

Private Antitrust Litigation

Contributing editor
Samantha Mobley



2016

GETTING THE
DEAL THROUGH 

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Private Antitrust Litigation 2016

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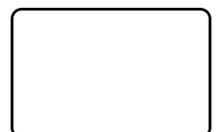


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Brazil

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Legislation and jurisdiction

1 How would you summarise the development of private antitrust litigation in your jurisdiction?

Antitrust private litigation in Brazil is still in its infancy and there is a lot of ground to cover to build a strong culture of private antitrust litigation. Antitrust enforcement in Brazil, as a whole, is a relatively recent innovation and only in the past few years has more substantial progress been made.

In the past decade regulatory investigation of antitrust has been developing rapidly because the Administrative Council for Economic Defence (CADE) has made improvements to its discovery procedures and the quality of its decisions. With more technology available to it and having highly encouraged whistle-blowing to incur smaller or no fines, CADE has been able to pursue international cartels more effectively. CADE's main priority is to go after cartels, in line with international practice.

CADE has dismantled several cartels and issued administrative penalties, and, consequently, private antitrust litigation has begun to seem a realistic prospect for harmed consumers or buyers. Also, the more technical CADE's decisions are, they have a greater evidentiary value in proceedings before courts of law. Nevertheless, there are two circumstances that could still put a brake on private antitrust lawsuits: it is still rare to find a CADE decision that can determine the damage caused by a cartel with any precision; and, in contrast to the US system there are no treble damages in Brazil (although there is a bill under discussion in the legislature proposing a double damage standard in cartel cases).

However, a few court decisions (and others still on discovery) with regard to private antitrust. The leading case in Brazil on private antitrust, because of the depth of the judicial reasoning, is a suit filed for a small action in the south of Brazil in which indemnification was demanded for the harm suffered from a petrol station cartel. From an economic perspective, however, the cases arising from the *Industrial Gases* cartel may be the best example of Brazil's progress in this area: many buyers filed for damages following CADE's record fine, imposing on the companies an overall fine of around 3 billion reais. Thus, the Public Prosecutor's Office started a civil class action against the companies involved in the *Industrial Gases* cartel, and several other suits have been proposed in recent cartels, as seen in the train cartel. Petrobras is also internally studying the possibility of filing a suit against the companies involved in the contractors cartel (from *Operation Car Wash*) in which the company suffered great losses.

With a few structural changes in CADE, the Antitrust Law – entered into force in May 2012 – attempted to shift the focus from merger reviews to antitrust violations. New forensic laboratories have been created and an increase in CADE's staff paints a promising picture for the future, confirming the Brazilian tendency to reach the European standards of antitrust litigation for damages and some day the US level.

2 Are private antitrust actions mandated by statute? If not, on what basis are they possible? Is standing to bring a claim limited to those directly affected or may indirect purchasers bring claims?

Brazil's Antitrust Law foresees the right of action for private parties harmed by antitrust violations to claim damages. However, according to the Brazilian Civil and Consumer Codes, anyone who has been harmed in any way has a right of action, despite the nature of the injury suffered. The

applicable code will depend on what kind of relation the injured party has with the other party.

However, it is important to stress the positive implications of including such possibility in the Antitrust Law, because it clarifies to the general public that a private party may file a suit even though CADE has not reached a final decision yet. In a jurisdiction where the statute of limitations in those cases is relatively low (three years), the individual party cannot always wait for CADE to take the first step.

Moreover, as stated above, indirect purchasers, as long as they were harmed by an antitrust violation, may seek compensation for the damages suffered. From this standpoint, basically anyone who can effectively demonstrate the harm done due to the antitrust violation has the right of action. It does not matter what kind of commercial relation the parties had.

