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New Regulation to Boost Antitrust Damages Actions in Brazil: Will it Work?

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Last November, on the 10th anniversary of the Brazilian Competition Act (Law No. 12,529/2012, or BCA), a long-expected regulation aiming at incentivizing actions for antitrust damages was enacted in Brazil (the so-called "*Brazilian Private Enforcement Package*" – BPEP, or Law No. 14,470/2022).

Formerly proposed before the Brazilian Senate in 2016 (Senate Bill 283/2016) and inspired by the US treble damages as well as the EU Damages Directive (Directive 2014/104/EU), this new law strengthens the tools for the implementation of the domestic competition policy. Competition policy has been historically anchored, in Brazil, in activities performed in the public enforcement [1] realm – i.e., the *administrative prosecution* by the Brazilian antitrust agency (CADE) and the *criminal prosecution* by investigators, public prosecutors and Courts against those anticompetitive acts that also constitute criminal violations (Law No. 8,137/90). On the backseat has sat, so far, the private enforcement regime.

This ancillary role of private enforcement is not a result of a lack of legal rules. Indeed, the Brazilian Civil Code (BCC) has, for a long time, entrusted individuals injured by an unlawful practice the right to sue for damages (BCC, Art. 927 and BCA, Art. 47, which covers actual loss, loss of profit, and pain and suffering).

However, as in many areas of the law, a legal provision alone is insufficient to effectively exercise a right. This is particularly important in the case of competition law private enforcement, against which practical obstacles play a central role in preventing private parties from suing for damages. These hurdles, in general, include uncertainties concerning the limitation period; complex and expensive litigation, often taking several years, and lack of monetary incentives when the expected indemnification is confronted with the chances of success and the litigation costs (including, if the case, the costs incumbent on the losing party). The BPEP was passed to change this landscape in Brazil.

However, discussions concerning the necessity of boosting domestic private enforcement did not occur out of context.

From the 1980s and 1990s, studies began to point out the importance of actions for damages as a deterrence mechanism against anticompetitive practices in the US. [2] In the 2000s, a landmark

judgment by the European Court of Justice (ECJ) (*Courage v Crehan*) confirmed the then-disputed possibility that individuals could bring damages actions based on violations of the provisions of European Union rules on the protection of competition. [3] This precedent raised the European debate, culminating, in 2014, in the edition of the European Damages Directive No. 2014/104/EU, comprising provisions aimed at guaranteeing the right to total compensation for damages arising from anticompetitive acts and clarifying/harmonizing procedural rules for this purpose. In 2019 the OECD launched its peer review on Competition Law and Policy in Brazil and stated that "*to date, the extent of successful private enforcement activity in Brazil has been limited*". According to the entity, a bill to boost private actions while protecting the effectiveness of public enforcement, notably CADE's leniency program, should, thus, be passed – a demand that has now been attended.

Three legislative goals and eight provisions: an overview of Law 14,470/2022

A common ground for contentious debates on initiatives seeking the promotion of private enforcement is finding the right balance between, on the one hand, incentivizing parties to sue those who commit antitrust infringements and inviting courts to have a more active role in the interpretation and application of competition law; and, on the other hand, sustaining a strong, empowered, and consistent public enforcement coordinated by an antitrust agency. The idea of harmonization, thus, is vital.

In Brazil, the vector for such compatibility assumed the need for shoring up CADE's activity and avoiding collateral effects in the public enforcement subsystem. Hence, far from altering the "*CADE-centrism*", the new law aims to increase CADE's general level of enforcement whereas assuring concrete benefits to the injured parties through a few normative "*fine-tunings*".

These adjustments include, for example, further increasing the attractiveness of traditional instruments of collaboration (e.g., Leniency and Cease and Desist Agreements – TCC) to CADE's investigations, connecting their benefits not only to the traditional administrative and criminal immunity but also to lower level of compensation to be paid by a such party if sued for damages. Another fine-tuning is the attempt to reduce litigation transaction costs by (supposedly) dissipating important procedural quandaries and uncertainties.

In more didactic terms, Law No. 14,470/2022 contains *eight provisions* which modify the original text from the BCA to fulfil *three regulatory goals*: **(i)** incentivize plaintiffs to sue for damages; **(ii)** balance the incentives for public and private enforcement; and **(iii)** provide legal certainty on specific procedural rules. These are discussed in detail below.

In the *first group* of measures, aimed at *creating (financial) incentives for filing lawsuits*, there is the provision for the right to compensation in an amount equivalent to twice the damages suffered (double damages) as a result of a collusive anticompetitive act (e.g., a cartel or influence on collusive behaviour) (BCA, Art. 47, §1). Whereas it is true that, similar to the rules in the EU, the principle of full compensation applies in Brazil,[4] the idea that wrongdoing should be punished in "*double*" has been more recently present in the Brazilian legal system in different legal fields, such as, for example, (i) Consumer Law (see Consumer's Defense Code Article 42, sole paragraph, setting forth the right to double refund for undue payment by a consumer); or (ii) Civil and Regulatory Law, given the provision from Law No. 10,209/2001, ruled constitutional by the

Brazilian Supreme Court, which grants the right to double payment to cargo carrier who has not received in advance a toll voucher to be provided by the cargo shipper. [5] Thus, Brazilian private enforcement law follows the US model rather than the EU model when it comes to punitive damages.

