THE PRIVATE COMPETITION ENFORCEMENT REVIEW

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Editor
Ilene Knable Gotts

THE LAWREVIEWS

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PREFACE

Private competition litigation can be an important complement to public enforcement in the achievement of compliance with the competition laws. Antitrust litigation has been a key component of the antitrust regime for decades in the United States. The US 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. The process imposes high litigation costs (both in terms of time and money) on all participants, but 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 create 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. Although these initiatives may, on the margin, decrease the volume of private antitrust litigation in the United States, the environment remains ripe for high levels of litigation activity, particularly involving intellectual property rights and cartels.

Until the last decade or so, the United States was one of the few outliers in providing an antitrust regime that encouraged private enforcement of the antitrust laws. Only Australia had been 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. Brazil provided another, albeit more limited, example: it has had private litigation arise involving non-compete clauses since the beginning of the 20th century, and monopoly or market closure claims since the 1950s. In the past decade, we have seen other regimes begin to provide for private competition litigation in their courts, typically, as discussed below, only after (i.e., as a 'follow on' to) public enforcement. In some jurisdictions (e.g., Argentina, Lithuania, Mexico, Romania, Switzerland and Venezuela), however, private actions remain very rare, or non-existent (e.g., Nigeria), and there is little, if any, precedent establishing the basis for compensatory damages or discovery, much less for arbitration or mediation. In addition, other jurisdictions (e.g., Switzerland) still have very rigid requirements for standing, which limit the types of cases that can be initiated.

The tide is clearly turning, however, with important legislation either recently having been adopted or currently pending in many jurisdictions throughout the world to provide a greater role for private enforcement. In Australia, for example, the government has undertaken a comprehensive review and has implemented significant changes to its private enforcement

law. The most significant developments, however, are in Europe as the EU Member States implement the EU's directive on private enforcement into their national laws. The most significant areas standardised in most EU jurisdictions involve access to the competition authority's file, the tolling of the statute of limitations period and privilege. Member States continue to differ on issues relating to the evidentiary effect of an EU judgment and whether fines should be factored into damages calculations. Even without the directive, many of the Member States throughout the European Union have increased their private antitrust enforcement rights.

The development of case law in jurisdictions also has an impact on the number of private enforcement cases that are brought. In China, for instance, the number of published decisions has increased and the use of private litigation is growing rapidly, particularly in cutting-edge industries such as telecommunications, the internet and standard essential patents. In Korea, private actions have been brought against an alleged oil refinery cartel, sugar cartel, school uniform cartel and credit card VAN cartel. In addition, the court awarded damages to a local confectionery company against a cartel of wheat flour companies. In contrast, in Japan, over a decade passed from the adoption of private rights legislation until a private plaintiff prevailed in an injunction case for the first time; it is also only recently that a derivative shareholder action has been filed. Moreover, in many other jurisdictions as well, there remain very limited litigated cases. For example, there have been a growing number of private antitrust class actions commenced in Canada; none of them have proceeded to a trial on the merits.

The English and German courts are emerging as major venues for private enforcement actions. The Netherlands has also become a preferred jurisdiction for commencing private competition claims. Collective actions are now recognised in countries such as 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 have taken steps to facilitate collective action or class-action legislation. In addition, in France, third-party funding of class actions is permissible and becoming more common. In China, consumer associations are likely to become more active in the future in bringing actions to serve the public interest.

