

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
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RELATIONSHIP BETWEEN PUBLIC AND PRIVATE ANTITRUST ENFORCEMENT

-- Brazil --

15 June 2015

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More documents related to this discussion can be found at: <http://www.oecd.org/daf/competition/antitrust-enforcement-in-competition.htm>

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-- Brazil --

1. Overview of private enforcement in Brazil

1. The Brazilian Competition Law, Law no. 12.529 of 30 November 2011, provides for two types of enforcement of antitrust law in Brazil: the public and the private.

2. In Brazil, public antitrust enforcement does not primarily intend to compensate damages caused by an anticompetitive conduct, but rather to repress the conduct and to restore market conditions. In other words, it seeks to cease anticompetitive practices and to deter future anticompetitive practices, by way of the deterring effect of penalties applied in a sanctioning decision.

3. Therefore, the punitive measures set out in Law 12.529/2011 include sanctions which do not intend to reward the State for any damage caused, such as ineligibility for public financing or to participate in public bidding procedures. Also, in this sense, it can be understood that the fines imposed in such proceedings do not aim to provide compensation or have a mitigating character, but, mainly, aim to have an illustrative function that will reinforce deterrence.

4. On the other hand, Brazilian competition law provides that the sum of fines levied by Cade will be allocated to the Fund for the Defense of Diffuse Rights. Such fund aims at not only compensating the damages caused by a violation to the economic order in general, but also the damages caused to the environment, to consumers and to other diffuse and collective interests. Thus, even though penalties imposed by CADE do not provide for direct compensation to the victims of an antitrust infringement, they do seek to repair harms to society caused by competition violations.

5. The primary goal of private enforcement, in its turn, is to compensate damaged parties. In other words, whereas penalties (including administrative ones) aim at discouraging infringements, private enforcement is mainly concerned with re-establishing the *status quo ante* of those who have been harmed by a certain conduct. Rather than repressing or sanctioning an action, indemnification is based on repairing an injury. Therefore, Brazilian civil law provides that compensation should be measured by the damages caused.

6. Specifically in the field of damages for antitrust, the Brazilian Competition Law foresees the right of private parties to compensation, the “right of action” before the judiciary. Article 47 of the Brazilian Competition Law provides that aggrieved parties may take legal action in defence of their individual interests or individual homogenous interests so that the anti-competitive practices cease and they are compensated for the losses and damages suffered, regardless of the investigation or administrative proceeding, which will not be suspended due to court action.

7. Under the Competition Law, therefore, public and private enforcement are independent. In order to file a lawsuit for compensation for damages incurred as a result of an infringement of competition rules, there is no need to have an administrative proceeding formally established or to have a final decision of the Brazilian competition authority, the Administrative Council for Economic Defense (CADE).

8. According to the Competition Law, then, both those who were directly or indirectly affected can file an action for damages. Even if the party is not directly involved in a legal relationship with the wrongdoer, but has suffered damage, they can file a claim for damages.

9. Private compensation claims can be filed by an individual, a legal entity or by a collective entity. Collective actions may be initiated by consumer organizations, public prosecutors, unions or other public bodies. Its purpose is to remedy collective interests of the public.

10. As an expert in competition, as well as the sole entity responsible for enforcing the Brazilian competition law, CADE can be a valuable resource for courts when hearing private enforcement cases. It is important that courts, when hearing private actions, allow and encourage the involvement of competition authorities by, for example, requesting the authority to provide estimates of the losses suffered by victims of the anti-competitive conduct.

11. Also, under Article 118 of the Brazilian Competition Law, CADE should be called before the judiciary to give an opinion as a legal assistant, when matters of application of the Brazilian Competition Law are being discussed. CADE can intervene, for instance, when it has already finalized a competition decision, or as an *amicus curiae*, when there is not yet a final decision.

12. Furthermore, in accordance with Article 93 of the Brazilian Competition Law, condemnations handed down by CADE are considered extrajudicial enforcement orders, allowing victims of antitrust infringements to use the authority's decision as evidence of harm in court proceedings.

2. Challenges in private enforcement

13. Despite the existing framework and legal provision for private enforcement as a result of antitrust infringements, private actions are still rare in Brazil. This can be attributed to a variety of factors.

14. Firstly, in Brazil, as in other jurisdictions, there are legal and procedural obstacles to damage actions. These include the need for complex economic analyses, evaluation of risk and the calculation of damages, which are notoriously difficult to obtain by private parties.

15. The issue of access to documents within an administrative proceeding file at CADE, and particular leniency documents, is of crucial importance.

