142/2006-79, decided by CADE's Administrative Tribunal on 28 May 2014.

5 Administrative Proceeding No. 08012.009888/2003-70, decided by CADE's Administrative Tribunal on 1 September 2010.

In 2016, the Superior Court of Justice (STJ) issued a landmark decision, determining that CADE should disclose confidential documents originating from a leniency agreement signed in the context of a global cartel, the *Compressors* cartel case,[6] when deciding a lawsuit filed by direct purchasers of compressors for refrigeration. The rationale behind the decision issued by the STJ was that the documents would be important for damage claims and that their disclosure would be important to provide grounds to demonstrate the harm caused to third parties. In addition, according to the STJ, the immunities and benefits from leniency would be limited to the administrative and criminal spheres and there would be no legal grounds to extend them to the civil sphere to benefit leniency applicants.

On CADE's appeal in 2018, the court clarified that the disclosure should respect commercial secrets and relevant information for competitive purposes, and should only occur after a final ruling by CADE's Tribunal. The final wording of CADE's Resolution No. 21/2018, which is currently in place, is in line with the 2018 STJ's decision, and represents an important clarification of the limits and procedures for the disclosure of documents originating from agreements reached with CADE.

As a result of these improvements, both in terms of legal framework and practical incentives, the OECD recently recognised in its Peer Reviews of Competition Law and Policy Brazil that, in recent years, CADE has made notable efforts to promote more private actions through the publication of more detailed decisions, accompanied by efforts to inform potential injured parties about the infringement so that they may assert their rights against the companies involved in the infringement.[7] In 2018, settlement agreements (cease-and-desist agreements) signed by defendants with CADE in the context of Operation Car Wash included for the first time specific provisions establishing an additional discount to the pecuniary contribution to be paid by the defendant, if there are damages paid to injured victims.[8]

There is still a long way to go until Brazil reaches a mature state of development in this area. According to public research carried out by one of the working committees of the Brazilian Institute for Competition, Consumer Affairs and International Trade Studies (IBRAC), only 86 damages claims for cartel conduct were identified between 1994 and June 2017. Thirty-one of these claims related to investigations conducted at the CADE level (follow-on litigation).[9] The number is very low, especially considering that since the Brazilian Competition Act came into effect in 2012, there have been more than 60 convictions in cartel cases considered by CADE, involving hundreds of companies and individuals.[10] In this sense, the OECD report also

6 Administrative Proceeding No. 08012.000820/2009-11, decided by CADE's Administrative Tribunal on 16 March 2016.

7 OECD (2019), OECD Peer Reviews of Competition Law and Policy: Brazil www.oecd.org/daf/competition/oecd-peer-reviews-of-competition-law-andpolicy-brazil-2019.htm.

8 Public release available at: http://www.cade.gov.br/noticias/cade-celebra-acordos-em-investigacoes-da-lava-jato.

9 DRAGO, Bruno. Presentation on the panel 'Damages Claims In Brazilian Antitrust: Defining The Borders Between Fighting Cartels And The Leniency Program', which occurred on 24th International Seminar on Competition Policy promoted by IBRAC, 24 October 2018.

10 Ibidem. Source: 'CADE in Numbers' and CADE's Balances from 2012–2015, available on the authority's website.

highlights that in 2017, there were 15 administrative proceedings resulting in either convictions, cease-and-desist orders or leniency agreements, while private claims were verified for only seven of them.

Relevant procedural aspects

Territoriality

The Brazilian Competition Act establishes that, without prejudice to any agreements and treaties to which Brazil is a party, its provisions apply to acts that are wholly or partially performed within the Brazilian territory, or that produce or may produce effects in Brazil.[11] Therefore, an antitrust investigation can be started and private claims can be filed against companies that participated in anticompetitive practices carried out in Brazil, or abroad if the practices produced effects in Brazil. The first private litigation case involving a global cartel case was the *Compressors* cartel case, ruled on by STJ, as described above.

Resolution CADE No. 21/2018 also includes a specific provision for the disclosure of documents in the context of international cooperation. In this hypothesis, CADE and the lenient applicant (or cease-and-desist applicant) must first authorise this exceptional case of disclosure.

Eligible persons

Private antitrust lawsuits in Brazil can take the form of individual private action, class actions, or public civil actions.

Any affected individual or company may bring a private action for the redress of damage arising from anticompetitive practices.

Class actions are an alternative that allows individuals and companies with individual homogeneous rights resulting from the anticompetitive conduct to go to court collectively (although the reparation of damages will be individual), represented by the following persons:[12]

- the public prosecutor's office;
- the federal government, federal district, states and municipalities;
- entities and bodies from public direct or indirect administration[13] charged with the protection of consumer rights, the economic system or free competition; and
- an association established for at least one year to engage, among other institutional purposes, in the protection of consumer rights, the economic system or free competition.