The *second group* outlines provisions to balance *CADE's investigative efforts (public enforcement) and the promotion of private prosecution*. Indeed, given (i) the importance of leniency agreements and TCC to CADE (vital source for getting evidence to prosecute companies, as well as a destabilizing factor to unlawful cooperation among firms); and (ii) the fact that such agreements do not insulate its applicant from the duty of compensation provided for in Art. 47 of the BCA, it was necessary to reset the scale and provide further immunities to leniency and settlement applicants. These new immunities refer to the exclusion of the double damages rule and from the ordinary application of the joint and several liability institutes.

As to the *third group*, the law *seeks to clarify procedural rules applicable in action for damages*. For such, it establishes (i) the *iuris tantum* presumption that overcharges by an entity harmed by the anticompetitive conduct have not been passed on, which in turn needs to be proved by the defendant (reversed burden of proof); (ii) that statute of limitations for damage claims is of five years and only starts *after* the publication of CADE's final decision; and (iii) that CADE's decisions should suffice as evidence for the granting of provisional measures by Courts in the benefit of the claimant.

Only one provision of the project converted into Law No. 14,470/2022 was vetoed by the Brazilian Presidency: the one that determined that the parties to leniency and TCC agreements with CADE should enter arbitral commitments with the parties interested in filing their demands via such forum.

Still, a bumpy road ahead

With that said, the future developments from the private actions for damages before the Brazilian Courts will undoubtedly tell whether the legislator contributed decisively or not to improve the effectiveness of such an instrument from the competition policy toolkit. From now on, despite the above legislative innovations, it is worth keeping an eye on some practical issues that will certainly populate the Brazilian competition arena in the coming years. Some of them are briefly anticipated below.

First, the new legislation only awards financial incentives (double damages) to the dissuasion of collusive anticompetitive acts. It turns out that the universe of competition infringements is much broader, including several vertical/unilateral practices. Thus, even though the bill is aligned with the prevailing "*dogma*" that the cartel must be traditionally understood as the most harmful infringement to the market functioning, it would not be out of place to discuss the importance of grating the same type of incentives for plaintiffs who suffered damages resulting from unilateral abuse by agent(s) with substantial market power, chiefly in the age of digital markets and in a country characterized by a predominantly oligopolistic market structure in critical economic sectors. Recent studies on the profile of private antitrust enforcement in Brazil also corroborate this importance. [6]

Second, the BPEP may give rise to unwanted outcomes concerning suits filed independently and

before a decision issued by CADE. In such cases, rules relating to the statute of limitations may, in practice, become imprecise or out of place: does it seem reasonable to unconditionally stay the running of the statute of limitations for seeking antitrust damages for infringements that CADE will not scrutinize, or whose prosecution occurs several years after the termination of the alleged unlawful conduct? [7]

Third, considering that (i) CADE famously applies harsh fines in cartel cases; and that (ii) the more and more common judicialization of the authority's decision may lead, in a further round, to an increasingly encouraging settlement of the dispute with the defendant, one could easily ask: how would the incentives for the actions for damage be shifted if (i) the Judiciary overturns CADE's decision; or, in the imminence of such (ii) CADE agrees to settle upon the express or tacit recognition that no unlawful conduct was performed, or, at least, no damage to the market existed?

Fourth, concerning the *iuris tantum* presumption of non-pass-on of the overcharges, the defendant carries the burden of proof to show that the plaintiff lost, in whole or in part, his/her right to compensation for passing on his damages. Such proof, however, is extremely complex and will certainly demand the discovery of the plaintiff's documents. If such a burden is deemed unbearable by the Court, a Judge may reverse it (Civil Procedure Code, Art. 373, §1) or even determine access to specific documents from the accuser. From another angle, such presumption may result in difficulties for the right to full compensation for those seeking compensation for *indirect* damages arising precisely from the passing-on of the overcharge (e.g., consumers who purchase a product made from inputs sold at an overpriced price due to a cartel).

Finally, regarding the greater ease in granting provisional relief to the plaintiff based on CADE's decision, only practice will tell the effectiveness and appropriateness of this rule. It may, in fact, be the right medicine for the wrong patient. In the case of provisional measures after CADE's decision, the cessation of the anticompetitive offence will have already been achieved. As such, the primary relief to be requested will likely be the anticipation of the damages. Its quantification, however, is not trivial but is considered one of the most complex challenges of private enforcement, often requiring using different econometric methods and elaborating different counterfactual scenarios.

