BRAZIL

Court proceedings in key jurisdictions
Introduction

This chapter is part of the *ICC Compendium of Antitrust Damages Actions* (the “Compendium”) which can be read in full on the ICC website at www.iccwbo.org.

Designed to provide decision-makers with a comparative overview of the issues most frequently arising in private antitrust litigation in key jurisdictions, the Compendium reflects contributions from leading antitrust law specialists around the world. It does not try to explore the complexity of each legal system but strives to capture a comprehensive picture of the matter, organised around nine topics, and completed in some jurisdictions by an additional chapter highlighting key issues. A collection of decisions issued in the same jurisdictions is also available on the ICC website. This database is the essential complement to the overviews for a comparative approach and will allow a better understanding of the rules presented in the compendium.

With this publication, ICC hopes to help in-house counsels, antitrust practitioners and enforcers, but also judges of the courts and academics, navigate through a new, fast-changing legal environment.
Glossary

**Appeal:** a proceeding undertaken to have a decision reviewed by a higher authority whose jurisdiction may include (i) an entirely new assessment of the case, (ii) a limited review of manifest errors of law and facts, or (iii) a specific review limited to legal issues.

**Article 101 TFEU:** This provision prohibits as anti-competitive all agreements, decisions, and practices between undertakings and concerted practices which may affect trade between EU Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market.

**Article 102 TFEU:** This provision prohibits any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it. Those behaviours are incompatible within the internal market in so far as it may affect trade between EU Member States.

**Award:** a final judgment or decision, especially one by an arbitrator or by a jury assessing damages.

**Burden of proof:** The responsibility for a party during legal proceedings to prove the facts it asserts; the burden of proof may be shifted to the opposing party once the standard of proof has been met.

**Cartel:** Any horizontal collusion between competitors whose purpose is to fix prices or quantities, allocate markets, while sharing sensitive commercial information.

**Cease-and-desist order:** a court’s or agency’s order prohibiting a person from continuing a particular course of conduct which is deemed harmful. In competition law proceedings, these orders also include a prohibition from adopting future conducts likely to have the same effects as the one which is prohibited.

**Claimant:** the party who brings a civil suit in a court of law.

**Class action:** a lawsuit where a person or a group seeks damages for a larger group of claimants. Class action proceedings typically include a preliminary stage to define the characteristics of the group, which needs to gather persons with identic cases and who have suffered a prejudice from the same tort.

**Competition authority:** Any public authority, whether independent of forming part of a government administration, whose role is to enforce rules which prohibit unilateral and coordinated behaviours that restrict competition.

**Damages:** money claimed by, or ordered to be paid to, a person as compensation for loss or injury.

**Defendant:** a person sued in a civil proceeding.

**Discovery:** Proceeding whereby a party has to disclose information and documents relating to the litigation upon the request of the opposing party. This procedure is usually implemented during the pre-trial phase of the lawsuit.
**Directive 2014/104/EU:** European Union Directive issued on 5 December 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and the EU. The purpose of this text is to set forth common rules among EU Member States in order to enhance private enforcement of Articles 101 and 102 TFEU and full compensation for victims of anti-competitive conducts. The text also provides for specific rules on the interplay between civil lawsuits and enforcement proceedings before competition authorities.

**Follow-on:** A competition law claim for damages where the alleged infringement has previously been found by a final decision of a competition authority.

**Immunity:** Total exemption of fine for a company that is the first to reveal the existence of a competition law infringement to a competition authority.

**Infringer:** Any company that has implemented unilateral or coordinated behaviours infringing competition law, where a competition authority has found such infringement in a decision.

**Joint-and-several liability:** liability that may be apportioned either among two or more parties or to only one or a few select members of a group of Infringers upon the decision of a competition authority or a civil court.

**Leniency:** A competition law procedure that rewards companies that adopt anti-competitive conducts with Immunity or reduction of fine, if they inform the competition authority of an infringement that it did not previously have knowledge of.

**Limitation period:** a statutory period after which a lawsuit or prosecution cannot be brought in court.

**Passing-on defence:** a competition law defence that relies on the civil law principle of unjust enrichment. During civil proceedings, a defendant may argue that the plaintiff’s claim for compensation should be totally or partially denied as it passed the alleged overcharge resulting from a competition law infringement on its own customers.

