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# Private Antitrust Litigation 2014

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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?

In Brazil, injured parties have two main courses of action regarding private antitrust litigation at the judicial level: litigation directed to ceasing practices that violate the economic order; and litigation seeking damages for loss due to antitrust violations. These lines of private action are set forth in article 47 of the New Competition Law (Law 12,529/11 or the New Law), enacted in 2011, and they are similar to the possibilities under Law 8,884/94 (the previous Competition Law). Suits can be brought either individually (eg, by competitors) or collectively (eg, by an industry association on behalf of its competitors against a competitor). Notwithstanding those possibilities, the majority of discussions concerning wrongful acts in light of competition law in Brazil still take place in the administrative sphere and private antitrust litigation does not frequently reach courtrooms.

Alongside private antitrust litigation, which is still incipient, there is a significant volume of administrative proceedings where parties seek intervention by the Brazilian competition authority, the Administrative Council for Economic Defence (CADE). There is also a kind of antitrust litigation in the judiciary, where parties challenge CADE's decisions and penalties imposed on violators of the economic order. In that regard, several lawsuits have been adjudicated involving findings of anti-competitive behaviour and restraints on acts of concentration, with significant implications for private interests.

As mentioned above, private antitrust litigation seeking damages for loss or to prevent anti-competitive behaviour has progressively increased. This has especially been the case with cartel cases or cartel findings by CADE. However, this particular type of antitrust litigation is still not a major phenomenon. Cost involved in proving damage, attorney's fees, filing costs and the prolonged time frame for final decisions are among the main reasons for the relative underdevelopment of the practice. Moreover, the case law regarding significant questions is still scarce and unsettled in this area of the law.

The New Competition Law (the New Law) entered into force in May 2012 and restructured Brazil's system for competition defence, reinforcing CADE's position as the administrative authority with investigative and enforcement powers in relation to competition law. It is expected that the New Law will improve the efficiency and effectiveness of the administration of Brazil's competition law.

The New Law profoundly altered the merger review system. For instance, the New Law establishes a mandatory pre-merger notification and approval regime – in contrast to the previous regime where parties could opt for ex post notification. The changes to the merger review system have required a series of implementing measures. As a result of the entry into force of the New Law, CADE and the competition bar have directed most of their attention to ensuring that the implementation of the pre-merger review system takes place smoothly. However, CADE is expected to progressively focus on the control of anti-competitive practices. The newly established General Superintendence is also likely to focus on the investigation of anti-competitive practices. This, together with the tendency of older cases to progressively reach superior courts, may be a boon for private antitrust litigation Brazil in the medium term.

**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?

Article 47 of the New Law is similar to article 29 of Law 8,884/94. It establishes an individual right of action for private parties whose interests are prejudiced by the anti-competitive conduct. It allows such parties to seek cessation of anti-competitive practices as well as compensation for loss. The right of private action is theoretically independent of any investigation or administrative proceeding. Moreover, the filing of a private suit does not in principle stay any potential administrative proceeding that may be pending.

As there is no specific rule that regulates the filing and course of actions relating to anti-competitive practices, the proceedings regarding anti-competitive behaviour are governed by general procedural rules. The Constitution provides that judicial relief shall be available to any harm or threat to a right. From this perspective, indirect purchasers (affected by the anti-competitive practice) would also be entitled to bring claims to seek the cessation of anti-competitive practices that affect them, and compensation for the damages that they experiment.

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

The principle of free competition is enshrined in the Constitution. Besides the New Law itself (Law 12,529/11) and Law 8,884/94 for acts that took place while it was in force, the main applicable legislation includes Law 5,869/1973 (the Code of Civil Procedure), Law 7,343/1985, which regulates Public Civil Actions, and Law 8,078/1990, which provides for consumer protection. Any lawsuit involving the antitrust authority shall be brought before federal courts. Private antitrust lawsuits shall be brought in the state courts (with jurisdiction for cases of a civil nature).

**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?

Private actions are conceivable to redress any practice that is considered to be an infraction of the economic order. Such practices include, in particular, those listed in article 36 of the New Law. According to article 36, infringements against the economic order are those that have or may produce the following effects on the market:

- limiting, falsifying or in any way harming free competition or free enterprise;
- dominating a relevant market of goods or services;
- arbitrarily increasing profits; and
- exercising a dominant position in an abusive manner.