Private litigation related to damage arising from anticompetitive conduct may also be brought by means of public civil actions, which aim to protect collective rights and may be commenced by the following persons, representing the interests of those affected by anticompetitive conduct:[14]

- the public prosecutor's office;
- the public defender's office;
- the federal government, federal district, states and municipalities;

11 Article 2, Law 12,529/2011.

12 Article 82 of the Brazilian Consumer Defense Code – Law No. 8,078/90.

13 'Indirect administration' refers to entities with their own legal identity but that carry out public administrative functions in an autonomous manner, such as municipalities and public foundations.

14 Article 5 of Law No. 7,347/1985.

- independent government entities, government-owned companies, foundations and mixed-capital companies; and
- an association established for at least one year to engage, among other institutional purposes, in the protection of consumer rights, the economic system or free competition.

The damages in public civil actions are paid to the state on behalf of the collectively harmed parties.

According to the OECD Peer Reviews of Competition Law and Policy Brazil, state and federal prosecutors' offices have been responsible for the majority of civil suits seeking collective redress, most of which have related to consumers' rights complaints.

According to the research of the IBRAC's Working Committee, referred to above, CADE participated as an assistant in a single claim, arguing that the discussions in the other actions would involve particular interests and not collective rights.[15]

Timing and costs

A private claim for the redress of damages caused by a cartel may be proposed as a result of an administrative investigation (follow-on litigation) or related to a conduct that is not yet subject to administrative scrutiny (stand-alone suits). For conduct under investigation in both administrative and civil spheres, it is worth noting that a private claim will be a completely independent proceeding.

Accordingly, a private lawsuit does not depend on the existence of an administrative proceeding or an administrative decision. The existence of a private lawsuit, in turn, does not alter the course and timing of the administrative proceeding.

With regards to the timing for commencing a private claim, the limitation period is three years for private actions[16] and five years for public civil actions.[17] There are important discussions underway to define when the limitation period should commence. According to the OECD, if the limitations periods runs from the time a news report emerges of a leniency application, that may discourage private claimants, with limited information to meet the requirements for filing a claim, who may decide not to seek damages, owing to the possibility of a negative decision and the costs involved.

To provide more clarity and certainty to the statute of limitations, Bill of Law No. 11,275/2018 suggests the following amendments to the Brazilian Competition Act: a limitation period of five years, as from the moment in which unequivocal knowledge of the conduct is available (i.e., the moment in which a final administrative or criminal decision is published); and the suspension of the limitation period for civil claims while the administrative proceedings are ongoing.

15 DRAGO, Bruno. Presentation on the panel 'Damages Claims In Brazilian Antitrust: Defining The Borders Between Fighting Cartels And The Leniency Program', which occurred on 24th International Seminar on Competition Policy promoted by IBRAC, 24 October 2018.

16 For private actions, the term is three years according to Article 206, §3º, V, of the Brazilian Civil Code. Depending on the case, the term may be 10 years, following the general rule established in Article 21 of the Brazilian Civil Code.

17 For public civil actions, the term is five years (analogue application of Article 21 of Law No. 4,717/65).

The costs and time incurred in litigating in Brazil may also discourage affected third parties from seeking redress in the courts. From the beginning of a private claim until a final decision is rendered, a lawsuit may take, on average, 10 to 15 years. Bill of Law No. 11,275/2018 aims at speeding up private litigation by providing that CADE's decisions should be taken into consideration by courts.

Besides paying for their expenses in the course of the private claim, defeated parties must pay court costs and expenses, plus statutory attorneys' fees, which amount to 10 to 20 per cent of the value of the claimed damages (except in public class actions).

Evidence

Burden of proof and sources of evidence

To file a private claim in Brazil, a party must demonstrate the existence of anticompetitive conduct; the existence of damage to be redressed; and causal relationship between the misconduct and the damage. The Brazilian legal system allows the parties to rely on several means of proof as evidence for each of these elements.

Accordingly, the Brazilian Civil Procedure Code provides for a non-binding list with certain possible means of proof, stating that allegations may be grounded in 'all legal means, as well as morally legitimate ones'.

Before or during the lawsuit, the judge may also order, on his or her own initiative, or at the party's request, that additional documents be produced and that certifications or records of an administrative proceedings are provided by other government entities – see below.

As in other jurisdictions, the burden of proof in Brazil usually lies with the claimant. Nevertheless, there is an exception in consumer law, under which the burden of proof may be reversed to the defendant, on the basis that consumers may sometimes be legally, economically or technically vulnerable and have limited access to the relevant evidence related to the alleged conduct. And this provision also applies to claims by consumers seeking damages for antitrust violations.