**SME (Small—and Medium-sized Enterprise):** categories of micro, small and medium enterprises defined based on their staff headcount, and either their turnover or balance sheet total.

**Stand-alone action:** A competition law claim for damages where the alleged infringement has not previously been found by a final decision of a competition authority.

**Standard of proof:** In any legal procedure, the level of evidence that is required to establish with certainty a fact or a liability.

**Tort:** A civil wrong, other than breach of contract, for which a remedy may be obtained, usually in the form of damages; a breach of duty that the law imposes on persons who stand in a particular relation to one another.
In Brazil, private antitrust litigation is set forth in Law No. 12,529/2011 (the “Brazilian Antitrust Law”) but is mainly based on general rules of tort liability provided in Law No. 10,406/2002 (the “Brazilian Civil Code”). Private enforcement of antitrust law has historically been limited, but there is a trend of expansion resulting from stronger public prosecution of cartels and broad diffusion of competition policy; new rules and guidance from government agencies and authorities; and bills aiming to introduce specific procedural rules and to promote private antitrust litigation, especially Brazilian Senate’s Bill No. 283/2016 (“Bill No. 283/2016”, currently Bill No. 11,275/2018).

1. Jurisdiction

The primary authority in charge of enforcing antitrust law in Brazil is the Administrative Council for Economic Defence (“CADE”). However, CADE is only in charge of public enforcement and not of private damages actions.

Therefore, victims of anti-competitive practices can seek compensation before civil state courts in the venue of their domicile, according to Article 53, V, of Law No. 13,105/2015 (the “Brazilian Code of Civil Procedure”).

If the Brazilian Government, state-owned companies, government agencies—such as CADE, foundations, professional activity supervisory boards or even the Federal Public Prosecutor’s Office—are parties, the jurisdiction will be of federal courts. In case such entities intervene in the process as interested third-parties, the case records shall also be sent from the state courts to the federal courts.

2. Relevant legislation and legal grounds

Article 47 of the Brazilian Antitrust Law expressly states that parties directly or indirectly harmed by anti-competitive practices, as well as entities with standing to propose collective actions in Brazil, may sue the infringers to obtain damages and the cessation of the practices, regardless of any inquiry or any on-going administrative process. This means that infringers can be sued even if no violation had been previously established by CADE.
Since the Brazilian Antitrust Law offers no other guidance\(^1\) regarding private antitrust litigation, claimants must resort to general rules of tort liability.

The general rule of tort liability in the Brazilian legal system is set forth by Article 927 of the Brazilian Civil Code, which establishes that any party that causes harm to others, by committing a wrongful act, is bound to repair it.

In addition, Article 186 of the Brazilian Civil Code sets forth that any party that violates rights and causes harm to another, by action, voluntary omission, negligence or imprudence, commits a wrongful act. Abuse of rights is also a wrongful act, according to Article 187 of the Brazilian Civil Code. Therefore, the configuration of a wrongful act requires the violation of the legal system and consequent harm to another party.

This means that tort liability—and, therefore, antitrust damages actions in Brazil—is subject to the existence of four essential conditions: (i) wrongful act; (ii) fault or intent\(^2\); (iii) harm; and (iv) causal link between the wrongdoing and the harm, in accordance with Article 927, which requires wrongful act and harm, and Article 403, which requires causal link, both from the Brazilian Civil Code.

Any victim, whether they are direct or indirect customers, competitors, suppliers, etc., can seek compensation before the Brazilian courts, as long as they can prove they were harmed by the anti-competitive conduct. Parties have the right to employ all legal, as well as morally legitimate, means to prove the facts on which the claim is based, even if they are not specified in the Brazilian Code of Civil Procedure. Usual methods include documental and expert evidence.

As indicated above, it is not necessary that CADE, the Public Prosecutor or criminal courts have started an investigation or issued a decision finding an infringement for the action to be admitted, and therefore “stand-alone actions” are possible. However, to date, most antitrust damages actions in Brazil were based on decisions from CADE convicting companies for participating in cartels, and can be characterised as “follow-on actions”.