3 If based on statute, what is the relevant legislation and which are the relevant courts and tribunals?

The most important piece of legislation with regard to antitrust is Law No. 12,529/2011. Nonetheless, its main application does not pertain to judicial matters; on the contrary, it is mainly applicable to the administrative sphere. Therefore, the civil, consumer and civil procedural codes hold the most significance in private antitrust litigation. The Civil Code applies to pending litigation of any ordinary relationship, while the Consumer Code and Civil Code will apply to parties in consumer relations. There are certain benefits derived from the Consumer Code, such as the reversal of the burden of proof. The Civil Procedural Code regulates the procedures in which lawsuits of a civil nature must be filed and applies to the Civil Code and Consumer Code.

There are several types of courts in the Brazilian judicial system and each one has its own rules. For private antitrust litigation, the state courts are responsible for both the first instance (single-judge courts that analyse discovery, substantive and procedural law), and second instance in which a group of judges review the first-instance decisions. In the superior courts, the Federal Supreme Court and the Superior Court of Justice adjudicate according to specific rules, while the former may only judge cases in which there may be violations of the Brazilian Constitution, the latter hears cases in which federal law is being discussed or to consolidate conflicting precedents.

4 In what types of antitrust matters are private actions available? Is a finding of infringement by a competition authority required to initiate a private antitrust action in your jurisdiction?

As stated above, any individual or company that has suffered harm from any antitrust violation may seek compensation for the damages suffered. There is no need for an administrative decision from the competition authority stating the infringement to proceed with private antitrust litigation. However, there are certain aspects that one should bear in mind before filing an antitrust lawsuit.

The first main aspect to be observed is the statute of limitations, which in cases regarding civil compensation for damages is three years. CADE often takes longer than that to rule on a case. However, it is advisable to wait for a decision from the antitrust authority to proceed with the private litigation, especially because the evidence will be much more robust and most of the groundwork will have been already laid out by CADE. There

are no specialised antitrust judicial courts in Brazil, so they tend to give great weight to CADE's decisions.

In conclusion, one should wait for CADE to issue a decision as long as one can, respecting the statute of limitations, but there is no other restriction on starting the claim.

5 What nexus with the jurisdiction is required to found a private action? To what extent can the parties influence in which jurisdiction a claim will be heard?

As seen in most international cartels, the same violation may be punished in several different jurisdictions and the antitrust watchdogs have even started to create an international network of cooperation and to assist each other in evidence-gathering procedures. In Brazil, as long as the effects of the antitrust violation are produced here (even though the violation was committed abroad), there is cause for the claim to be heard in national territory. Furthermore, it will not depend whether the company or individual is established in Brazil. On the contrary, CADE, and consequently the judiciary will have jurisdiction as long as the antitrust violation generates effects in Brazil.

This cooperation among foreign authorities was first seen in Brazil in 2009, when the Brazilian antitrust authorities were involved in a joint search-and-seizure operation with EU and the US in the *Compressor* cartel. The evidence obtained was shared by the watchdogs and helped to bring stronger evidence to the process.

6 Can private actions be brought against both corporations and individuals, including those from other jurisdictions?

Private actions can be brought against both corporations and individuals. When CADE first started investigating antitrust violations, in the mid 1990s, it was rare to see individuals being prosecuted by the administrative authority. Nowadays, CADE has put emphasis on ensuring that individuals are held liable for their violations and more often than not, CADE has ruled against those individuals with high fines being imposed (the fine applicable to the individuals ranges from 1 to 20 per cent of the fine imposed on the company).

Although CADE has been convicting individuals for their anti-competitive violations in the administrative sphere, there are no records of private actions being brought against individuals; the main focus of private litigators is to go after companies.

Private action procedure

7 May litigation be funded by third parties? Are contingency fees available?

The funding of litigation by third parties may occur in any area of law, since there are no legislative prohibitions on doing so. The cost of the procedural fees may be paid by anyone, since it is just a matter of filing the right documents, and the courts are only concerned whether the fees are paid. It does not raise any eyebrows if a company or someone unrelated to the suit pays the fees.

