

The International Comparative Legal Guide to:

Competition Litigation 2009

A practical insight to cross-border Competition Litigation



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1 General

1.1 Please identify the scope of claims that may be brought in Brazil for breach of competition law.

Claims against multilateral conducts (mainly cartels) and unilateral conducts (as tying arrangements, refuses to supply, discrimination among buyers, predatory pricing and others) can be brought in Brazil for breach of competition law. Challenges against mergers (as well as acquisitions, joint ventures, etc.) can also be brought.

1.2 What is the legal basis for bringing an action for breach of competition law?

The basic text is Law 8884, of 1994, although the Secretaria de Direito Econômico (SDE), of Ministry of Justice, and Conselho Administrativo de Defesa Econômica (CADE), issue regulations that are applicable, provided that they do not collude with the basic law.

1.3 Is the legal basis for competition law claims derived from international, national or regional law?

As mentioned above, the law is national. There is a Mercosur agreement, together with Argentina, Uruguay and Paraguay, but so far it is not applicable by itself.

1.4 Are there specialist courts in Brazil to which competition law cases are assigned?

In Brazil, competition law has primarily an administrative treatment; this means that there is an administrative system to handle it. A case must start at the SDE, which is an administrative body under the structure of the Ministry of Justice, in charge of preparing the files and conducting all the production of evidence that may be required. Considering that the SDE has a double position, both prosecutor and auxiliary court, sometimes the first prevails over the latter.

The files are then sent to CADE, which is an independent body, with Commissioners appointed for a fixed term of at least two years, which is really an administrative court. CADE's decisions are always final in the administrative side, save for possible motions for clarification, and the only attitude against them is going to Court, what usually is done.

However, there are no specialised Courts in Brazil to decide competition matters. In fact, a file against a CADE's decision starts at first instance, and this judge may review and/or repeat the whole production of evidence. So far there is not a single case against CADE

that has gone through all instances, and this fact alone gives us a measure of the difficulty to create a real jurisprudence on this matter.

Parties can go directly to Court, instead of going through SDE and CADE, but this has not been done due mainly to the lack of specialised Courts. In fact, the SDE/CADE system is still, for better or worse, a specialised administrative court.

A special difficulty is to define whether the case must be brought before a state or federal court, and on this issue we face mixed decisions. However, if it is to go against a decision by CADE, it is clear that we must go to a Federal Court, as CADE is a federal agency.

1.5 Who has standing to bring an action for breach of competition law and what are the available mechanisms for multiple claimants? For instance, is there a possibility of collective claims, class actions, actions by representative bodies or any other form of public interest litigation?

It is important to clarify that everything here is public interest litigation in Brazil. SDE and CADE always act for public interest. Multiple claimants can also go to SDE for the opening of a file. By the way, the SDE/CADE system can act on its own initiative.

There is also a system of public civil actions that can be started by public prosecutors and, although apparently it looks like there is a conflict with the SDE/CADE/Court system, because it may lead to contradictory decisions over the same facts, the same problem is watched here: there is no reliable jurisprudence yet.

1.6 What jurisdictional factors will determine whether a court is entitled to take on a competition law claim?

The SDE/CADE system has jurisdiction over the whole country. If a party wants to go to Court against CADE, the federal courts of Brasília, the capital of the country, where the CADE is located, are to be chosen. However, if a file is to be delivered to a Court independently, there is still a great discussion about whether the interested party should do it through a state or through a federal court. We would advise that a federal court should be in charge of it because there is an article in the relevant law saying that any file based on such law should be communicated to the CADE, which may be a party in it and then transfer the case, if started elsewhere, to a federal court.

1.7 Is the judicial process adversarial or inquisitorial?

The process before the SDE/CADE system is inquisitorial, just in its very beginning, but, for the most part it is adversarial. The process before a Court is adversarial.

2 Interim Remedies

2.1 Are interim remedies available in competition law cases?

Yes, interim remedies are available in competition law cases.