Private antitrust damages actions will usually not be stayed as a result of ongoing investigations by CADE regarding the same conduct. However, defendants may seek the stay of a claim based on related pending decisions, such as the judicial review of CADE’s decision in which the claim is based, in accordance with Article 313, V, “a”, of the Brazilian Code of Civil Procedure. Some claims were stayed based on this provision\(^3\).

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1 In some cases, CADE may issue non-binding guidance regarding the calculation of damages, to help potential claimants. Recently, CADE issued Resolution No. 21/2018, which regulates the procedure to access documents and information contained in its administrative proceedings. In addition, it establishes that CADE may consider, in the calculation of fines or settlements’ values, eventual judicial or extrajudicial reparation of the damages caused.

2 The necessity to prove fault or intent in antitrust damages actions against companies is debatable, since the Brazilian Antitrust Law establishes strict liability for companies that take part in anti-competitive conducts. However, it can also be argued that mentioned strict liability only applies in the public enforcement and that demonstration of guilt or intent is fundamental to civil liability.

3 As an example, see Process No. 0004954-43.2013.8.21.0012 of the Dom Pedrito, Rio Grande do Sul, judicial district, involving the “cartel of medicinal gases”.
3. **What types of anti-competitive conduct are damages actions available for?**

Antitrust damages actions can be brought against any kind of anti-competitive conduct, meaning any act that has the purpose or may produce any of the following effects, whether or not they succeed and regardless of fault: (i) limiting, adulterating, or in any way hindering free competition or free enterprise; (ii) controlling relevant markets of goods or services; (iii) arbitrarily increasing profits; and/or (iv) abusively dominating a market, in accordance with Article 36 of the Brazilian Antitrust Law.

As examples, the following conducts, mentioned in Article 36 of the Brazilian Antitrust Law, may be subject to antitrust damages actions: (i) agreements with competitors regarding prices, quantity of goods, allocation of shares or segments of markets, etc.; (ii) promotion or influence of uniformed or concerted business practices amongst competitors, aiming to standardize the agents’ conducts (e.g. imposition of price lists for a given category, or by a class association); (iii) limiting or preventing the access of new entrants to the market; (iv) creating difficulties for the establishment, operation or development of competitors; and others, but mainly those listed in the Brazilian Antitrust Law.

4. **What forms of relief may a private claimant seek?**

In accordance with Article 47 of the Brazilian Antitrust Law, private claimants may seek: (i) the cessation of the anti-competitive conducts and (ii) compensation for losses and damages suffered.

This means a private claimant may seek pecuniary damages—including overcharges paid and any loss of profits—as well as pain and suffering damages (non-pecuniary losses). In the case of cartels, for instance, non-pecuniary losses could be claimed based on the reduction of welfare for consumers deprived of access to the affected products, either because of overcharges or reduction in supply. This may be the case, for example, in relation to a cartel that affects public health or essential goods.

According to Article 944 of the Brazilian Civil Code, compensation is measured by the magnitude of the damages. Punitive damages are not available for antitrust damages actions. In addition, damages must be assessed on a case-by-case basis.

Claimants may also seek an injunction to immediately cease the anti-competitive conduct—such as discriminatory practices or denying access to essential facilities, among others, in accordance with Article 47 of the Brazilian Antitrust Law and Articles 294 to 311 of the Brazilian Code of Civil Procedure.

Infringers may be considered jointly and severally liable for the damage caused by collective anti-competitive conducts, based on Article 942 of the Brazilian Civil Code. This would mean that a victim could claim full compensation from any of them until being fully compensated. Infringers which compensated damages above their individual share of responsibility could pursue reimbursement against other joint infringers, in accordance with Articles 283 and 934 of the Brazilian Civil Code. With that said, joint and several civil liability

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4 As an example, see Process No. 332.865 (2013/0120915-8)—MG at the Brazilian Superior Court of Justice, involving the so called “cartel of medicinal gases”.
for collective anti-competitive conducts is not a settled matter under the Brazilian courts’ case law and some authors question this position⁵.