However, this question raises more important topics, namely the assignment of judgment credits and the assignment of the right to sue. For a credit to be assigned, there must first be a ruling by a competent court finding the antitrust violator liable and awarding damages. There is no question, however, that this type of credit may be assigned to third parties after the ruling. Usually, this is done by parties who do not have the cash flow to go through a long-standing trial, and, therefore, they assign the credit for a smaller return and someone else takes the risk.

Even though the right to assign judgment credits is settled law in Brazil, what happens if an injured party does not have the money to start a private antitrust litigation (which is far more common than the situation above)? Can someone assign the right to sue? This is a grey area and open to much debate and must be analysed in depth, which is beyond the scope of this paper. However, according to our understanding, there should be no legal hurdle obstructing the reach of the judicial system because the right of action in this case is nothing more than an uncertain amount to be fixed as compensation to the injured party that may or may not be granted by the courts.

Finally, it is important to stress that litigants may be able to avoid all legal costs if the party does not possess the wealth for them, from filing costs to attorneys' fees, although there are no public attorneys specialising in antitrust, which may severely impact the search for compensation.

8 Are jury trials available?

No. Jury trials in Brazil are only available for cases that involve crimes against human life (eg, homicide, infanticide, patricide, accessory to suicide).

9 What pretrial discovery procedures are available?

There is no pretrial discovery in Brazil. The discovery procedure is all done before a judge, in the initial phase of the proceedings, and there are few exceptions that allow evidence to be presented further on in the trial – the availability of evidence is the main factor to determine whether it can be presented later on. In the probative stage, each party presents the evidence it has and the evidence it intends to produce in court. All evidence may be challenged by the other party, and it is up to the judge to rule according to the validity and admissibility of such evidence. The judge may also discard evidence *ex officio*.

As mentioned above, the most valuable evidence in an antitrust litigation is a ruling by CADE. Because CADE is the expert in the eyes of the courts as regards antitrust matters in Brazil, a positive decision by CADE will certainly act to the plaintiff's advantage since judges with some expertise in competition law are rare. This is slowly changing, and good judicial decisions have been issued already, and the trend is for economic law expertise to be much more common among the judiciary in the coming years.

10 What evidence is admissible?

According to article 332 of the Brazilian Procedural Code, any evidence obtained by lawful means is admissible in Brazil and has the sole purpose of proving the facts under legal discussion. Such article is applicable to antitrust procedures. CADE frequently uses evidence borrowed from other jurisdictions in its administrative proceedings. It is common for the parties to substantiate their claims using CADE's ruling as proof, which holds a high standard of proof to the judiciary.

11 What evidence is protected by legal privilege?

Legal privilege is applicable to all communication with attorneys, in-house or outside council, written or verbal, and is not admissible in court or before CADE. There have been a few cases in which law firms were targeted by search and seizure, and documents were illegally apprehended. However, such operations were not viewed well by the superior courts and created immediate concern among the legal community. For this reason, a new law was enacted to fill the void and explain the scope of legal privilege. Nowadays, search and seizure in law firms must be done carefully and specifically.

The search and seizure order must be very specific and shall not have any broad provisions, pointing out exactly what is the object of the search seizure; and a member of the bar association must be present at all times. It is important to stress that no type of communication with clients can be seized by authorities, but if there is strong indicia of any crime or object of crime being sheltered on the inside of a law firm (hiding evidence, weapons, drugs, etc), the order must be focused on the purpose of the crime supposedly committed.

With respect to trade secrets, CADE and the courts may have unrestricted access to those types of documents and information, as long as they are essential for carrying on the investigation and resolution of the trial. However, CADE and the courts cannot disclose these documents to the general public (and maybe to other parties that had not provided the information), and the proceedings must be deemed as classified, restricting access to the parties and the court.

12 Are private actions available where there has been a criminal conviction in respect of the same matter?

The effects arising from antitrust cases are divided into three spheres: administrative, criminal and civil. Whatever happens in one sphere cannot directly interfere in another. Hence, double jeopardy will only be applicable in the same sphere. Although a ruling in one sphere may help a cause in another in no way will it be recognised as binding in the other sphere (ie, someone may be acquitted in the criminal sphere and obliged to pay damages in the civil). However, when there is *res judicata* in criminal proceedings, the facts are no longer under discussion in the civil sphere.

