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New Perspectives and Interplay
with Leniency**

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I. INTRODUCTION

Private antitrust enforcement in Brazil has been on the rise over the past five 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, CADE; and the increasing general awareness of competition law in Brazil.²

Pursuant to Article 47 of Brazil's Antitrust Law, victims of anticompetitive conduct may recover the losses they 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 any party who causes losses to third parties 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.³

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

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² 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.

³ Punitive damages are not expressly provided for in the law, but some plaintiffs have been awarded those as well.

against corporations. Please note that pass-on defense is not applicable to misconduct against consumers;⁴ for other cases, there have been no statutory provisions or case law issued to date.

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.

II. 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.⁵ 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 by the agency, 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, concluded that there was no antitrust violation and therefore did not award any compensation to the plaintiffs.⁶ 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, a 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

⁴ See Brazil's Consumer Protection Code, Article 25.

⁵ See Proceedings No. 08012.009888/2003-70 (industrial gases cartel case), adjudicated by CADE on September 1, 2010.

⁶ 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.

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.

Although Brazil is said to have only single damages, injured third parties may resort to provisions contained in the Civil Code (Article 940) and Brazil's Consumer Protection Code (Article 42) to require the payment of double damages, as the payment of a supra-competitive price was due to an antitrust 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.

III. IMPACTS ON THE LENIENCY PROGRAM

However, 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.

IV. CONCLUSION

As private antitrust litigation evolves in Brazil, the challenges facing practitioners and enforcers alike tend to get more complex and intertwined. Issues related to discovery and confidentiality, especially in view of cross-jurisdictional cases, and the interplay between private enforcement and leniency, among other issues, are first and foremost symptoms of a system that is no longer in its infancy. The transition of Brazil's private antitrust enforcement into a mature and tested set of rules and practices is a process that we are seeing now—as in any such transitions, it will not be without some turbulence.