Differences will continue to exist from jurisdiction to jurisdiction regarding whether claimants must opt out of collective redress proposals to have their claims survive a settlement (as in the UK), or instead must opt in to share in the settlement benefits. Even in the absence of class action procedures, the trend in Europe is towards the creation and use of consumer collective redress mechanisms. For instance, the Netherlands permits claim vehicles to aggregate into one court case the claims of multiple parties. Similarly, in one recent case in Austria, several parties filed a claim by assigning it to a collective plaintiff. Some jurisdictions have not to date had any private damages awarded in antitrust cases, but changes to their competition legislation could favourably affect the bringing of private antitrust litigation seeking damages. Most jurisdictions impose a limitation period for bringing actions that commences only when the plaintiff knows of the wrongdoing and its participants; a few, however, apply shorter, more rigid time frames without a tolling period for the commencement of damages or injunctive litigation. Some jurisdictions base the statute of limitations upon the point at which a final determination of the competition authorities is rendered (e.g., India, Romania, South Africa and Austria) or from when the agency investigation commences (e.g., Hungary). In other jurisdictions such as Australia and Chile, it is not as clear when the statutory period will be tolled. In a few jurisdictions, it is only after the competition authority acts that a

private action will be decided by the court. Of course, in the UK – an EU jurisdiction that has been one of the most active and private-enforcement friendly forums – it will take time to determine what impact, if any, Brexit will have.

The greatest impetus for private competition cases is the follow-up litigation potential after the competition authority has discovered – and challenged – cartel activity. In India, for instance, as the competition commission becomes more active in enforcement investigations involving e-commerce and other high-technology areas, the groundwork is being laid for future private antitrust cases. The interface between leniency programmes (and cartel investigations) and private litigation is still evolving in many jurisdictions, and in some jurisdictions it remains unclear what weight to give competition agency decisions in follow-on litigation private cases and whether documents in the hands of the competition agency are discoverable (see, e.g., Sweden). Some jurisdictions seek to provide a strong incentive for utilisation of their leniency programmes by providing full immunity from private damages claims for participants. In contrast, other jurisdictions, such as the Netherlands, do not bestow any benefit or immunity in a follow-on damages action. These issues are unlikely to be completely resolved in many jurisdictions in the near term.

There is one point on which there is almost universal agreement among jurisdictions: almost all 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. A few jurisdictions, such as the UK, however, are prepared to allow claims in their jurisdictions when there is a relatively limited connection, such as when only one of a large number of defendants is located there. In contrast, in South Africa, the courts will also consider spill-over effects from antitrust cartel conduct as providing a sufficient jurisdictional basis.

The litigation system in each jurisdiction to some extent reflects the respective perceptions of what private rights should protect. Most of the jurisdictions view private antitrust rights as an extension of tort law (e.g., Austria, Canada, France, Israel, Japan, Korea, Norway, the Netherlands and the UK), with liability arising for participants who negligently or knowingly engage in conduct that injures another party. Turkey, while allocating liability on the basis of tort law, will in certain circumstances award treble damages as a punitive sanction. Some jurisdictions treat antitrust concerns as a defence for breaching a contract (e.g., Norway and the Netherlands); others (e.g., Australia) value the deterrent aspect of private actions to augment public enforcement, with some (e.g., Russia) focusing on the potential for unjust enrichment by the defendant. In Brazil, there is a mechanism by which a court can assess a fine to be paid by the defendant to the Fund for the Defence of Collective Rights if the court determines the amount claimed as damages is too low compared with the estimated size and gravity of the antitrust violation. Still 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 permitting the enforcement officials to participate in a case (e.g., in Brazil, as well in Germany, where the competition authorities may act as *amicus curiae*).

Some jurisdictions believe that private litigation should only be available to victims of conduct that the antitrust authorities have already penalised (e.g., Chile, India, Turkey and Venezuela). Interestingly, no other jurisdiction has chosen to replicate the United States' system of routinely awarding treble damages for competition claims; instead, the overwhelming majority of jurisdictions take 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, as does Turkey). In Venezuela, however, the plaintiff can get unforeseen damages if the defendant has engaged in gross negligence or wilful misconduct, and in Israel, a court recently recognised the right to obtain additional damages on the basis of unjust enrichment law. Finally, in almost all jurisdictions, the prevailing party has some or all of its costs compensated by the losing party, discouraging frivolous litigation.