Article 36 of the New Law lists several examples of conduct that may result in the infringements indicated above. These include practices such as cartelisation, limitations on market access to competitors, tying, refusals to deal, predatory pricing and abuse of intellectual property rights, among others.

Article 47 of the New Law does not require a finding of infringement by CADE before private parties initiate actions to cease anti-competitive conduct or obtain compensation for damages. In fact, article 47 expressly states that the private lawsuit is independent from any inquiry or administrative proceeding. From this perspective, the control system regarding anti-competitive practices is decentralised and a finding of infringement by CADE would not be required before private litigation is initiated.

However, there may be a debate as to whether article 47 alone governs the issue of whether a prior finding of infringement is necessary. In light of CADE's position as the adjudicating agency with competence to hold that a practice is anti-competitive, one might argue that a finding of infringement should be required before private action is initiated.

From a practical standpoint, previous findings by CADE may prove significant or even indispensable to substantiate a claim that an anti-competitive practice has taken place and calculate remedies appropriately. For instance, in a recent ruling, the Minas Gerais Appellate Court stated that CADE decisions are executive titles enforceable before courts.

**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?

Article 2 of the New Law establishes that the Law applies to practices committed in whole or in part in Brazilian territory, and practices that produce or that may produce effects therein. Article 2 provides general guidance on the territorial jurisdiction for antitrust matters in Brazil. Several other provisions might be used to determine venue depending on the circumstances of the case. The general rule under civil procedural law is that an action shall be brought in the jurisdiction of the defendant's domicile.

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

Article 31 of the New Law provides that the Law applies to individuals and legal persons under private or public law, as well as any associations of entities or people, incorporated de facto or de jure, even if temporarily, with or without a legal personality, and even if the person operates under a legal monopoly. Therefore, private actions may be brought against either corporations or individuals, or both, including those nationals of other jurisdictions, provided that either the territory or effects-based criteria explained in question 5 above are met.

## Private action procedure

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

There is no express provision forbidding third parties from funding private antitrust suits. Funding by third parties is not completely uncommon in other areas of the law and there seems to be no cogent reason why it would not be an acceptable practice. In addition, there may not be a need for the party itself to fund the lawsuit if it lacks the financial resources. The Federal Constitution guarantees full access to the courts to all citizens regardless of their economic capacity. Accordingly, litigants who cannot afford to pay court costs and legal fees are entitled to request to proceed in forma pauperis. Where applicable, this possibility exempts parties with insufficient financial resources from the payment of court costs (such as judiciary charges, fees, experts' and lawyers' fees, etc).

The so-called quota litis clause (contingency fees clause) in litigation has been accepted, including when it is established in connection with other fee arrangements. Article 38 of the Code of Ethics and Discipline of the Brazilian Bar Association determines that the quota litis clause may only be stipulated in pecunia and that the professional's financial gain (success fees plus the legal fees paid by the losing party to the lawyer of the prevailing party, the latter of which are awarded by the judge) may not be greater than that of the client.

**8** Are jury trials available?

Jury trials are not available and do not apply in connection with anti-competitive practices or crimes against the economic order. The use of jury trials under Brazilian law is restricted to a few specific types of crime, none of which concern competition-related matters.

**9** What pretrial discovery procedures are available?

The discovery procedure is unfamiliar to the Brazilian procedural system. Instead, all evidence is produced in court, being presided over directly by the judge of the case. The judge examines the evidence presented by the parties and grants or denies their admissibility based on an assessment of value and relevance to the case at hand.

In contrast to discovery procedures that take place in certain countries in which the lawyers meet out of court to present to one another the evidence that they intend to use, in Brazil the evidence is produced before the judiciary (exercise of the adversary system). Normally, the evidence is presented at the probative stage. However, there are exceptional mechanisms whereby evidence may be collected before the probative stage and even before the actual filing of the lawsuit. In addition, the Public Prosecutor in the exercise of its functions may launch civil inquiries to investigate practices contrary to the economic order, and request certificates, data, examinations or expert investigations from any public or private entity for a possible future judicial action.