13 Can the evidence or findings in criminal proceedings be relied on by plaintiffs in parallel private actions? Are leniency applicants protected from follow-on litigation? Do the competition authorities routinely disclose documents obtained in their investigations to private claimants?

To speed up the already-too-slow proceedings, the courts have been admitting evidence 'borrowed' from other lawsuits (criminal or civil) with a few conditions. The thresholds for admissibility are still under intense discussion and no consolidated precedent has been formed yet. However, what all courts have agreed upon is that, in order to be valid, the borrowed evidence must have gone through *res judicata*. This understanding is highly logical because the evidence, to be admissible in a new proceeding, must have been ruled upon by a competent court with due process. The new Procedural Code that will enter into force in March 2016 has a provision (article 372) that expressly allows evidence produced in other proceedings to be admissible, and it is up to the judge to decide the value of the evidence in the proceeding.

With respect to leniency applicants, the Antitrust Law establishes that for a leniency application to be accepted by CADE, there must be an admission of infringement. But if an applicant is granted immunity by CADE, the administrative sphere works independently from the criminal and civil, and the immunity will not be applicable in litigation. On the contrary, the admission of guilt will hold a high probative value in the eyes of the courts.

There is no routine disclosure of documents, but all the proceedings before CADE are public and available through its website (www.cade.gov.br). Confidential information is not disclosed and is deemed as classified, being omitted from the documents. Nonetheless, the courts may ask CADE to disclose all documents (even confidential ones) pertaining to a specific case and CADE usually cooperates.

14 In which circumstances can a defendant petition the court for a stay of proceedings in a private antitrust action?

Due to the independence of the antitrust legal spheres, detailed above, there is no provision that may stay an antitrust proceeding. However, the Civil Procedural Code presents a few possible scenarios for staying any type of proceeding. In this regard, the most relevant one is that, if all the parties agree, the proceedings may be stayed for up to six months. The judge can also determine it, if he or she finds it convenient, but not for long periods.

15 What is the applicable standard of proof for claimants? Is passing on a matter for the claimant or defendant to prove? What is the applicable standard of proof?

The applicable standard of proof in any private antitrust case will follow the same principles as in most civil liability cases. The plaintiff will attempt to prove that the defendant is culpable for actions that caused damage and present the evidence to support the claims. The most important aspect of the plaintiff's arguments is to determine the causal nexus from the defendant's actions to the damage suffered and that it was all done knowingly. The ruling will be issued based on the preponderance of the evidence presented by both parties, and no assumption must be made due to the alleged severity of the offence.

Furthermore, the burden of proof will depend on the matter presented and on the relation between the parties. If the claim is brought by a consumer, the relation between the parties is deemed as a consumer relation, and the burden of proof will always be for the defendant, since the applicable law will be the Consumer Code. However, if the parties are equal the claim will be based on the Civil Code, and the burden of proof will fall on the plaintiff in cases regarding the facts that constitute the rights under discussion, while the burden of proof will fall on the defendant in cases regarding the hindering, altering or extinguishing of a plaintiff's right.

16 What is the typical timetable for collective and single party proceedings? Is it possible to accelerate proceedings?

The Brazilian judicial system is known for its sluggishness, making it almost impossible to predict how long a proceeding will take - particularly in antitrust litigation, which is a relatively undeveloped area. It is more a bet than a forecast to say that single proceedings for antitrust damages may last from five to eight years for a first-instance decision, and collective ones may last 20 to 30 per cent longer than individual proceedings. Nevertheless, things seem to be changing after digital proceedings were implemented (almost every new claim is made through the internet, with

no physical papers whatsoever). In recent years, judges are proving to be more comfortable with the digital proceedings and have been issuing their decisions in record time. With the new Procedural Code that will enter into force in March 2016, this trend only looks likely to improve, and hopefully in the next few years we will be able to precisely estimate the timetable of a proceeding.