Concluding remarks

In conclusion, if the good purpose of the Law No. 14,470/2022 is indisputable and deserves *a priori* applause, it is still uncertain its actual incremental effect on the strengthening of Brazilian antitrust enforcement. This point inspires attention. If effectiveness is not a criterion of normative validity as claimed by Kelsen, social legitimacy is a *conditio sine qua non* for such. **[8]** As the well-known saying tells: „*Das mag in der Theorie richtig sein, taugt aber nicht für die Praxis*". [9] Practical issues will, therefore, have an important role here, as anticipated. Attention should also be played to (i) the speed and technical accuracy of the parties and judges in the application of such a new law to the Brazilian judicial culture; and (ii) the efficient "*fit*" between the time and quality of the administrative prosecution carried out by CADE; and the search for compensation before Courts.

More than embedding in the Brazilian legal system rules that increase the possibility of punishing individuals and undertakings, it seems essential for the good development of the domestic antitrust

policy that ongoing evaluative initiatives are put in place to understand the concrete effects of the legislation vis-à-vis its original aims. Surveillance and punishment, simply, are not enough. Real gains for society demand time and institutional perseverance, with efforts that go beyond mere legislative activity. In this field, either by the State or by civil society, good examples abound. [10]

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[1] Public enforcement, for the context of this text, concerns the implementation of competition law by administrative or criminal institutions. On the other hand, private enforcement corresponds to the implementation of such law by means of lawsuits filed by or in the name of an individual or a group of individuals.

[2] See, for instance, *Private antitrust litigation: New evidence, new learning*.

[3] See The Role of Private Enforcement within EU Competition Law.

[4] For critics of the punitive nature of antitrust damages vis-à-vis the Brazilian legal framework, see Defesa da concorrência e bem-estar do consumidor.

[5] See Direct Action for the Declaration of Unconstitutionality No. 6031, Rapporteur Min. Carmén Lucia Antunes Rocha.

[6] See *A compatibilização dos enforcements concorrências público e privado: a dimensão pública da persecução privada*.

[7] In cartel cases, CADE *understands* that it has up to twelve years to start the prosecution of the infringement as of its termination without the investigation being declared time bared.

[8] Toward a New Legal Common Sense: Law, Globalization, and Emancipation.

[9] "*It may be valid in theory, but not applicable to the praxis*". (*Über den Gemeinspruch: Das mag in der Theorie richtig sein, taugt aber nicht für die Praxis*).

[10] V.g. A recent assessment on the application of Directive 2014/104 carried out by the EC in 2020 in https://ec.europa.eu/competition/antitrust/actionsdamages/report_on_damages_directive_implementation.pdf. There are also numerous academic initiatives in the same direction, among which Cartel damages actions in Europe: How courts have assessed cartel overcharges.

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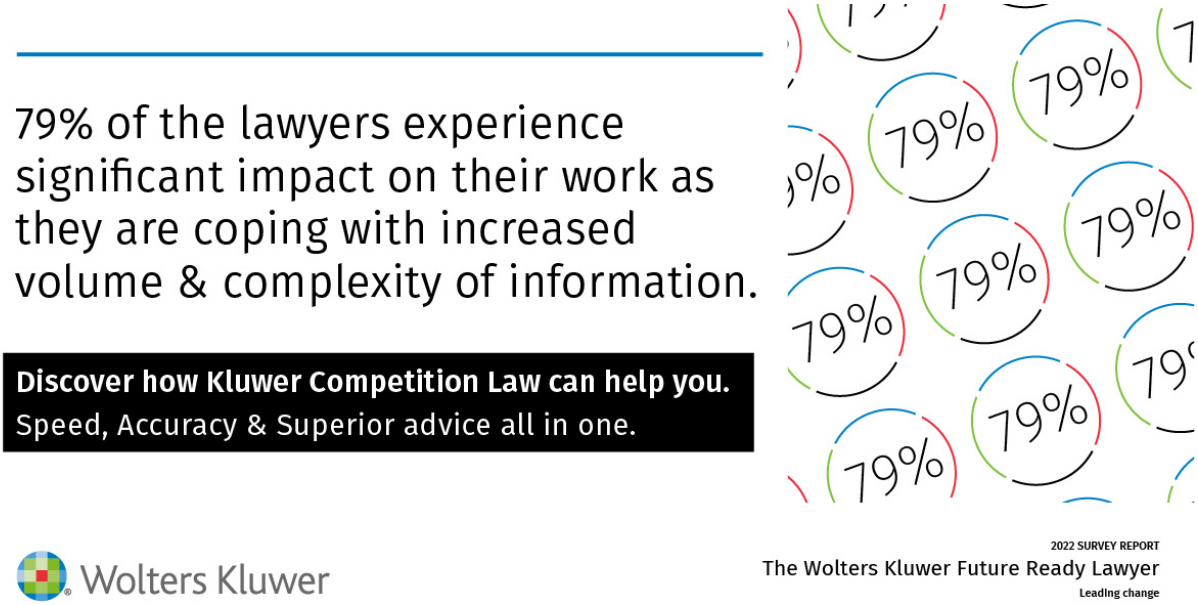

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