From a practical standpoint, any public findings of antitrust authorities (SEAE, SDE and CADE under Law 8884/94 and, as of the entry into force of the New Law, CADE or its organs) are likely to be extremely relevant as evidence (see question 4). These findings may be available before the lawsuit is initiated or become available before the probative stage in a lawsuit.

**10** What evidence is admissible?

Article 332 of the Code of Civil Procedure states that any lawful means for producing information may be a source of evidence in civil proceedings. Private antitrust litigation is governed by the same principle. As stated above, in practice, public findings by antitrust authorities are likely to carry particular weight. In this regard, a recent decision by Minas Gerais State Appellate Court recognised the probative value of a decision by CADE, notwithstanding the fact that this decision by CADE had been stayed by a federal court.

**11** What evidence is protected by legal privilege?

Information exchanged between clients and lawyers is protected. Thus, documents drafted or received by outside counsel or by in-house counsel in the context of an attorney–client relationship are

protected. Moreover, according to the Brazilian Bar Association rules, counsels are entitled to refuse to testify as witnesses: in proceedings in which they act as counsel; regarding facts related to persons of whom they are or have been counsel; and regarding facts under professional confidentiality. Furthermore, when a confidential issue is critical to the resolution of the suit, the court can determine that the entire lawsuit take place in secrecy (with access to the lawsuit files restricted to the parties and their counsel) and may require that the holder of this confidential information present it to the court.

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

Private actions are available where there has been a criminal conviction in respect of the same matter. In fact, under article 935 of the Civil Code, prior and definitive determination regarding the existence of a fact or facts about its perpetrator by a criminal court cannot be called into question in a civil lawsuit. In this sense, plaintiffs' may use a prior criminal conviction in respect of the same matter to substantiate a civil lawsuit for damages, for instance. On the other hand, the criminal res judicata does not apply to the civil lawsuit: if the defendant is acquitted in penal proceedings, this will not imply the immediate discharge of his or her liability in the civil lawsuit.

**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?

Evidence produced in criminal proceedings may normally be used in civil lawsuits. As explained above, findings in criminal proceedings may be carried on to civil proceedings and to the extent that such findings are definitive determinations regarding the existence of facts about a perpetrator they may not be called into question in a civil law suit.

Article 86 of the New Law establishes that punitive administrative action is extinguished or reduced from one-third to two-thirds by a leniency agreement. Article 87 prevents the prosecution of crimes related to the economic order and those directly related to the practice of cartel with regard to the beneficiary of the leniency agreement, after the beneficiary has met with the terms of the agreement. In sum, under articles 86–87 of the New Law, agents that comply with the terms of their leniency agreement are exempt from administrative and criminal liability. However, leniency agreements do not exempt defendants' potential civil liability in private actions.

Since private antitrust claims have not been widespread in Brazil, it is not possible to ascertain a practice regarding disclosure of documents to private claimants. Documents obtained in antitrust investigations are often protected as confidential and, in this sense, private claimants would not in principle be entitled to rely on them. However, CADE decisions are made public as rule (even if confidential information is redacted and thus not made available) and private claimants may access these public decisions or parts thereof and rely on them in private actions.

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

As explained above, a private claim would be independent from an enforcement decision that is pending or that is being challenged. Moreover, it would be possible to bring a private action even if no administrative proceeding has been initiated. Conversely, private antitrust procedures would likely not be stayed or prevented due to the existence of administrative procedures or criminal action related to the same matter. Yet, there is no definitive guidance on this issue and it is not inconceivable that a judge decides to stay private antitrust procedures upon request for various reasons, depending on the defendant's ability to cogently demonstrate that a stay would be warranted.

**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 principles regulating the standard of proof with regard to private antitrust claims would be the general principles of procedural law. Pursuant to article 333 of the Code of Civil Procedure, the burden of proof lies with the plaintiff in respect of the constitutive fact of its right, and with the defendant in respect of the existence of a hindering, modifying or extinguishing fact of the plaintiff's right. The collection of evidence is presided over by the judge, and is entirely subject to the contestation of the parties. The judge will freely examine the evidence, giving attention to the facts and circumstances of the case records (article 131 of the Code of Civil Procedure). Exceptions to this general rule might prevail in specific cases regulated by special laws. For example, in actions brought by consumers as defined under consumer law, the burden of proof regarding constitutive facts may be shifted on to defendants pursuant to consumer law. The purpose of such shift is to protect consumers, based on a presumption that they are relatively disadvantaged.