17 What are the relevant limitation periods?

As explained above, we must understand the antitrust effects in three separate and independent spheres. Hence, we have three different statutes of limitations regarding antitrust violations. First, according to the competition law, the limitation period regarding competition and economic offences is five years counting from the day the offence took place or from the day the offence ceased in cases regarding continuous violation. The second limitation period relates to criminal offences, and it will be regulated by the penal code (only applicable to individuals), which has specific provisions, depending on the sanction applied, but cannot surpass 12 years. Finally, the statute of limitations regarding private antitrust actions is three years in damages claims. The most relevant discussion on this subject, however, relies on the definition of the starting point of the limitation period, more than on the period itself.

18 What appeals are available? Is appeal available on the facts or on the law?

There are several possible appeals that may apply to private antitrust claims and there is no need to explain them at length here. Nonetheless, it is important to point out the steps available after a first denial from the courts. When facing a first rejection from the courts, the parties may challenge such decision with a regular appeal, where the same proceedings will be ruled on by a group of judges (the number varies according to the appeal court), who will analyse both facts and law. Afterwards, if one of the parties is still unsatisfied with the result, there is the possibility of appealing to the superior courts: Supreme Federal Court and Superior Court of Justice, which will only rule upon matters regarding the law. The first will analyse matters that affront the Brazilian Constitution or matters regarding individuals with special benefits; while the latter will analyse claims that affront federal laws.

Collective actions

19 Are collective proceedings available in respect of antitrust claims?

The Antitrust Law foresees the possibility for private parties to seek compensation for damages and to require the cessation of any ongoing antitrust violation. In this regard, both the Antitrust Law and the Consumer Code establish the individual and collective rights to claim damages. Nevertheless, even though the law guarantees the possibility for private parties to collectively seek damages, the law also specifies that the parties harmed shall do so duly represented by a civil association (active for at least one year; the judge may lift this requirement if the association was created due to social importance or impact due to the severity of the damage done).

There are two main precedents concerning collective antitrust actions filed by civil associations representing private parties following cartel offences. The first was filed by a tourism association against the airlines cartel and the other one by an association of hospitals from Minas Gerais against the companies involved in the *Industrial Gases* cartel. Both actions have been ongoing for a few years, but no final decision has been issued yet.

20 Are collective proceedings mandated by legislation?

There are several types of collective proceedings, depending on the matter in question. Collective proceedings concerning private antitrust litigation are specified above (see question 19) and regulated by the Antitrust Law and the Consumer Code.

Also, besides civil associations, there are others that may file a collective proceeding:

- the Prosecutor's Office;
- all branches of the executive power; and
- all governmental entities created for the protection of common and collective rights.

The collective suit is filed in the name of the society and the community. However, we rarely see any individual compensation in those cases: the public branches seek a type of exemplary and punitive damages (disguised as non-material collective damage), while the compensation for harmed buyers are usually left aside. The most effective way to gather individual compensation is through an individual action.

21 If collective proceedings are allowed, is there a certification process? What is the test?

There is no test or certification process as long as the plaintiff is entitled by law to file collective proceedings (see question 20).

22 Have courts certified collective proceedings in antitrust matters?

No.

23 Can plaintiffs opt out or opt in?

As explained above (see question 19), there is no possibility for private individuals or companies to file a collective suit, and, thus, they cannot opt out or in for antitrust litigation, but we must consider that the effects of any ruling in a collective proceeding will reach all of the community. In this regard, the Consumer Code has an interesting provision, which states that any harmed buyer with an ongoing suit on the same matter as any collective proceeding also under discussion may stay the private proceeding and await a verdict on the collective action since the outcome of a positive ruling in the collective action will also reach that private party, but a negative verdict does not impede the private action from carrying on, since the facts and law may differ from a legal standpoint.