Cultural views also clearly affect litigation models. Outside the EU and North America, the availability of group or class actions varies extensively. A growing minority of jurisdictions embrace the use of class actions, particularly following a cartel ruling by the competition authority (e.g., Israel). Some jurisdictions (e.g., Turkey) permit group actions by associations and other legal entities for injunctive (rather than damages) relief. Jurisdictions such as Germany and 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 some jurisdictions (e.g., China, Korea and Switzerland), several claimants may lodge a collective suit against the same defendant if the claims are based on similar facts or a similar legal basis, or even permit courts to join similar lawsuits (e.g., Romania and Switzerland). In Japan, class actions were not available except to organisations formed to represent consumer members; however, a new class action law came into effect in 2016. In contrast, in Switzerland, consumers and consumer organisations do not currently have legal standing and cannot recuperate damages they have incurred as a result of an infringement of the Competition Act. In Poland, only entrepreneurs, not individuals, have standing to bring claims under the Unfair Competition Act, but the Group Claims Act is available if no administrative procedure has been undertaken concerning the same case.

Jurisdictions that are receptive to arbitration and mediation as an alternative to litigation (e.g., Germany, Japan, Korea, the Netherlands, Switzerland and Spain) also encourage alternative dispute mechanisms in private antitrust matters. Some courts prefer the use of experts and statements to discovery (e.g., in Chile; 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 that '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; pre-existing documents are not protected in Portugal; limited recognition of privilege in Germany and Turkey; and 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 by the Portuguese Competition Authority. Some jurisdictions view settlement as a private matter (e.g., France, Japan and the Netherlands); others view it as subject to judicial intervention (e.g., Israel and Switzerland). The culture in some jurisdictions, 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 pretrial settlement conference is mandatory.

As suggested above, private antitrust litigation is largely a work in progress in many parts of the world. Change occurs slowly in some jurisdictions, but clearly the direction is favourable to the recognition that private antitrust enforcement has a role to play. Many of the issues raised in this book, such as the pass-on defence and the standing of indirect purchasers, remain 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 change both through proposed legislative changes as well as court determinations. The one constant across almost all jurisdictions is the upward 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
February 2019

Chapter 6

BRAZIL

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

I OVERVIEW OF RECENT PRIVATE ANTITRUST LITIGATION ACTIVITY

Historically, Brazilian antitrust practice relied heavily on public enforcement. As a consequence, private antitrust litigation activity is still incipient in Brazil, although in recent years some turning points have contributed to enhance local practice in private antitrust enforcement. These turning points, an outline of judicial precedents and the local legislative framework served as an introduction for the current status of Brazilian private competition enforcement.

The former Competition Act[2] already set forth that injured parties could actively go to court to defend their individual or collective interests, to end anticompetitive practices and to seek redress of losses and damages, regardless of an administrative process, which would not be stayed by the filing of a lawsuit. This same provision is reproduced in Article 47 of the Competition Act.[3]

However, the first known private antitrust action for recovery of losses caused by cartel behaviour was only filed in 2006, before the Minas Gerais State Court of Justice. It was related to the *Long Steel* cartel case, under which the Cobraco Group sued ArcelorMittal and obtained a preliminary injunction compelling the latter to adopt the same price (adjusted by inflation) effective before the cartel period (the independent *Long Steel Distributors* case).[4] The courts also ruled favourably on redress of losses from the cartel's overpricing policy. This lawsuit followed a decision handed down by CADE, the Brazilian antitrust agency, in 2005, which fined the long steel manufacturers for price-fixing, customer allocation and resale price maintenance.

In 2010, CADE innovated by recommending that a copy of a cartel decision (in the *Industrial Gases* cartel case) be sent to potentially injured parties with the purpose of enabling and encouraging them to seek recovery for damage caused by the anticompetitive conduct.

