

Private Damages in Brazil: Early Beginnings, Big Stumbling Blocks



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I. INTRODUCTION

Private antitrust enforcement in Brazil has been on the rise over the past six years. This may be due to such reasons as the global trend of antitrust authorities encouraging damage litigation by potential injured parties; the growing number of infringement decisions issued by Brazil's antitrust agency, Conselho Administrativo de Defesa Econômica ("CADE"); and the increasing general awareness of competition law in Brazil.³

More specifically, a decision issued by CADE in 2010, determining for the first time that a copy of its finding of a cartel violation be sent to potentially injured parties, so that such parties could seek damages from the relevant wrongdoers, may have served as particular encouragement. In one of the lawsuits that followed, the first instance court judge issued an injunction, under which the defendants were prohibited from selling the relevant product with any surcharge after the date of the order. The recent *Siemens* case has also raised a number of issues in connection with damage claims in Brazil.

This article aims to provide an overview of the applicable framework for private damages in Brazil, as well as discuss recent developments and challenges ahead.

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³ Over the last decade the cartel enforcement landscape has significantly changed in Brazil. In 2000 new investigative tools were granted by Congress (dawn raids and leniency agreements), and since 2003 the Brazilian antitrust authorities have promoted a hierarchy of antitrust enforcement that places hard-core cartel prosecution as the top priority. As a result, Brazil now has an increasing number of cartel-related activities, including investigations (including alleged international cartels), record fines for cartel offenses, individuals being held criminally accountable, and increasing cooperation between criminal and administrative enforcers. There has also been a positive change in perception by the criminal prosecutors and judges as to the seriousness of cartels.





II. LEGAL FRAMEWORK OVERVIEW

Pursuant to Article 47 of Brazil's Antitrust Law, victims of anticompetitive conduct may recover losses sustained as a result of a violation, apart from an order to cease the illegal conduct. A general provision in the Brazil Civil Code also establishes that one who causes losses shall indemnify those that suffer injuries (Article 927). Plaintiffs may seek compensation of pecuniary damages (actual damages and lost earnings) and moral damages. Under recent case law, companies are also entitled to compensation for moral damages, usually derived from losses related to its reputation in the market.⁴

Apart from complaints based on contracts, a significant percentage of private actions are based on horizontal conduct in Brazil. Similarly to other jurisdictions, both corporations and individuals may be sued individually (*e.g.*, by competitors, suppliers, and direct or indirect purchasers) or collectively for antitrust violations, but the greatest majority of pending cases are against corporations.

Individual v. Collective claims. Individual lawsuits are governed by the general rules set forth in the Brazilian Civil Procedure Code. Collective actions are regulated by different statutes that comprise the country's collective redress system. Standing to file suits aiming at the protection of collective rights is relatively restricted, and only governmental and publicly held entities are allowed to file. State and Federal Prosecutors' Offices have been responsible for the majority of civil suits seeking collective redress, most of which have been related to consumers' rights complaints.

Consumer v. Business claims. Depending on whether the buyers of the cartel's products are businesses or consumers, different statutes may apply. A consumer is defined as any individual or legal entity that acquires or uses a product or service as an end user. Under this definition, businesses may also be deemed consumers as long as they are end-users of a product or service.⁵ In this case, Brazil's Consumer Protection Code⁶ applies, which guarantees a much more favorable standing for claimants. As a general rule, the burden of proof lies with the plaintiff (Article 333 of Brazil's Civil Procedure Code); however, under Brazil's Consumer Protection Code, the burden of proof may be shifted to benefit end-users and courts generally allow this. Any end-user or class end-users is entitled to bring an action against a cartel member, even being an indirect purchaser (see Article 25, Paragraph 2, of Brazil's Consumer Protection Code).

Pass-on defense. Pass-on defense is not allowed in consumer (end user) related claims.⁷ There are no statutory provisions or court precedents in different areas, but it is our opinion that antitrust violators may be able to assert that any illegal overcharges were passed on by a plaintiff direct purchaser to indirect purchasers as a defense to reduce (but not to exclude) indemnification.

Multiple Damages. Although Brazil is said to have only single damages, injured third-parties may claim the payment of double damages based on provisions contained in the Civil Code and Brazil's Consumer Protection Code, as the payment of a supra-competitive price was due to a misconduct. We are not aware of any decision awarding double damages for antitrust offenses in Brazil but we believe this possibility constitutes an additional incentive for private enforcement in Brazil and brings legal uncertainty to the business community.