Expert opinions are usually an important means of proof in private litigation, given the complexity of technical issues related to the market, and are required to define whether the anticompetitive conduct occurred and to calculate the damages.

CADE's final decision in an anticompetitive conduct investigation is an administrative decision that may be reviewed in court and therefore is not binding on the judiciary. Nevertheless, together with other pieces of evidence, CADE's decision may be an important factor in a judicial decision in a private claim (see the discussion on Bill of Law No. 11,275/2018, above). The IBRAC's Working Committee's research, mentioned above, identified that, although judges are not bound by administrative decisions, CADE decisions have been taken into consideration in private claims. The decision in the administrative investigation, therefore, may be valuable evidence in private litigation.[18]

18 DRAGO, Bruno. Presentation on the panel 'Damages Claims In Brazilian Antitrust: Defining The Borders Between Fighting Cartels And The Leniency Program', which occurred on 24th International Seminar on Competition Policy promoted by IBRAC, 24 October 2018.

Disclosure of documents and information by CADE

As described above, a judge in a private claim may request government entities (such as CADE) to provide documents obtained in an administrative proceeding. There is no doubt that these documents may be relevant evidence in private litigation to demonstrate the existence and extent of damage. Nevertheless, since these documents may have been obtained by CADE in the context of leniency agreements, settlement agreements and dawn raids, it is necessary to exercise great caution in the definition of the limits of such disclosure to preserve the attractiveness of CADE's leniency and settlement agreement programmes, which are essential for CADE's policy to deter cartels.

The STJ's decision in 2016 providing that CADE should disclose confidential documents originating from a leniency agreement signed in the *Compressors* cartel case (as discussed above) brought special attention to this discussion. After CADE's appeal against the STJ's decision, and the issuance of a draft resolution on the subject by CADE, there have been several developments on the disclosure of documents and information by CADE.

In 2018, the STJ clarified its decision, holding that the disclosure should respect business secrets and relevant information for competitive purposes, and only occur after a final ruling by CADE's tribunal. Based on that ruling, CADE issued Resolution No. 21/2018, which specifies the procedures for, and limitations on, the disclosure of information and documents obtained by CADE in an administrative investigation. The Resolution sets out a list of documents that are excepted from disclosure, including the conduct history (i.e., confessions and admissions), and business secrets and relevant information for competitive purposes. It also provides that the public prosecutor's office that participates in leniency agreements may have access to all documents provided by the signatory company, which may be used in private litigation or a criminal investigation; and that confidential documents lose their confidential status when CADE's Administrative Tribunal issues its final decision in the case.

Calculating damages

Determining the extension of the damage to be redressed is an essential step in private litigation. At the same time, given the information asymmetry between the parties, calculating damages is not a simple task.

The SEPRAC Guidelines provides a detailed analysis of certain economic tools and methodologies that can be adopted in private litigation, including the quantification of overcharges resulting from cartels and the passing-on of overcharges. It brings international experience, comparative methods, as well as methods based on the structure of the companies and markets in which they are active.

With regards to the passing-on of overcharges, the legal framework provided in the Consumer Protection Code determines that private litigation does not require the existence of a direct relationship between the injured parties and the defendants, imposing joint liability on the manufacturer, builder, importer or assembler. In indirect purchaser cases, for instance, final consumers may sue a supplier of intermediate goods engaged in an anticompetitive conduct.

The pass-on defence is available in Brazil, and defendants can and do argue that the cartel overcharges were transferred down the value chain and, therefore, that eventual damages were mitigated by the pass-on. Chances of success in a pass-on defence strategy may be questionable.

Coordinating administrative penalties and private damages is extremely important to guarantee an effective antitrust enforcement framework, capable of deterring anticompetitive conduct and entitling victims to seek the redress of damage caused by the conduct. In 2018, agreements signed with CADE in Operation Car Wash included, for the first time, a specific provision establishing an additional discount to the pecuniary contribution if the defendant agreed to pay damages to affected parties.

Arbitration

The Competition Act does not provide any guidance on whether antitrust claims would qualify for alternative dispute resolution mechanisms, such as arbitration. Arbitration in Brazil is governed by Law No. 9,307/1996, which determines that only discussions around disposable economic rights qualify for arbitration. The controversy around this provision is that antitrust discussions involve both public rights (related to the harm caused by the conduct to society) and economic rights (related to the damage caused to companies and individuals).

Some authors and practitioners[19] argue that the economic rights related to damage caused to companies and individuals could qualify for arbitration. Under this approach, arbitration could be an alternative to private litigation with several advantages, namely, confidentiality; the precision and technical quality of the decision issued by a specialised arbitrator; and the speed of the process.