Therefore, from 2010 CADE has started to encourage victims to file follow-on claims in Brazil for damage caused by cartels. The resulting increase in terms of the economic cost of business misbehaviour has contributed to the deterrent effect of competition law enforcement. It was in 2016, however, that the fiercest discussions about private antitrust

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2 Former Competition Act, Law No. 8,884 of 1994.

3 Competition Act, Law No. 12,529 of 2011.

4 Noman, Gustavo Lage. 'Das provas em processo concorrencial'. 2010. Available at www.dominiopublico.gov.br/download/teste/arqs/cp136669.pdf. Accessed December 2018.

litigation activity and its balance with local public enforcement occurred, when a landmark decision from Brazil's Superior Court of Justice (STJ) ordered CADE to disclose confidential documents originating from a leniency agreement (2016 STJ decision).

The 2016 STJ decision relied on the following assumptions: the documents in point could support claims for compensation; the legal framework for leniency programmes only provided for administrative and criminal immunity (and not civil immunity); and there is a mandatory rule of publicity for acts of the Brazilian public administration. Therefore, the STJ's rationale was that keeping the documents obtained under a leniency programme confidential and extending such status to the civil sphere, even after the end of CADE investigations, would perpetuate the harm to third parties and, by extension, give leniency applicants a benefit that is not backed by law.

In response, and again in 2016, CADE issued a draft resolution (CADE 2016 draft resolution) stating that it will pursue a balance between public and private enforcement by respecting third-party rights of access to documents originating from leniency agreements, settlement agreements and dawn raids. In addition, the CADE 2016 draft resolution suggested certain changes to Article 47 of the Competition Act concerning the civil aspects of private antitrust actions.

In 2018, significant developments related to private antitrust investigations came into effect. To better detail how third parties affected by anticompetitive practices could claim their rights, the Seprac, an entity under the Brazilian Treasury Ministry, issued guidelines describing methods and tools that could be used to detect cartels, quantify overcharges and quantify the passing on of overcharges.[5]

In addition, following appeals filed by CADE in connection with the 2016 STJ decision, in 2018 the court clarified that, as a general rule, documents obtained under a leniency agreement could be made available, while respecting business secrets and relevant information for competitive purposes, but only after a final ruling by CADE.

Finally, the CADE 2016 draft resolution was finally issued as CADE resolution 21/2018, which regulates the procedures for accessing documents and information through administrative proceedings commenced by CADE to investigate anticompetitive practices, including those arising from leniency agreements, settlement procedures and search and seizure lawsuits; and promotes private antitrust ligation.

II GENERAL INTRODUCTION TO THE LEGISLATIVE FRAMEWORK FOR PRIVATE ANTITRUST ENFORCEMENT

Article 47 of the Competition Act generically establishes that those injured by an anticompetitive conduct may go to court to defend their individual or collective interests, to seek an injunction to cease the anticompetitive practice and to recover damages.

Private lawsuits can be brought regardless of the existence of an administrative decision on an anticompetitive practice, and even before an administrative proceeding itself is instated. In addition, the existence of a private claim does not stay the administrative proceeding, which develops independently.

5 An English version of the Seprac guidelines may be accessed at http://www.fazenda.gov.br/centrais-de-conteudos/publicacoes/guias-e-manuais/estimating-cartel-damages. Last accessed on 7 December 2018.

Both individuals and corporations can be sued, either individually or collectively. Private antitrust lawsuits can also take the form of individual enforcement actions or collective actions.

Coupled with the provisions in the Competition Act, the Brazilian Civil Code and the Brazilian Civil Procedure Code (CPC) also set out general rules governing private lawsuits. Moreover, collective actions are further governed by a specific legal system that brings together several laws and regulations, such as the Brazilian Consumer Protection Code and the Public Class Actions Law.

III EXTRATERRITORIALITY

As established in Article 2, the Competition Act applies (without conflicting with the conventions and treaties to which Brazil is a signatory) to any anticompetitive conduct that is fully or partially performed in Brazil, or that produces or may produce effects locally.