24 Do collective settlements require judicial authorisation?

No judicial authorisation is required in collective settlements. The public entities, entitled by law to file collective lawsuits, may settle any matter privately, requiring an adjustment of conduct by the other party and may even impose a fine. On the other hand, if the adjustment of conduct is breached, the public entity must go through the judicial system in order to request that settlement be enforced. With regard to civil associations, the settlement may also take place privately and there is no need for judicial authorisation.

25 If the country is divided into multiple jurisdictions, is a national collective proceeding possible? Can private actions be brought simultaneously in respect of the same matter in more than one jurisdiction?

It is still a matter under intense discussion by jurists and the courts. In general, a collective action ruling must apply to all national territory due to the fact that it is regulated by federal law, and, hence, its effects should be erga omnes. However, the Brazilian courts have not yet reached a unanimous position, but the majority understanding lies in favour of the community, based on the argument that several jurisdictions should not limit the protection of the collectivity and should instead aid it.

There is no restriction on simultaneously filing a private action in different jurisdictions within the Brazilian judicial system as long as the parties are different. Obviously, for instance, the same company involved in a cartel offence may be the defendant in two (or even more) different lawsuits in different states as long as the plaintiffs differ from each other and have cause for doing so. The same is also applicable to the actions brought by the State Prosecutor's Office.

26 Has a plaintiffs' collective-proceeding bar developed?

No.

Remedies

27 What forms of compensation are available and on what basis are they allowed?

Compensation regarding antitrust violations is dealt in the same manner as any lawsuit involving damages, since the plaintiff will ask the court for the compensation of the damages caused by the antitrust infringement, as well as the compensation for lost profits. These types of restitution concern only material damages. Non-material damages may also be applicable

Update and trends

Awareness of competition law, specifically cartel law, has grown in Brazilian society, moving from a purely academic focus to the broader public. The involvement of the government and big companies in cartel cases is daily noticed. CADE, after its recent reformulation, has been increasingly visible in society, deciding approximately 55 administrative proceedings from 2013 to May 2014. Among them, several cases of high visibility were judged, for example, the cement companies cartel, wherein a total of 3.1 billion reais in fines was applied to the violating companies, a record for CADE.

Therefore, strict compliance with the Antitrust Law becomes impracticable and, when achieved, the calculation of the benefit to the company is done by estimation. Thus, the recent trends and expected future developments involve the consumers seeking their damages due to the effects caused by the cartels under the perspective of civil liability, aiming to identify the losses caused to the consumers that suffer from the action of the cartels. This will also contribute to diminishing the cartelists' illegal activities, since they will also start to pay for damages in addition to the fines.

depending on the severity of the offence. Usually in cartel violations, non-material damages are awarded.

28 What other forms of remedy are available? What must a claimant prove to obtain an interim remedy?

Interim injunctions are available under certain circumstances specified by law and the party requiring the injunction must prove that if not granted irreparable harm would be caused and there is irrefutable evidence demonstrating the likelihood of success on the merits. These types of injunctions are filed to preserve the status quo ante when a party's rights are threatened. Usually in antitrust violations, the harm has already been done (and often over many years) so we do not see it very often in private antitrust actions. However, injunctive relief is a possible remedy for requiring the cessation of the antitrust violation. Other common uses of injunctive relief are:

- restraining orders against individuals;
- suspensions of the legal effects of certain acts; and
- the preservation of assets.

29 Are punitive or exemplary damages available?

Currently there is only the possibility to seek damages for the actual loss occurred. However, we are starting to see a shift on this understanding, since several courts have been awarding non-material damages as a form of punitive and exemplary damages.

30 Is there provision for interest on damages awards and from when does it accrue?

The Civil Code expressly foresees legal interests in lawsuits regarding compensation for damages, counting from the day the damage occurred (or ceased to continue); besides the interest the amount due is linked to inflation. The judicial interest rates are nowadays very favourable to the damaged party.