⁴ Punitive damages are not expressly provided for in the law, but some plaintiffs have been awarded those as well.

⁵ Case law is fully settled on the concept of end user for businesses. There are hundreds of thousands of ongoing court disputes related to several activities, such as bank lending, the utilities sector, and even certain industrial products, if used in peripheral or support activities.

⁶ The legal and institutional framework of consumer protection law and policy in Brazil is established by Law 8,078, of September 11, 1990 ("Law 8,078/90" or "Consumer Protection Code"). Under Brazil's Federal Constitution, consumer protection has the status of a fundamental right.

⁷ See Brazil's Consumer Protection Code, Article 25.





Joint and Several Liability. Under both Brazil's Civil Code and Brazil's Consumer Protection Code, if more than one wrongdoer contributed to the event, their liability shall be joint and several, without apportionment, *i.e.*, each cartel member may be held liable for the entire cartel-related damage. This means that an aggrieved party may bring suits against all cartel members, jointly or separately. The satisfaction of the entirety of the awarded damages by one of the jointly liable wrongdoers releases the remaining wrongdoers from liability before the aggrieved party (Brazil's Civil Code, Article 275). However, if the aggrieved party has only been partially compensated by one of the joint wrongdoers, it may claim the balance from the other wrongdoers (Brazil's Civil Code, Article 277). Pursuant to Articles 283 and 934 of Brazil's Civil Code, the joint wrongdoer who single-handedly compensated all damages awarded to the aggrieved party may seek partial or total reimbursement (contribution) against other joint wrongdoers.

Statute of limitations. Under Article 206, Paragraph 3, V of Brazil's Civil Code, the statute of limitations for private damages claims is three years,⁸ but case law is not yet settled whether it should be counted from (a) the date in which the violation occurred (*actio nata* doctrine) or (b) when the claimants became or could reasonably have become aware of the illegal conduct. It is our opinion that the latter shall prevail, due to very nature of most price-fixing schemes. Depending on whether CADE makes the investigation public from the outset and on the level of evidence available for third-parties, courts could take the view that injured parties were aware of the fact even before CADE has issued its decision sanctioning a cartel. Also, the fact that a party confesses its participation in the wrongdoing within a settlement procedure with CADE may also be deemed sufficient to trigger the three-year deadline, as such settlements are made public as of the signing date and posted at CADE's website. CADE's final decisions are public and available at its website, which means that it is accessible to any third-party and potential claimants may be aware of a matter and present claims before courts.

A second discussion may arise regarding what is the period of time for which damages can be sought when dealing with continuous long term relationships, such as distribution agreements. Again, neither statute nor case law provides clear criteria: courts could consider either the entire period, provided there is continuity and/or concatenation of actions, or three years prior to the last violation or the knowledge thereof.

III. CADE AND FOLLOW-ON LITIGATION

Since 2010, CADE (Brazil's Antitrust Tribunal) has been prompting follow-on damage litigation derived from cartel infringements and a number of alleged injured parties have already filed claims in Brazil, which adds to the deterrent effect of overall enforcement by increasing the economic cost of the misbehavior. In 2010, CADE, for the first time, included in a cartel decision a recommendation for a copy of the decision to be sent to potential injured parties for them to recover losses.⁹ Following that, a number of parties allegedly affected by the cartel sued for damages in courts throughout the country.

As it would be expected, follow-on litigation depends on the strength of CADE's case. CADE's decisions lack collateral estoppel effect, and even after a final ruling has been issued, all the evidence of the administrative investigation may be re-examined by the judicial courts, which could potentially lead to two opposite conclusions (administrative and judicial) regarding the same facts. In the generic drugs cartel case, for example, CADE found the companies guilty of price-fixing, and the alleged injured parties sought redress in court. The judge, however, found no antitrust violation and therefore did not award any compensation to

⁸ If the claim arises from a direct contractual relationship between plaintiff and defendant and if the case can be construed as a breach of contractual obligations, then it could be argued a five (5) year statute of limitations, but some precedents indicate that three years most likely will prevail (*e.g.*, REsp. 1.238.737).

⁹ See Proceedings No. 08012.009888/2003-70 (industrial gases cartel case), adjudicated by CADE on September 1, 2010.





the plaintiffs.¹⁰ In any case, we should take this latter example as an exception as, on average, judicial courts confirm over 70 percent of CADE's decisions.