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

It is extremely difficult to estimate how long courts may take to decide a given case in Brazil. Long probative phases and extensive appeals procedures may take place. One may estimate that a private or collective action runs for an average period of five years before reaching definitive judgment (trial, appellate and last resort).

Even though it would be hard to 'accelerate proceedings' as such, a party may be able to obtain interim relief. For instance, under article 273 of the Code of Civil Procedure, the judge may, at the request of the party, totally or partly advance the effects of the protection sought in the final request (interim relief). Such relief should only be granted where unequivocal proof convinces the judge that the allegation seems to be founded, and the damage is likely to be irreparable or hard to repair, and there is no risk that the interim relief becomes irreversible.

**17** What are the relevant limitation periods?

Pursuant to article 46 of the New Law, the limitation period for infringements against the economic order is five years from the date that the unlawful act is committed or, in the case of a permanent or continued infringement, from the date on which it ceased. In cases where the administrative violation also constitutes a criminal violation, the limitation period applicable for the criminal violation applies. For the purposes of private claims for damages, article 206, 3, V of the Civil Code determines that the limitation period is three years from the date of the injurious act or fact. It would be debatable whether the claimant should have been aware of the infringement before the limitation period is triggered.

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

The Brazilian appellate system is complex and provides various means to challenge court decisions. While an analysis of each of these appeals would fall outside the scope of this contribution, the appeals that are normally applicable in civil actions are:

- The *recurso de apelação* appeal, which is applicable against any judgment. In the *recurso de apelação* appeal, the matter heard

by the courts of first instance will be returned in its entirety (facts or erroneous application of law, or both) to the Appellate Court of the state or federal circuit court of appeals (Brazil's second instances), which may partially or totally reverse the judgment (collegial decision).

- The *agravo* appeals, which are applicable against interlocutory decisions (acts whereby the judge, during the course of proceedings, resolves an incidental issue), such as denial of the production of certain evidence.
- The motion for an *en banc* rehearing, which is applicable where non-unanimous court decisions (two votes against one, for example) reverse a judgment on the merits at the appellate level.
- The motion for clarification of judgment, which is used when there is obscurity, contradiction or omission in a routine order, interlocutory decision, judgment or court decision. The purpose of this motion is to complete a defective decision, clarifying any omissions and dissipating the obscurities and contradictions.
- The special and extraordinary appeals, which are extreme measures not designed to re-examine the factual or probative matter by contrast to the *recurso de apelação* appeals. A special appeal will be permitted against a final decision by a court of exclusive or appellate jurisdiction, when the decision conflicts with a treaty or federal law, denies them legal effect, or gives a federal law a different interpretation than has been given by another court, among other circumstances. The extraordinary appeal may be lodged against final decisions by courts of exclusive or appellate jurisdiction, and will generally be accepted when the decision at issue conflicts with a constitutional provision. A special appeal will be judged by the Superior Court of Justice; an extraordinary appeal will be judged by the Supreme Court of Justice.

## Collective actions

**19** Are collective proceedings available in respect of antitrust claims?

In Brazil, there are many mechanisms created for the protection of collective rights. Article 47 of the New Law entitles private parties to bring private claims directly with regard to their own individual rights to request the cessation of anti-competitive practices or indemnification. Such parties may opt to do so individually or as a group of claimants. Collective actions in private antitrust litigation may be filed by civil associations in defence of individual or shared common interests. In such cases, plaintiff(s) and defendant(s) are private parties, whether they appear alone or associated for this purpose. Two recent cases, from São Paulo and Minas Gerais respectively, are representative of this type of private collective lawsuit: *Sindetur/SP v American Airlines and Others* and *Associação de Hospitais de Minas Gerais (AHMG) v White Martins Gases Ind Ltda and Others*. In the former example, a union of tourism agencies sued airline companies and, in the latter case, an association of hospitals sued suppliers of medicinal gases, both for cartelisation.