31 Are the fines imposed by competition authorities taken into account when setting damages?

There is no correlation between the fines imposed by CADE and the compensation a plaintiff may seek in a private antitrust litigation. This is especially so as CADE rarely quantifies the harm done by antitrust offenders – although the Brazilian Antitrust Law orders that fines imposed by CADE cannot be inferior to the damage generated by the cartelists. If the value is duly quantified by CADE, the courts may use the calculated amount to determine the damages incurred by a specific party, but the compensation of damages is totally independent from the fine applied (or not) by CADE.

32 Who bears the legal costs? Can legal costs be recovered, and if so, on what basis?

Until the final ruling on the matter is rendered, each party will bear the respective legal costs. When the final decision is rendered, the losing party will be compelled to pay all legal costs and attorney fees. If the requirements were partially granted, the costs are split equally by the parties. It is important to stress that there are two different types of attorneys' fees in Brazil and they greatly differ. The one mentioned here relates to the attorneys' fees imposed by the judge, which is mandatory by law and does not have any relation to the fees privately agreed in the client-attorney relation.

Underprivileged plaintiffs or defendants may request exemption from the courts of all legal costs. If the party can prove the insufficiency of funds, the courts usually grant it. However, antitrust violation usually involves larger players, so we hardly see such situation in antitrust litigation.

Even though the losing party will have to bear all legal costs plus the attorneys' fees, this situation is not likely to occur. Usually, each party pays its own legal costs, since the judge must rule in favour of the party in its entirety to burden the opposing party with all costs. Private antitrust actions are extremely complex, involving several requests made to the judge, and it is hard to find a ruling granting all of them.

33 Is liability imposed on a joint and several basis?

Both the Antitrust Law and the Civil Code foresee joint and several liability concerning all the companies (this is applicable to companies in the same economic group as well) and individuals involved in the offence.

34 Is there a possibility for contribution and indemnity among defendants?

See question 33.

35 Is the 'passing on' defence allowed?

There is no legal impediment for the defendant to exercise the passing-on defence. However, there is no known precedent of a defendant invoking such defence. This type of defence would hold great value and would be of great use to defendants in antitrust violations since Brazilian law regarding liability is restricted to the actual loss of the party.

The passing-on defence works particularly well for a company at the top of the supply chain because it can logically argue in a private antitrust action against any direct purchaser seeking compensation for damages

that when the claimant sold the product to another buyer, the overcharge was already included, hence the party did not experience any actual loss. Even though at first it seems a defence strategically aimed at the defendant, it may also stimulate indirect purchasers to venture into private antitrust litigation.

36 Do any other defences exist that permit companies or individuals to defend themselves against competition law liability?

Usually antitrust actions, before CADE or the courts, are in favour of the defendant if there are procedural grounds for annulment. Often the defendants can obtain the annulment since the authorities overstep their legal rights of investigation (eg, it is common for the authorities to use illegal wiretaps as evidence in the proceedings, and when challenged in the judicial system the evidence is dismissed). Also, the authorities take too long to issue a definitive ruling and the limitation periods often have already expired.

37 Is alternative dispute resolution available?

A new line of thought regarding antitrust arbitration has been emerging in recent years and has yet to win more support. Nonetheless, it is interesting to note jurists trying to expand the reach of Antitrust Law. According to this thinking, contracts that have an arbitration clause - if later found to be the object of an overcharge or any type of antitrust violation concerning that specific contract - must be resolved through arbitration. Arbitration has been growing exponentially in Brazil in the past few years, and the legal community has embraced arbitration as an extraordinary method of dispute resolution due to the unpredictability of the judiciary (it is common to see the same facts and law being ruled in totally different ways, causing a great deal of legal uncertainty to lawyers and parties). There have been decisions in the United States that deemed antitrust as arbitrable in international matters.

However, in Brazil the incompatibility of the Antitrust Law for arbitration procedures is still high since antitrust enforcement cannot be undermined by a private contract with an arbitration clause due to the fact that the provisions in the Antitrust Law are mandatory and generate an extra-contractual (civil tort) liability, making antitrust violation fall out of the scope of the clauses of the contract, which includes the arbitration clause.

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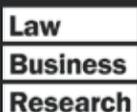
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