16. Information and documents provided in the scope of a leniency agreement are kept confidential by CADE. Access to these documents is restricted to those who are being investigated, as well as other public authorities, such as the Federal Public Ministry. However, the Judiciary has not yet ruled on whether the signing a leniency agreement is considered a formal confession which can give rise to necessary compensation damages.

17. It must also be noted that there is not a strong culture of claiming damages in Brazil, which is a cultural obstacle to the proliferation of private enforcement in the field of antitrust.

18. Also, on the side of the judiciary itself, the prolonged time that appeals can take within the Brazilian judiciary and judges' lack of familiarity with antitrust strongly contribute to discourage actions for damages. It is also worth mentioning that due to these characteristics of being a lengthy process requiring complex legal and economic analysis, private actions for damages can be extremely costly for the parties.

3. Synergies between public and private enforcement

19. Although Brazilian Competition law explicitly provides that victims of antitrust infringement are entitled to claim for damage compensation, such actions in Brazil are still in their infancy¹, compared with other jurisdictions, such as the United States or Europe.

20. In other words, while private enforcement is an important tool to ensure the effectiveness of competition law, there is little evidence that victims are fully exercising their right to damages following an infringement of competition rules.

21. Despite the aforementioned difficulties faced by private claims for compensation, these actions, in addition to leading to the cessation of the anti-competitive conduct, can be an important tool for deterrence, as they increase the negative financial consequences imposed on a infringer of competition rules, acting as an important reinforcement for the objectives of public enforcement. In other words, the filing of such actions increases the deterrent effect of anticompetitive practices and strengthens antitrust policy.

¹ The number of private enforcement cases is very limited. Recently, the Association of Private Hospitals of the State of Minas Gerais obtained an injunction in a collective public civil action, filed in the State of Minas Gerais, against companies that were condemned by CADE in the “Gas Cartel” case. The injunction ruled that the companies condemned should stop overpricing in the sale of industrial and medical gases, and that an expert determine the higher amount paid by hospitals as a result of the cartel. Following this suit, the Basic Sanitation Company of the State of São Paulo – SABESP, as a supplier several of the condemned companies, also filed a private individual action, demanding compensation for losses suffered as a result of the cartel.

REFERENCES

- COMISSÃO DAS COMUNIDADES EUROPEIAS. Livro Branco sobre acções de indemnização por incumprimento das regras comunitárias no domínio antitrust. Bruxelas, 2008. Available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2008:0165:FIN:pt:PDF>.
- CONNOR, John M. Price-fixing overcharges: legal and economic evidence. Purdue University Staff Paper n° 04-17, April 2005.
- CONNOR, John; HELMERS, Gustav. Statistics on modern private international cartels, 1990-2005. Working Paper American Antitrust Institute n°. 07-01. Available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=944039#PaperDownload.
- CRANE, Daniel A. Optimising private antitrust enforcement. Available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1474956##.
- EUROPEAN PARLIAMENT. Directive of the european parliament and of the council of on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union. Available at: <http://ec.europa.eu/competition/antitrust/actionsdamages/documents.html#link1>.
- FERRAZ JÚNIOR, Tercio Sampaio. Direito da concorrência e enforcement privado na legislação brasileira. Revista de Direito da Concorrência, São Paulo: November, v. 1, n° 2, 2013.
- GABAN, Eduardo Molan; SANTOS, Bruno Droghetti Magalhães. Reparação de danos no direito antitruste brasileiro. Available at: <http://www.migalhas.com.br/dePeso/16,MI140915,61044-Reparacao+de+danos+no+Direito+Antitruste+brasileiro>.
- MATION, Gisela Ferreira. As ações civis para cessação e reparação de danos causados por condutas anticoncorrenciais no Brasil. Available at: <http://www.esaf.fazenda.gov.br/premios/premios-1/premios/viii-premio-seae-de-monografias-edicao-2013/monografias-premiadas-em-edicoes-antiores>.
- Organisation for Economic and Cooperation and Development – OCDE. Competition law and policy in Brazil: a peer review. 2010.
- Competition policy 1994 workshop with the dynamic non-member economies. 1996. Available at: <http://www.oecd.org/daf/competition/prosecutionandlawenforcement/2697296.pdf>.
- Lei e política de concorrência no Brasil: uma revisão pelos pares. 2005.
- Quantification of harm to competition by national courts and competition agencies. November 2012. Available at: [http://search.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/CO MP\(2011\)25&docLanguage=En](http://search.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/CO MP(2011)25&docLanguage=En).
- ROSENBERG, Barbara; BERARDO, José Carlos da Matta. Brazil: cartels and leniency. The Antitrust Review of the Americas 2007. Global Competition Review: 2007.