2.2 What interim remedies are available and under what conditions will a court grant them?

Interim remedies can be granted in the administrative file and also in Court. The interested party must demonstrate “prima facie” the “fumus boni iuris”, meaning that there is a probability to win, and the “periculum in mora”, meaning that otherwise, if and when winning, the damages will not be corrected anymore, due to the passing of time and the consolidation of the situation.

When in Court, Judges may (and usually do) demand a guarantee, which can be (i) an escrow deposit, (ii) a bank guarantee, (iii) real estate, or others. In most cases, a bank guarantee is the most suited guarantee but some Judges still demand an escrow deposit.

3 Final Remedies

3.1 Please identify the final remedies which may be available and describe in each case the tests which a court will apply in deciding whether to grant such a remedy.

In the administrative file, the main remedies are (i) the order to stop the practice, (ii) the fine and (iii) a publication of the final decision in a newspaper with a wide circulation. The fine can go from 1 to 30% of the total revenues of the company or group of companies to which it belongs for the year before the file started. There are no guidelines for it, but fines have gone so far from 1% (for companies that had only attempts) to 20% (for ringleaders). There is a general feeling that fines tend to be increased.

In case the relevant party does not accomplish the sanction, paying the fine, CADE can go as far as an intervention in the administration of the company, although such a possibility is still theoretical.

In a Court case, if it is a file against a decision by CADE, the final decision will always be about the fine which was already imposed by CADE. The Court can change CADE’s decision or, in some cases, lower the fine. However, if it is a purely private litigation, there is no standard according to which the Judge will decide. The claimed damages are private damages and evidence must be made about the real amount of such damages.

3.2 If damages are an available remedy, on what bases can a court determine the amount of the award? Are exemplary damages available?

Damages are an available remedy only in a purely private litigation, in Court. In these cases, there is no standard according to which the Judge will decide. As mentioned before, the claimed damages and the real amount of such losses should be demonstrated through evidence, and this will guide the Judge to establish the amount of the award.

3.3 Are fines imposed by competition authorities taken into account by the court when calculating the award?

As mentioned above, the system is dual. The imposition of a fine will start with CADE, but the Court can do just anything about it, except making it higher.

4 Evidence

4.1 What is the standard of proof?

SDE and CADE, as well as Courts, are free to measure any evidence produced by the parties. A confession, however, may overcome all other kinds of evidence.

4.2 Who bears the evidential burden of proof?

The burden of proof lies with the plaintiff. The main problem here is that, in the administrative file, the plaintiff is the authority itself (SDE), the same with the inquisitorial responsibility.

4.3 Are there limitations on the forms of evidence which may be put forward by either side? Is expert evidence accepted by the courts?

There are no limitations on the forms of evidence which may be put forward by either side, except the legality of the evidence production. We must have in mind that one of the “sides” is the administration itself, acting as if a public prosecutor would, and at the same time having the obligation to ordinate the whole set of evidence.

Expert evidence is accepted both by administrative bodies (where formality is not high) and the Courts (in which a Judge will appoint an expert and each party can appoint its own assistant expert). But here we are talking about technical issues (like, e.g., defining what were the losses of a party or whether a product is in the same relevant market as another). Of course opinions by experts, with no other formalities, can be added to the files.

4.4 What are the rules on disclosure? What, if any, documents can be obtained: (i) before proceedings have begun; (ii) during proceedings from the other party; and (iii) from third parties (including competition authorities)?

Competition authorities are entitled (and, some will say, are obliged) to demand for whatever documents are needed for the clarification of a case, no matter where these documents are: with the accused party; with third parties; or even with the Government. But the authorities can do it only after the beginning of the proceedings. Even dawn raids can be awarded only in administrative proceedings, confidential as they may be. Refusal to supply such documents may be under a special punishment, according to Law 8884.

The parties also have the right to know about whatever files runs against them, having access to the file. Even if confidentiality is granted, the accused party, through a lawyer, can have access to all documents that constitute evidence.

However, when we talk about disclosure there are limits that the authorities should attempt to, such as the statute of limitations, the analysis through the rule of reason (which is applied to all the antitrust practices), among others.