Additionally, article 47 entitles the Public Prosecutor's Office, the federal government, states, federal districts, municipalities, certain public entities and associations devoted to the protection of consumer rights to initiate proceedings to protect those affected by anti-competitive practices. In many of these cases, the litigation is not strictly between private parties, thus falling out of the scope of private antitrust litigation.

**20** Are collective proceedings mandated by legislation?

Collective proceedings are mandated by article 47 of the New Law. In the collective proceedings of a private nature where the aggrieved parties take legal action in defence of their individual interests or shared common interests of their own accord, the judicial proceedings are regulated by the Civil Procedural Code (Law 5,869/73).

On the other hand, the collective proceedings initiated by the government on all federal levels, the public prosecutors, certain public entities and associations devoted to the protection of consumer rights are further regulated by Laws 7,347/85, 4,717/65 and 8,078/90.

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

The Brazilian procedural system does not contemplate a formal phase for examining the admissibility of class proceedings. As a result, defendants in collective proceedings are often subject to lengthy litigation. Nevertheless, certain provisions fill this gap to some extent, insofar as it is possible to consider the certification phase of the American class action to be similar to the curative phase of the individual proceeding in Brazilian law (fully applicable to the class regulation). In the curative phase, the judge analyses whether the conditions (standing, interest, and cause of action) and prerequisites (capacity to plead in court, competence of the judge, and jurisdiction, among other factors) of the action were properly met in order to permit further proceedings and the subsequent judgment on the merits. If any defect is found in the action, the judge will dismiss the proceedings without reaching the merits.

**22** Have courts certified collective proceedings in antitrust matters?

The judiciary permits class actions for damages brought by parties with legal standing to sue when the anti-competitive practices cause losses to the community. In most lawsuits, the anti-competitive practice and the right to receive compensation are asserted on the basis of a decision rendered by CADE in the corresponding administrative case. For instance, Public Prosecutors have brought public civil actions related to trade practices of steelmakers, restrictions to the sale of a supermarket, and owners of gasoline stations.

**23** Can plaintiffs opt out or opt in?

Class actions indiscriminately and automatically protect the entire community, group or class of victims harmed by a given event. This in effect dispenses with the express manifestation of interested parties' intention to participate in a class action (opt in), except in the event provided for in article 104 of the Consumer Protection Code (CDC). Article 104 determines that if the stay of an individual action is not requested within 30 days from the cognisance of the filing of the class action, the plaintiff of the individual action will be excluded from the subjective extent of the judgment to be pronounced in the class action. This 'reservation' (stay of the individual action until the judgment of the class action) is an institution that bears similarities to the right to opt out or opt in as understood in US class actions, given the possibility that the interested party and plaintiff of an individual action chooses whether or not to stay the processing of its individual lawsuit to wait for the outcome of the class action. In Brazilian collective law, res judicata only operates secundum eventum litis: that is, the judgment of the validity of the class suit will extend its effects to the entire community (except as explained above in connection with article 104 of the CDC). On the other hand, if the suit is deemed to be baseless, the res judicata will preclude the re-filing of the class action, but will not preclude individual actions disputing the same matter or the individual actions stayed as a result of the application of article 104 of the CDC. This effectively negates the need for a party to opt out of the class action, since an unfavourable res judicata would not preclude an individual action pleading the same rights. Lastly, it is also important to mention that in accordance with article 94 of the CDC, the interested parties in a class action may intervene as co-plaintiffs in order to help the plaintiff of the class action defend and safeguard the collective rights to which protection is sought.

**24** Do collective settlements require judicial authorisation?

Article 5.6 of Law 7,347/85 (the Public Civil Action Law) determines that public agencies with legal standing to sue may accept an interested party's commitment to adjust its conduct to become compliant through the imposition of a fine. The settlement instrument will have the force of a prima facie judicially enforceable debt instrument. Private collective settlements regarding damages also do not require judicial authorisation. However, in the event of default or lack of compliance, the settlement instruments would necessarily be brought before the judiciary. At this time, the judge will examine and decide about the regularity and legality of the agreement.