Even before 2010, few collective damages lawsuits had been spontaneously brought by local state prosecutors' offices representing alleged victims to anticompetitive conduct, most if not all in connection with regional fuel retail cartel cases that were initially investigated by the same prosecutors.

Relevant case law includes two investigations by the state prosecutors' office in Rio Grande do Sul. Defendants in the Guaporé investigation were sentenced to two-and-a-half years of jail time for fixing fuel prices. After the criminal investigation was concluded (the administrative case is still pending), the State Prosecutor's Office filed for individual and collective damages and the parties were sentenced to compensate consumers that had been injured by the cartel and pay collective moral damages due to "having offended society, by having abused local consumers that were harmed in their vulnerability." Likewise, in Santa Maria, after retailers were also sentenced to serve jail time (decision under appeal), prosecutors filed for individual and collective redress, both granted by the courts.

In such scenarios, although joint and several liability to cartel participants in general was no longer only a theoretical risk, it had not yet become a real threat to leniency, since those were local cases and private litigation and had not effectively shown up on CADE's agenda. But the agency's pivotal ruling in a high profile case that received international publicity may have tipped the scale. This decision was issued in the midst of the consolidation of Brazil's cartel enforcement program and at a time when the authorities were very committed to promoting consumers' and other stakeholders' awareness of the harm caused by price-fixing, bid-rigging, and other cartel-related conducts. Indeed, in a recent case, a customer sent a letter to a leniency applicant claiming damages after the company voluntarily decided to make public its identity following a raid. This could be happening in the auto parts cases under investigation by CADE. Since few customers are potentially affected in these cases, they could attempt to settle before/instead of going to court.

Another interesting case involves the alleged bid-rigging cartel affecting the subway state company in São Paulo, which has been disclosed to CADE by one of the alleged cartel participants through a leniency agreement signed in 2013 (the *Siemens* case). Following the initiation of CADE's case, public prosecutors and the São Paulo Attorney General's Office filed multiple damage claims.¹¹ As in Brazil the leniency applicant has no immunity regarding cartel damages, in November 2013 Siemens released a note stating the "it cannot be excluded that significant cartel damages will be brought by customers against Siemens Brazil based on the outcome of the investigations." The case has also attracted the attention of the Court of Auditors in the State of São Paulo, which has already asked CADE to share the evidence of the case so that the agency can audit the contracts at issue. The same holds true for the municipal politicians in São Paulo, who have recommended, in 2014, that the mayor's office monitor CADE's antitrust investigation to gather the necessary information to support the damage claims.

¹⁰ See the decision rendered by the 14th Chamber of the State Court of São Paulo in Public Civil Action No. 0029912-22.2001.403.6100.

¹¹ For example, in May 2014, the São Paulo state prosecutors launched a civil claim asking for BRL 2.5 billion (roughly USD 625 million) in damages compensation for cartel practices affecting contracts signed in 2008 and 2009, as well as the prohibition for the targeted companies from taking part in public tenders for three years. In December 2014, a court in São Paulo ordered the state prosecutors to amend their initial petition in a civil action filed earlier that month against 10 companies to recover cartel damages in the amount of BRL 418 million (roughly USD 104 million, including moral damages estimated to be 30 percent of the amount of the affected contracts, which covered 2001-2002) and aiming the companies' dissolution. Under the judicial decision, it is the prosecutors' burden to justify the reasonableness of the request to dissolve the companies, which is an extreme measure under Brazil's legal system. In September 2015, the São Paulo state prosecutors launched a new civil action to recover damages from nine companies suspected of rigging bids for maintenance work contracted by the state subway company CPTM, from 2007 to 2014. Prosecutors are seeking in damages the value of the contracts plus the alleged overcharge, totaling BRL 918 million (roughly USD 230 million).





The Brazilian Courts have yet to issue a final ruling on civil antitrust claims. Follow-on lawsuits in the following industries are pending decision: cement, industrial gases, compressors (leniency), fuel retail, sand extraction, steel bars and subway trains (leniency). Such claims were brought by customers or by the Federal Prosecutors on behalf of customers.

IV. CHALLENGES AHEAD

Interplay with the leniency program. If private claims pick up in Brazil before certain amendments to the law are introduced, they could have an adverse effect on the Leniency Program, which is considered to be the pillar of Brazil's Anti-Cartel Program. This is because, in Brazil, cartel members — with no exception for the leniency applicant — are jointly and severally liable for damages caused by their illegal practices, *i.e.*, each cartel member may be held liable for the entire cartel-related damage.