With the objective of settling that and other matters related to antitrust damages actions, Bill No. 283/2016 aims to establish double damages for parties injured by cartels and promotion or influence to adopt uniform or concerted business practices between competitors. Signatories of leniency agreements or cease-and-desist commitments (settlements) with Cade may be dismissed from paying double damages if they deliver to Cade documents that allow for the calculation of the harm caused by the infringement. In addition, if Bill No. 283/2016 is approved, signatories of leniency agreements or settlements will not be considered jointly and severally liable with other infringers. Such Bill was already approved in the Brazilian Senate and now awaits approval in the Brazilian House of Representatives⁶. The provisions of the Bill will enter into force after its official publication as Law and will only apply to new infringements, in accordance to Decree-Law No. 4,657/1942 (so-called “Introductory Law to the Rules of Brazilian Law”), which disciplines the application of Brazilian laws in general and establishes that new laws, as a general rule, do not affect juridical acts fully performed while the previous applicable law was in force.

The calculation of damages usually demands the production of expert evidence, which may be requested by the parties or ex officio by the judge, in accordance with Article 370 of the Brazilian Code of Civil Procedure.

As the calculation of civil damages in cases of anti-competitive practices may be an arduous task for the judiciary, decisions from Cade may sometimes include considerations and guidance for judges to set the amount to be paid to the victim in case the claim is received.⁷ The Public Prosecutor’s Office or the judge may also request Cade to provide information, including any estimation of damages it could have made in the course of the administrative investigation. In accordance to Article 118 of the Brazilian Antitrust Law and Article 138 of the Brazilian Code of Civil Procedure, Cade may also be notified to intervene as assistant or amicus curiae in claims involving Brazilian Antitrust Law.

Finally, the calculation of non-pecuniary losses caused by anti-competitive conducts is a complex and hardly predictable matter in Brazil, especially due to the lack of clear and settled parameters for such task. Usually, for cases involving non-pecuniary losses in general, courts take into account the intensity of suffering and case law. In the case of antitrust damages claims, however, there is still not sufficient case law or guidance in Brazil, and non-pecuniary losses awarded so far are somewhat arbitrary.

5. **Passing-on defence**

Courts in Brazil have admitted the passing-on defence, at least in the first and second instances⁸, even though it is not expressly set forth in any legislation in force. It is currently

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⁶ One of the two commissions involved in the review of this bill has already issued a favourable opinion. It is a positive sign in the sense of a future adoption. However, it is difficult to estimate how long it will need to be finally approved, as the Brazilian legislative process can be extremely variable, depending on political interests.


⁸ To date, there is no public decision from the superior/supreme courts yet.
based on Article 944 of the Brazilian Civil Code, which establishes that compensation is measured by the extension of the damages, and Article 884 of the Brazilian Civil Code, which prohibits unjust enrichment.

There is controversy regarding the burden of proof on the matter of passing-on. Some authors argue the burden of proof falls on the claimant, who must prove the facts that constitute its rights, in accordance with Article 373, I, of the Brazilian Code of Civil Procedure. Other authors argue that it is up to the defendant to prove the existence of facts that can block, modify or dismiss the claimant’s rights, in accordance with Article 373, II of the Brazilian Code of Civil Procedure. There is no settled case law in any of those directions, as this is a new matter in Brazil, and there is no strong trend between academics for either side.

The current version of Bill No. 283/2016 aims to settle the question by establishing that the passing-on of overcharges will not be presumed and that defendants must prove that it happened.

Either way, considering that claimants can more easily demonstrate that overcharges were not passed on to their own consumers, the judge may shift the burden of proof to the claimants, provided this is done in a reasoned decision. In that case, claimants must be given the opportunity to challenge the shifting of the burden of proof (Article 373, §1º of the Brazilian Code of Civil Procedure), i.e. they may ask the judge to reconsider his/her decision to shift the burden of proof.

In the cases in which the burden of proof falls on the defendants, they may claim the disclosure of documents in possession of the claimants in order to prove the passing-on (Articles 396 to 404 of the Brazilian Code of Civil Procedure).

If the court supports the passing-on defence, indirect customers would still need to file a new lawsuit, subject to the same legal requirements and rules previously indicated.