Therefore, foreign entities responsible for anticompetitive conduct abroad, if somehow causing effects within the Brazilian territory, could in principle be sued locally, either by CADE or through a national judicial authority.

In addition, CADE resolution 21/2018, which came into effect in 2018, also contains a provision strengthening the extraterritorial effects of the Competition Act on private antitrust litigation by stating that confidential documents may be exceptionally disclosed, among other hypotheses, when there is international judicial cooperation, as long as the disclosure is authorised by CADE and the leniency or settlement agreement applicant.

IV STANDING

Private antitrust litigation can take the form of individual enforcement actions or collective actions.

Any aggrieved individual or company may bring a civil lawsuit for redress of damages arising from anticompetitive practices. In addition, in public class actions, the following, among others, have standing to represent the interests of those aggrieved by anticompetitive conduct (under Article 5 of Law No. 7,347 of 1985,[6] as amended):

a the Public Prosecutor's Office;
b the Public Defender's Office;
c the federal government, federal district, states and municipalities;
d independent government entities, government-owned companies, foundations and mixed-capital companies; and
e 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.

Moreover, private enforcement claims can be taken to state or federal courts in connection with private suits for damages filed by individuals or companies (or by legitimised institutions for public class actions) aggrieved by anticompetitive practices.

Notwithstanding this extensive list of eligible persons, a possible deterrent to private competition lawsuits following CADE's conviction of antitrust conduct (follow-on litigation)

6 The Law disciplines public class actions for, *inter alia*, damage caused to the environment, consumers or historical patrimony.

is the cost (both financial and other costs) of litigating in Brazil. For instance, defeated parties must pay court costs and expenses, plus statutory attorneys' fees, totalling as much as 10 to 20 per cent of the value of the claimed damages (except in public class actions). In addition, from filing a claim until a final decision is rendered, a lawsuit may take 10 to 15 years on average, during which time legal costs will accrue to both litigants. Senate Bill No. 283 of 2016, which was recently approved by the Senate and which will be sent for approval to the House of Representatives, aims to bring more celerity to claims by allowing CADE decisions to ground the concession of evidence-supported relief.

V THE PROCESS OF DISCOVERY

The Brazilian legal system envisages a wide array of elements to prove allegations in court, and the CPC provides a non-binding list of means of proof by expressly stating that 'all legal means, as well as morally legitimate ones, even if not specified in this Code, may apply to prove a fact' (CPC Article 369).

It should be noted that in Brazil, evidence may sometimes be produced even before a lawsuit is brought (usually in cases of urgency). In addition, before a lawsuit is brought or during its development, the judge can order (on his or her own initiative, or at a litigant's request), among others, that:

a documents be produced by the litigants themselves or by third parties;

b government entities provide certifications or records of an administrative proceeding if so necessary to prove an allegation; or

c specific evidence be put forward by a litigant.

Regarding (a), for instance, if a party refuses to show a document, a presumption against it on the question of fact can be raised. In addition, in some private enforcement claims, the burden of proof (which usually lies with the accuser) may be shifted. This usually occurs when the concept of a reverse burden of proof is applied to consumers, and especially if these are legally, economically or technically vulnerable. As another example, the specificities of a case could render it impossible or excessively difficult for a given party to produce evidence (or, otherwise, it could be easier to prove a contrary fact).

Regarding (b), CADE is also subject to this provision, but has expressly raised concerns that private enforcement litigation demanding access to such type of evidence may pose risks for the future of successful leniency programmes. CADE resolution 21/2018 provides for the specific situations in which documents produced through investigations conducted by the authorities may be disclosed to third parties interested in seeking their rights through private antitrust claims.

Regarding (c), it is worth noting that the production of evidence can entail significant costs for the parties, either individually or jointly.