Other jurisdictions provide for incentives for the leniency applicant regarding damage recovery for victims. For example, in the United States, the Antitrust Criminal Penalty Enhancement and Reform Act of 2004 ("ACPERA") protects leniency applicants from treble damages and joint and several liability in private lawsuits in exchange for cooperation with plaintiffs. Another example is Hungary: The 2009 Competition Act states that a leniency applicant is not obliged to compensate injured parties unless they are unable to collect their claims from other cartel members.

Brazil executed its first leniency agreement in 2003. Since then, approximately 35 agreements have been signed, a number with parties to international cartels. Since 2010, CADE has continued to strive to broadcast its Leniency Program, but in the background there is now increasing concern that applicants will be exposed in ways that may impair their standing in relation to other cartel participants. The Brazilian Congress needs therefore to pass new legislation excluding the leniency applicant from joint and several liability in order to preserve the incentives to the Leniency Program.

Another important aspect regarding the interplay between leniency and private claims is related to the level of protection offered by the agency to documents put forth by leniency applicants. For the incentives for leniency to be preserved, confidentiality of all documents submitted under the Program must be strictly enforced so as to ensure adequate protection against disclosure in private lawsuits, and thus avoid placing the leniency applicant in a less favorable situation than the other cartel members.

The risk of disclosure of such leniency documents, especially in view of cross-jurisdictional cases, might deter a cartel member from applying for leniency in Brazil. Even though CADE has been adopting a number of measures to ensure that the leniency documents and the identity of the leniency applicant remain confidential throughout the investigation, it is still unclear how it will treat the leniency documents following the adjudication of the case.

Also, if the leniency case involves a dawn raid and/or a parallel criminal investigation, CADE will not have the last word regarding confidentiality of the files, and the courts may not grant adequate protection to it. If that is to happen, those documents would be accessible by any third-party, who could then file damage claims before the courts.

Lengthy proceedings. Brazilian courts are well-known for moving slow, both in view of the significant number of pending cases, as well as due to several tools that allow parties to the case to unduly delay the proceedings. It is not rare for a judicial case to last well over 15 years. Indeed, Brazilian Courts have yet to issue a final ruling on civil antitrust claims despite the fact that the first cases were brought in the mid 2000's. This may prompt injured third parties in Brazil to present damage claims in jurisdictions other than Brazil.





Lack of consolidated case law on fundamental issues. There is little or virtually no consistent case law in Brazil on fundamental issues such as when the statute of limitation should start to count in connection with cartel damages. Another aspect that lacks guidance is how to calculate damages. Criteria for calculation of damages have varied significantly from case to case, and have ranged from approximately BRL 60 million (roughly USD 15 million) in the case brought by the Federal Prosecutor on behalf of customers against steel bar producers to 20 percent of the total market (CADE has referred to surcharges of 20 percent) for the duration of the conduct in another case.

IV. CONCLUSION

Brazil's private antitrust enforcement is still in its infancy if compared to other systems, such as the United States. At the same time, cases such as *Siemens* illustrate that the road to institutional maturity is not without significant obstacles. Indeed, given transaction costs in Brazil, consumers are more often than not "represented" by public prosecutors (differently from what happens in the United States for instance). And each public prosecutor enjoys significant autonomy, which creates problematic jurisdictional fragmentation. Add to that the lack of clear guidelines as to what is permissible in the damages arena and the end result may be the paradoxical effect of reducing *ex ante* deterrence: extreme measures — *e.g.*, asking for dissolution of corporations or damages with little nexus to actual welfare loss — just ends up paving the path to (expected) reversal by higher courts.

At least in the early stages of development of private antitrust damages, it would be preferable to have actionable "rules of the road" so as to make private damages easier to seek and, ultimately, decisions that are more likely to stick. Although antitrust authorities are not the obvious candidates to issue such guidelines in Brazil, broader cooperation with the public prosecutors' office would tend to mitigate uncertainties and reduce dispersion in the quality of cases brought to courts. The EU Directive 2014/104 on antitrust damages actions is a good example of an attempt to improve speed and efficiency of private enforcement while, at the same time, reducing dispersion in quantification of damages and thus the potential for absurd and disproportionate awards that might stray away from efficiency goals, and should serve as an example to Brazil.

It is early beginnings for private damages in Brazil, but there are obvious stumbling blocks. The route to overcoming such challenges requires reducing transaction costs for private enforcement while making sure damages awarded are credible and reasonable.