### 6. Pre-trial discovery and disclosure, treatment of confidential information

#### Pre-trial discovery

There is no pre-trial discovery phase in Brazil. Unless provided otherwise by any specific legislation, the burden of proof falls on the claimant regarding the facts that constitute his rights and on the defendant as to the existence of any fact that blocks, modifies or extinguishes the claimant’s rights.

The judge may also assign the burden of proof differently, provided this is done in a reasoned decision, giving the assigned party the opportunity to argue against the shift of the burden of proof.

In addition, in accordance with Articles 381 to 383 of the Brazilian Code of Civil Procedure, a claimant may present a motion for the early production of evidence. The motion shall be admitted in cases in which: (i) there is reasonable fear that it may become impossible or very difficult to attest certain facts during the course of the suit; (ii) the evidence to be produced may render viable an amicable solution between the parties or facilitate a swift
outcome through another adequate mean of dispute resolution; and (iii) prior knowledge of the facts may either justify or avoid the filing of the suit.

The claimant must precisely state the facts on which the evidence rests. The judge shall then determine the service of process upon parties who have interest in the production of evidence or in the fact to be proven. The interested parties may request the production of any piece of evidence in the same proceeding, provided it is related to the same fact, unless its joint production causes excessive delay—this should be assessed in each case, based on a proportionality analysis.

In those proceedings, the judge shall not render judgment on the occurrence or not of the fact, nor on the respective legal consequences.

Furthermore, during the course of a lawsuit, a claimant may request the disclosure of documents or evidence in possession of defendants or third parties. This means that the judge may order the production of documents from the files of CADE or from criminal investigations.

CADE’s Resolution No. 21 of 12 September 2018, regulates the procedure to access documents and information contained in administrative proceedings to impose sanctions for violations against the economic order. By standard, all documents and information are considered public, and even confidential records will be publicised after CADE’s Tribunal final decision. However, there are exceptions that will be maintained confidential even after CADE’s final decision, such as: (i) the anti-competitive conduct records elaborated based on self-accusatory documents and information voluntarily submitted during the negotiations of leniency agreements and settlements; (ii) documents that contain industrial secrets; (iii) documents related to business activity whose disclosure may represent competitive advantages to other economic agents; (iv) documents and information whose confidentiality is protected in specific legislation, such as tax and banking information, professional secrets, among others; (v) documents whose confidentiality was defined in judicial decisions; (vi) documents provided by a proponent during the negotiations of Leniency Agreement or Settlements subsequently frustrated; and others. However, access to those documents and information may be granted by specific judicial decisions, keeping in mind the necessity to protect the national policies of leniency and settlements.

7. Limitation Periods

The limitation period for individual antitrust damages actions is three years, according to Article 206, § 3º, V of the Brazilian Civil Code. For collective actions, the limitation period is five years, by analogy with Law No. 4717/1965, which sets forth the limitation period for collective claims (“Ação Popular”).

There is no settled case law regarding whether the limitation period should be counted from the date the damage happened (e.g. the date of each acquisition subject to overcharge) or from the date the victim became or could reasonably have become aware of the damage (e.g. the public disclosure of the investigations or of CADE’s final decision).

In addition, case law is not yet settled about the period of time for which damages can be sought. In other words, when dealing with continuous conducts (e.g. a long lasting cartel) courts could consider the limitation for each case of damage (e.g. each purchase subject to
overcharge), for the entire period or only injuries suffered in the three years prior to the last violation or reasonable awareness of the damage.

Brazilian Senate’s Bill No. 283/2016 aims to raise the limitation period for individual antitrust damages actions to five years counted from the unequivocal knowledge of the infraction, which will happen on the date of publication of CADE’s final decision or the outcome of the criminal action.

Parties potentially harmed by anti-competitive conducts may also seek motions to interrupt the limitation. Those consist of simple and non-adversarial proceedings, set forth in Article 202 of the Brazilian Civil Code and Article 726 of the Brazilian Code of Civil Procedure. They can be used to interrupt the limitation period once and retain the rights for future lawsuits.