Following this rationale, Bill of Law No. 11,275/2018 includes a provision establishing that settlement agreements that acknowledge participation in the investigated conduct shall include the obligation that the applicant in the agreement will submit to arbitration any cases for damages if the claimant requests or expressly agrees with the referral to arbitration. This provision may already be found in some of the settlement agreements recently negotiated with CADE and homologated by the authority's Administrative Tribunal.[20]

Challenges and trends

Recent developments in Brazil demonstrate a concern to foster private litigation, and build a deterrence policy that combines public and private enforcement, in line with other more mature jurisdictions.

There are still challenges that mean that private litigation is in its early stages in Brazil. First, there are the costs and delay in litigating in the Brazilian courts, which discourages affected third parties from seeking redress. Procedural difficulties in proving the conduct, a causal relationship between the conduct and the damage, and quantifying the damage may also hinder legitimate claims for damages resulting from an anticompetitive practice. Since CADE's decisions are not binding on the judiciary, parties to a lawsuit can challenge every piece of evidence.

In addition, competition issues usually involve complex economic discussions that are generally not familiar to courts, which may compromise the technical quality of decisions in competition private litigation cases. Finally, considering that the parties affected by the conduct

19 Dantas, Yane Pitangueira. 'A Arbitragem como Meio Alternativo na Resolução de Demandas Indenizatórias Decorrentes da Prática de Cartéis e a Minuta de Resolução do CADE submetida à Consulta Pública 05/2016'. Revista de Direito da Concorrência, Vol. 5, No. 1, May 2017, page 241.

20 Public release available at: http://www.cade.gov.br/noticias/cade-celebra-acordos-em-investigacoes-da-lava-jato.

usually have a commercial relationship with the cartel members, there is a retaliation risk and the danger that there will be a rupture of this commercial relationship. Probably for these reasons, according to the submission of Brazil to OECD (2015), Brazil in general still lacks a strong culture of claiming damages.

In recent years, some changes in both the legal framework and litigation practice have contributed to the development of private enforcement in Brazil. Resolution 21/2018, SEPRAC Guidelines and Bill of Law No. 11,275/2018 provide for important mechanisms that create a safer environment for affected parties to defend their interests in court and quantify the damages caused by the anticompetitive conduct. In this context, private litigation, although still incipient, is on the increase.

At the same time, developments in the legal framework and precedents have clarified the procedures for, and limitations on, the access to documents and information obtained by CADE in administrative proceedings investigating anticompetitive practices (including those arising from leniency agreements, settlement agreements and dawn raids). These measures are especially important to guarantee that the disclosure of documents observes the limits necessary to preserve the attractiveness of CADE's leniency and settlement agreement programmes, which have been relevant and efficient tools for deterring, detecting and prosecuting cartels.

Appendix 1

About the Authors

Cristianne Saccab Zarzur
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Cristianne Saccab Zarzur is praised by the market as an excellent technical expert, and for her straightforward approach and commitment to clients' needs.

She has an extensive track record on highly sophisticated competition and antitrust cases, including merger control and filings, anticompetitive practices, compliance programmes, counselling on commercial contracts from an antitrust perspective, and indemnification law suits.

Other than being one of the most important competition lawyers in the world, she has accomplished much more than obtain professional awards, and the recognition of clients and peers. As a true female leader, she is an enthusiastic advocate of the empowerment of women, and she co-founded the firm's women's committee to organise initiatives that have impact on the everyday life of associates within the firm.

She has been a partner at Pinheiro Neto Advogados since 2006, having joined the firm in 1992. She has also worked as a foreign associate at antitrust law firm Howrey Simon Arnold & White LLC in Washington from 2000 to 2001. She holds a bachelor's degree in law from the Mackenzie Presbyterian University in São Paulo (1995) and has a specialist degree in economic law from the Getulio Vargas Foundation in São Paulo (2002).

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Private competition litigation has spread across the globe, raising specific, complex questions in each jurisdiction. The implementation of the EU Damages Directive in the Member States has furthered the ability of victims of anticompetitive conduct to seek compensation, even as US courts tighten the standards for forming a class action.

The *Private Litigation Guide* – published by Global Competition Review – includes a section exploring in depth the key themes such as territoriality, causation and proof of damages, that are common to competition litigation around the world. Part 2 contains invaluable summaries of how competition litigation operates in individual jurisdictions, in an accessible question-and-answer manner. Beyond the established sites such as the US, Canada, Germany, the Netherlands and the UK, experts lay out the scene for competition litigation in countries such as China, Mexico and Israel.

As the editors of this publication note, 'litigating antitrust or competition claims has become a global matter, requiring coordination among jurisdictions, and requiring counsel and clients to understand the rules and procedures in many different countries and how the approaches of courts differ as to key issues.'

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