Finally, concerning discussions on the weight of evidence that applies to cases in which the underlying anticompetitive conduct has already been analysed and convicted by CADE, there is no common ground among the different local judicial authorities. The easiest position to defend is that this should be taken as relative evidence, since an administrative decision can be reviewed by a court. On the other hand, three trial courts and the Minas Gerais

State Court of Appeals have ruled that CADE final decisions are 'unequivocal evidence' of an antitrust violation, granting injunctions to displace the collusive equilibrium and halt overcharging.[7]

VI USE OF EXPERTS

Parties can request (and the judge can order on his or her own initiative) a wide range of means of proof, including the use of experts. The CPC devotes an entire chapter specifically to regulate the procedure and the possibility of using experts.

There is a high chance of expert opinions being required as evidence in a private antitrust litigation due to the intrinsic economic nature of the matters at issue and in response to the need for a full understanding of the market concerned. Expert witnesses would also be instrumental in defining whether an antitrust infringement has occurred, and in ascertaining the harm and ensuing compensation.

Finally, economic evidence originally produced under a CADE administrative proceeding can also serve as proof in a lawsuit.

VII CLASS ACTIONS

According to research carried out by Giovana Vieira Porto[8] and based on data collected by the Brazilian Institute for Competition, Consumer Affairs and International Trade Studies (IBRAC), class actions outnumber individual enforcement actions in private antitrust litigation.

VIII CALCULATING DAMAGES

Calculating the damages payable to a plaintiff is one of the most challenging aspects of private competition litigation. A decision on the occurrence of damage serves as grounds for ultimately calculating the compensation payable. Consequently, ascertaining damage is one of the cornerstones in a private competition claim.

One of the main findings of the research conducted by Giovana Vieira Porto[9] is that the criteria adopted by trial and appellate courts in calculating damages currently lack uniformity.

In calculating property damage (and, by extension, the resulting compensation), they have identified at least five distinct methodologies:

a the use of experts in the award calculation;

b the difference between the price paid by consumers and the price that was effective before the anticompetitive conduct, doubled;

c an arithmetic average of the profit made during the anticompetitive conduct;

d the amount to be set at the award calculation stage; and

e the values stated in an expert report during the discovery phase.

7 Peixoto, Bruno Lana and Da Silva, Ludmilla Martins. 'Recovery actions for cartel damages: state of affairs and challenges for the next five years'. *Brazilian Antitrust Law (Law N.º 12,529/11): 5 years*. April 2017.

8 Porto, Giovana Vieira. 'As ações ajuizadas com pedido de indenização por dano de cartel: uma análise empírica do estado da arte no Brasil'. 2017.

9 Ibid.

For its part, moral damage (pain and suffering) is mostly calculated in reliance on:

a the defendant's socioeconomic conditions;
b the nature of the injury;
c the consequence of the injury to victims;
d the repercussions in the personal lives of the aggrieved persons; and
e the reasonableness and proportionality of the compensation in relation to the damage caused.

In view of the above, and with the aim of providing more certainty in estimating cartel damages, in 2018 the Seprac issued guidelines that provide an economic analysis of the law, the value of the compensation and deterrence, as well as a general overview related to quantifying damage. The authorities clearly recognise that compensation for harm imposed on society does not refund the victims of a cartel, and that an effective antitrust enforcement framework must involve a complementary mechanism that entitles victims to demand compensation for damage. For this to be feasible, however, it is important to overcome one of the main obstacles for private antitrust actions: credibly proving and quantifying damage.

In this context, the guidelines detail concepts related to cartel practices, including methods of detection and, most importantly, possible methods for quantification of overcharges and the passing-on of overcharges, which includes, on a non-exhaustive basis, comparison-based methods and market or firm structure-based methods.

IX PASS-ON DEFENCES

Article 25 of the Consumer Protection Code could reasonably suggest that pass-on defences are not allowed in consumer-related claims. In brief, the Consumer Protection Code states that a clause precluding, exonerating or otherwise alleviating the obligation to indemnify for product and service defects is void, and further imposes joint and several liability on the manufacturer, builder, importer or assembler.