8. Appeal

Rulings of civil courts must be appealed before the respective state or federal Court of Appeals, which has jurisdiction over matters of fact and law.

Rulings of the Court of Appeals may be appealed before the Brazilian Superior Court of Justice, which rules only on points of law related to the application of federal laws or treaties, and the Brazilian Supreme Court, which rules on points of law related to the Brazilian Constitution.

9. Class actions and collective representation

Under Brazilian Antitrust Law, antitrust damages actions may be proposed by entities listed in Article 82 of Law No. 8.078/1999 (the “Brazilian Consumer Protection Code”) for the defence of homogeneous individual rights.

Furthermore, Law No. 7.347/1985 regulates collective actions in Brazil for the recovery of damages caused by infractions against the economic order.

In accordance with mentioned legislation, collective actions for the recovery of antitrust damages may be filed by: (i) the Public Prosecutor’s Office; (ii) the Public Defender’s Office; (iii) the Union, states, the federal district and municipalities; (iii) government agencies, state-owned companies, foundations and private companies controlled by the government; and (iv) associations that already existed for at least one year and that include in their institutional objectives the defence of consumers, competition or the economic order.

The majority of collective actions related to antitrust damages, in Brazil, were filed by the Public Prosecutor’s Office. In the few existing cases, CADE usually sends an official letter to the Public Prosecutor informing such Prosecutor of a recently issued infringement decision and suggesting that collective actions be initiated.

According to Article 103, III, of the Brazilian Consumer Protection Code, decisions in collective actions relating to antitrust damages give rise to res judicata and are binding upon everyone—benefiting all the victims and their successors—only if the claim is granted.
This means that each individual party or their successors may proceed with the liquidation and execution of the decision for their part of the damages. However, if the claim is not granted, interested parties that did not act as co-claimants may file individual lawsuits.

Collective actions do not operate as *lis pendens* to individual lawsuits, but the positive *res judicata* will not benefit the individual claimants if they do not request the suspension of their individual claims within 30 days, counted from the knowledge that the collective action exists.

10. Key issues

**Uncertainties regarding the limitation period**

As stated above, one of the main difficulties involving antitrust damages actions in Brazil is the lack of settled case law regarding whether the limitation period should be counted from the date on which the damage happened or from the date on which the victim became or could have reasonably become aware of the damage—there is controversy if the awareness should be presumed only after CADE’s final decision as well. Case law is also not settled about the period of time for which damages can be sought when courts are dealing with continuous conducts, such as long-lasting cartels.

Such uncertainties may discourage claimants from filing antitrust damages actions in Brazil. For this reason, Bill No. 283/2016 aims to settle the question by setting that the limitation period will be counted only from the unequivocal knowledge of the infraction, which will happen after the publication of CADE’s final decision or outcome of the criminal action.

**Burden of Proof for the Passing-On Defence**

In the matter of passing-on defence, there is controversy regarding if the burden of proof should fall on the claimant or the defendant. There is no settled case law in any of those directions, as this is a new matter in Brazil, and there is no strong trend between academics for either side. This, in turn, generates legal uncertainties that may be prejudicial for both claimants and defendants.

The current version of Bill No. 283/2016 aims to settle the question by establishing that the pass-on of overcharges will not be presumed and that defendants must prove that it happened. If such provision enters into force, however, there will still be discussions regarding how defendants will be able to prove the passing-on, since they probably do not have access to the claimants’ pricing strategies.

**Calculation of damages**

The calculation of antitrust damages is an arduous task for the claimants and the judiciary. This step usually demands the production of expert evidence and, even so, may stumble in the lack of familiarity of Brazilian courts with antitrust matters, lack of documents to base the calculation and difficulties to reach legal standards. The consulted case law shows that the liquidation phase in antitrust damages actions is surrounded with uncertainties, as very
often, in the past, the damages awarded were estimated or arbitrated by courts in a merely discretionary manner (i.e. with no actual link between the harm and the award).

Decisions from CADE may sometimes include considerations and guidance for judges, and CADE may be requested to provide information or to intervene in claims. However, additional changes in the Brazilian legislation, joined by the specialisation of Brazilian courts in antitrust matters, would be helpful.
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