**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?

The regulation of class protection is contained in the federal legislation (the Public Civil Action Act, the Class Action and Consumer Protection Code), and therefore its provisions apply to the entire Brazilian territory. However, whether one class action may be used for the defence of collective rights across a varied territorial scope is a separate matter. Some argue that the effect of the judgment and of the res judicata define the extent of the protection sought by the filing of a class action. But the issue lacks consensus in Brazilian case law and continues to generate important discussions in various courts. Many argue that the effects of the judgment and of res judicata in class actions would, depending on their subject matter, apply to the entire Brazilian territory. However, another school of thought, grounded in the existence of an express rule in the opposite sense (ie, article 16, Law 7,346/85), affirms that res judicata will only produce effects within the limits of the territorial jurisdiction of the body rendering judgment. In practice, the former school has tended to dominate the dispute, on the grounds that to limit the effects of trans-individual res judicata is to distort the very essence of class protection. Thus, there are numerous judgments of the Superior Court of Justice which assert the possibility that the judgment exceeds the limits of jurisdiction of the judgment-rendering body and extends to the entire Brazilian territory.

In Brazil, the judiciary is divided into regular courts (state and federal) and special courts (military, electoral and labour). The principal tribunals are the Superior Court of Justice (which judges last-resort cases originating in the regular courts and is responsible for the interpretative harmonisation of the infra-constitutional ordinary law rules) and the Supreme Court, which is the most important body of the Brazilian judiciary, performing the role of constitutional control and processing and judging the cases defined in the Constitution. Each body has specific powers, as established in the Federal Constitution, so each matter is related to a competent court of first instance.

Private actions may be brought simultaneously regarding similar matters in more than one jurisdiction, provided that the parties to each action are different. Private actions involving the same parties, the same subject matter and the same request may not be brought sequentially or in parallel in more than one state.

It would also be possible to have the Public Prosecutor of each state initiate a similar action claiming damages for consumers in parallel, and in parallel to private actions by the individuals or corporations themselves.

**26** Has a plaintiffs' collective-proceeding bar developed?

Legal standing for pleading trans-individual interests belongs not only to the organs of the direct or indirect public administration, the Public Prosecutor's Office, federal government, states, municipalities and federal districts, but also to lawfully established associations and other entities set forth in article 82 of Law 8,078/90 (the Consumer Protection Code) and article 5 of Law 7,347/85 (the Public Civil Action). It is common, therefore, for there to be entities that protect specific interests (such as consumer rights), with legal standing to file public civil actions. However, it is not possible to affirm that a specialised bar for plaintiffs' collective proceedings has developed in Brazil.

## Remedies

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

Damages resulting from activities that infringe the economic order and free competition may be of two kinds: economic and non-economic. Economic damage includes actual damage and lost profits (article 402 of the Civil Code). Actual damage implies the effective and immediate reduction of the victim's assets, whereas lost profits represent loss of probable profits, frustration of the expectation of profit or potential reduction of the victim's assets. Within the scope of private antitrust litigation, compensation for actual damages and lost profits will be due where the defendant is found to have engaged in an anti-competitive practice infringing upon the rights of the plaintiff.

Non-economic damage, on the other hand, consists of the infringement of the objective honour of the injured corporation (its good name and image before society) or of the subjective honour of an individual (emotional distress).

In both cases, if there is injury due to an act that infringes the economic order, the burden to make the victim whole will be on the perpetrator of the unlawful act, by means of a payment of indemnity to be established by the judge.

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

See question 16 regarding the interim remedy mechanism. Injunctions are also available. In this case, a claimant must show that the foundation for the request is relevant and that the final decision would not be effective if the injunction were not granted.

**29** Are punitive or exemplary damages available?

The Civil Code does not allow for punitive damages as these are understood in the US legal tradition. Rather, article 927 of the Civil Code provides for full compensation of the damage actually experienced by the victim. Article 927 determines that any person who by perpetrating an unlawful act (articles 186 and 187) causes damage to another person shall compensate the damage caused. Nevertheless, over the years, a school of supporters of the US system of punitive damages has formed, to the effect that some advocate the theory that the judge should take into account the compensatory nature of the damage suffered as well as the punitive and exemplary nature of the conduct engaged in by the offender.