In Brazil, it still under discussion whether a pass-on defence assertion would be accepted before a Brazilian court as an argument to exclude the obligation to indemnify.

In addition, the Seprac guidelines explicitly consider the passing-on of overcharges, recognising the higher challenge of quantifying damages in this situation. According to this approach, the passing-on of overcharges must be deduced from the compensation that must be paid to intermediate consumers, and the final consumer is entitled to compensation.

X FOLLOW-ON LITIGATION

In the first follow-on litigation involving a global cartel case, direct purchasers of compressors for refrigeration filed a lawsuit that was ultimately ruled on by the STJ in 2016 (as already stated, the decision compelling CADE to disclose documents obtained under a leniency agreement, which was further clarified in 2018 through establishing that disclosure should occur after a final ruling by CADE's Tribunal).

Notwithstanding, as the parties to a lawsuit can challenge every piece of evidence, even when it has been produced by CADE within an administrative proceeding, this can also be a significant obstacle to the development of private enforcement in Brazil, as it in practice means having to re-litigate the existence of a cartel. This is the case because CADE's decisions are not binding before the courts and, therefore, it could be a good strategy for defendants to (at least) delay a final decision.

XI PRIVILEGES

Attorney–client privilege and other related aspects arising from the attorney–client relationship are regulated by the Brazilian Bar Association Statute[10] and its regulations.

The Brazilian Bar Association Statute and its regulations apply to all Brazilian lawyers. As a rule, attorneys are assured of their right to protect and have a duty of not disclosing information received within the context of an attorney–client relationship. This privilege covers every piece of oral or written information in physical or electronic format, which renders it inviolable. It also extends to an attorney's office, files, data, mail, email and other communications. In this respect, there is a controversy concerning whether the attorney–client privilege is applicable to both external attorneys and in-house counsel, or only to external attorneys. Although the prevailing opinion of jurists has been that there is no limitation to the privilege based on this, some public authorities may have a contrary opinion in practice.

It has been argued that some in-house counsel now have a role in a company's business that is more similar to a manager or officer's role, rather than being an attorney *stricto sensu*. Consequently, in some situations involving information in the possession of an in-house counsel, there is a possibility of the attorney–client privilege being relativised, and thus the information disclosed.

XII SETTLEMENT PROCEDURES

Settlement procedures are usually promoted by private and public attorneys, and are officially encouraged by the judiciary. The CPC establishes that mediators and conciliators are aides in the administration of justice. Therefore, before or during the course of private antitrust claims, the use of alternative dispute resolution mechanisms should be facilitated.

However, parties are not under an obligation to engage in an alternative dispute resolution process before trial, and may expressly inform the judge that it is not in their interest to engage in mediation or conciliation (without any implications for the court dispute or their otherwise suffering any personal retaliation for that decision).

Parties may resort to arbitration only in disputes involving disposable economic rights; see below.

XIII ARBITRATION

Article 47 of the Competition Act clearly reads that the parties can take antitrust claims to court, but it remains controversial whether they can dispute antitrust matters through arbitration.

10 Brazilian Bar Association Statute, Law No. 8,906 of 1994.

Under Law No. 9,307 of 1996, a discussion can be settled through arbitration as long as it revolves around disposable economic rights, which means that the relationship has to be financially based. Since an antitrust discussion involves both economic and constitutional rights, it is hard to ascertain whether antitrust claims are arbitrable in Brazil.

Anticompetitive conduct can harm both society as a whole as well as the companies and individuals directly affected by it. The damage inflicted upon society refers to the collective rights of free competition and free enterprise, which constitute inalienable rights and which cannot be referred to arbitration. However, the damage inflicted upon companies and individuals that have suffered a measurable loss may indeed be subject to arbitration.[11]

One of the advantages of arbitration is that the parties may have their dispute settled confidentially by a trustworthy arbitrator (instead of a judge). In addition, it is probable that an arbitral decision will be more precise and faster than a court ruling. Arbitration has been debated in the context of Senate Bill No. 283 of 2016, and whether its adoption could for instance allow for a reduction in potential damages to be paid by defendants who accept the mechanism in favour of procedure celerity.

As the Competition Act expressly allows parties to look to the judiciary for redress of any injury from anticompetitive practices, such claims also qualify for alternative dispute mechanisms, such as arbitration or negotiation. However, parties do not often resort to these mechanisms in Brazil on account of the existing obstacles to indemnification, as further explained below.

XIV INDEMNIFICATION AND CONTRIBUTION

Under Article 47 of the Competition Act, those harmed by an anticompetitive conduct may resort to the judiciary[12] for redress of their losses. However, there are obstacles that might hinder indemnification. In this regard, the following three are worth mentioning:

a as indicated by CADE Commissioner Cristiane Alkmin in an institutional presentation,[13] litigation costs are high and the process is time-consuming. As such, when assuming that a party agrees to litigate under those conditions, there might be a chance it will not be fairly indemnified if it eventually wins the case;

b a plaintiff can probably expect retaliation from the cartel members, which are probably its main suppliers. This might conceivably pose an extremely risky strategy, as the plaintiff might not be interested in rupturing its commercial relations with the cartelist; and

c there are procedural difficulties in proving the conduct, a causal relation and its ensuing damage, which might also discourage plaintiffs from seeking redress in court.

11 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.

12 As provided above, there is a controversy on whether alternative dispute resolutions such as arbitration apply to cases of private competitive enforcement.

13 Schmidt, Cristiane Alkmin Junqueira. 'CADE. Análise econômica em cálculo de danos de Cartéis'. May 2016.

As a result, enough incentives might not exist for victims to seek indemnification against cartelists. Even though CADE has persisted in its efforts to promote private antitrust litigation, there has still only been a handful of lawsuits to that end.[14]

CADE is keen to encourage lawsuits as a powerful mechanism to fight cartel schemes. Leniency agreements do not reach the civil sphere, focusing instead on the criminal and administrative spheres. As a result, companies signing such agreements are not protected against civil lawsuits, which may encourage individuals to pursue indemnification claims against companies that engage in anticompetitive conduct (serving, by extension, as a deterrent to anticompetitive practices).

XV FUTURE DEVELOPMENTS AND OUTLOOK

CADE is increasing its efforts to crack down on anticompetitive conduct in Brazil, and especially cartel behaviour. In 2018 there were several developments, including the following:

a a new ruling by the STJ clarifying the access to confidential documents obtained through administrative proceedings commenced by CADE to investigate anticompetitive practices;

b guidelines issued by the Seprac providing methods to quantify damage caused and advantages taken by undertakings as a result of a cartel; and

c the publication of CADE resolution 21/2018, which aims at regulating access to documents obtained by the authorities and to foster private antitrust litigation.

In another attempt to promote private competition enforcement, Senate Bill No. 283 of 2016, which is about to be approved, proposes, among other things, that CADE final rulings should be given due consideration by the courts to ensure more expeditious decisions in private antitrust litigations. In keeping with the principle of the separation of powers, however, CADE decisions would not be binding on the courts. The bill of law provides for a set of very important mechanisms, which should foster private antitrust litigation, and it should be a landmark that will complete the Brazilian legal framework for combating cartels.

Clearly, Brazil and CADE are tending towards aligning with other, more mature jurisdictions as regards private competition enforcement.

14 Athias, Daniel Tobias. JOTA. 'Cartel, acordos de leniência e responsabilidade civil por danos privados'. 27 April 2016. Available at https://jota.info/artigos/cartel-acordos-de-leniencia-e-responsabilidade-civil-por-danos-privados-27042016#_ftn2. Accessed December 2017.

Appendix 1

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