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

There is express provision in Brazil for the imposition of legal interest on indemnification for damages, as established in article 406 of the Civil Code. These would normally accrue from the date of the damage (if the award establishes the damages based on such date). Once a final decision has been rendered, the condemned party must pay the calculated amount within 15 days from the publication of the judgment, lest a penalty of payment of an additional 10 per cent over the total amount will be due, as provided for in article 475-J of the Civil Procedure Code.

**Update and trends**

Based on the analysis of recent decisions in private antitrust lawsuits brought before the relevant Brazilian courts, some trends can be tentatively pointed out. First, appellate judges have tended to wait for CADE's final decision in administrative proceedings before establishing eventual penalties in judicial proceedings. However, this cannot be taken as a rule, as courts have also made findings in the absence of previous administrative proceedings and previously imposed administrative sanctions.

Second, although courts are not bound by CADE's findings in administrative proceedings, judges have attributed high probative value to administrative decisions. This is noticed especially in cases regarding interim injunctive relief for the cessation of anti-competitive practices based on CADE's previous determinations.

Third, the intensification of the leniency programme, the provision for settlement agreements under the New Law and the development of private antitrust litigation are likely to reciprocally influence one another in the medium to long term. Leniency agreements and settlement agreements regarding collusive practices entered into with CADE imply an admission of participation in the conduct in question. These administrative agreements may have probative value for plaintiffs in private antitrust litigation. On the other hand, defendants that have entered into these agreements may remain exposed to civil liability for the conduct that they have confessed to in the administrative sphere. Thus, while potential private antitrust litigation may arguably provide disincentives for leniency and settlement agreements, leniency and settlement agreements may facilitate private antitrust litigation. Yet, this conjecture has not been widely tested empirically, given the incipient nature of private antitrust litigation in Brazil.

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

This question does not appear to be settled. The amounts resulting from sanctions imposed by CADE are arguably not to be offset against the award fixed in court for compensation of damage resulting from infringements committed against the antitrust rules. The penalty applied by CADE (administrative) is of a punitive and sanctioning nature and arguably bears no relation to compensation for reparation of the damage suffered by the victim. However, provided that the fines imposed correlate to the damage to consumers, this would likely be a relevant parameter to be taken into account when settling damages.

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

Except in cases where the litigants proceed in forma pauperis (as guaranteed by the state to those who prove the impossibility of bearing the procedural costs without prejudice to their subsistence, as explained in question 7), parties will bear the costs of the acts that they perform or request throughout the whole proceeding, until the final judgment (article 19 of the Code of Civil Procedure). Upon judgment, the defeated party is ordered to pay the prevailing party's costs as well as legal fees.

**33** Is liability imposed on a joint and several basis?

Responsibility for an infringement committed against the economic order, pursuant to the provisions of articles 32 and 33 of the New Law, will be joint and several between the companies or entities that make up an economic group, de facto or de jure, which have participated in the unlawful act. The companies' directors may also be held jointly liable. In the conception of the Civil Code (article 275), if there is joint liability, the creditor has the right to demand and receive the common debt from one or some of the debtors, either partly or totally; if the payment has been made in part, the other debtors will remain jointly and severally bound.

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

Bearing in mind question 33 and the provision in article 283 of the Civil Code, when one or several joint debtors are sued by a creditor who demands the total debt from them, the aggrieved party may exercise its right to recover against the co-debtors in order to recover the allotted quota paid on their behalf.

**35** Is the 'passing on' defence allowed?

There is no express provision regarding the passing-on defence in Brazilian law. The law merely determines that for administrative sanctions, the degree of harm to free competition, the national

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economy, consumers and third parties shall be taken into consideration. However, it would seem logical that the passing-on defence be allowed in assessing the amount of the damage and, thus, compensation owed to the plaintiff.

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

Several defences are theoretically conceivable in private antitrust litigation to avoid liability. These defences may be procedural or substantive in nature and their availability is contingent on the concrete circumstances of each case at hand.

**37** Is alternative dispute resolution available?

In the case of a dispute concerning disposable equity rights (which is not the case of disputes involving collective rights of public nature, for example), the parties that have the capacity to contract may resort to arbitration as a substitute for judicial proceedings (Law 9,307/96). In this case, the litigating parties may opt for arbitral proceedings in an attempt to resolve the dispute.

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