4.5 Can witnesses be forced to appear? To what extent, if any, is cross-examination of witnesses possible?

Witnesses may be forced to appear, both before the administration and the Courts. Cross-examination is always possible.

- 4.6 Does an infringement decision by a national or international competition authority, or an authority from another country, have probative value as to liability and enable claimants to pursue follow-on claims for damages in the courts?

The theory of effects, which is very clearly applied in Brazil, makes the answer also very clear. An infringement decision by a national or international competition authority, or an authority from another country, has no probative value in Brazil, unless if it is to demonstrate a pattern (of course this is not a very clear evidence). A conduct will be punished in Brazil only if it has effects in the Brazilian territory, and both the conduct and the effects have to be proven in Brazil.

The theory of effects was analysed in details in the vitamins cartel and in this case CADE concluded that the conduct should be punished in Brazil because, despite the fact that all the acts have been practiced abroad, they caused effects in the Brazilian territory.

- 4.7 How would courts deal with issues of commercial confidentiality that may arise in competition proceedings?

Confidentiality is well dealt with by the SDE/CADE system, with regulations as to what can be and what cannot be confidential. When it comes to the courts, there is no such regulation but they are very sensitive to the subject.

5 Justification / Defences

- 5.1 Is a defence of justification/public interest available?

All kinds of defences are available in Brazil. A public interest defence, when applicable, may be a very strong one, because, at the end of the day, public interest is all the competition authorities are working for.

- 5.2 Is the "passing on defence" available and do indirect purchasers have legal standing to sue?

The "passing on defence" is available and indirect purchasers, under some circumstances, have legal standard to sue, although the necessary evidence, in this case, makes it practically impossible to do so.

6 Timing

- 6.1 Is there a limitation period for bringing a claim for breach of competition law, and if so how long is it and when does it start to run?

There is a basic five years statute of limitation, except when the case is also a crime, when the statute of limitation is the same as the one for a criminal violation. In the case of cartels, the limitation period can go from eight to twelve years, and, due to the fact that the determination is always post fact, we usually think of twelve years. By the way, the case law so far did not make it clear.

- 6.2 Broadly speaking, how long does a typical breach of competition law claim take to bring to trial and final judgment? Is it possible to expedite proceedings?

In the SDE/CADE system, although unpredictability is the general rule, experience shows a period of four or five years as a good bet. However, going to court makes it totally unpredictable, mainly because, with the lack of a single case having gone all the way, there

is no experience from which to take an average. Considering that there are cases running for more than seven or eight years in court, the expectations are not very optimistic.

The authorities always try to expedite proceedings, usually jeopardising the due process of law, but the parties, always aware of the due process of law and their rights to a thorough defence, usually insist on all the regular proceedings.

7 Settlement

- 7.1 Do parties require the permission of the court to discontinue breach of competition law claims (for example if a settlement is reached)?

The file in the SDE/CADE system is not between private parties but between the authorities and the accused parties. A claimant will only show the authority that a violation has been committed but the authority is the prosecutor. Then it is not useful to talk about permission of the authority, because the settlement, when it is the case, is made with the authority.

Settlements are not very often in Brazil, but this seems to be changing. There are settlements in cases involving several types of conducts, but settlements in cartel cases have been recently admitted by law and so far 4 settlements involving cartel were done: one in the meat-packaging case; one in the concrete case; one in the packaging case; and one in the rubber case.

If a case is brought to court against CADE, the plaintiff can give it up any time, although with the responsibility to pay expenses and legal fees. In a private litigation, a settlement can be achieved independently.

8 Costs

- 8.1 Can the claimant/defendant recover its legal costs from the unsuccessful party?

In the SDE/CADE system, a claimant or a defendant cannot recover its legal costs from the unsuccessful party, although, in a private lawsuit, a party sued by the system can try to show that the system did not act in good faith, thus causing damages which must be recovered.

- 8.2 Are lawyers permitted to act on a contingency fee basis?

The agreement between a party and a lawyer is a private matter, however ruled by ethical standards, one of which is the rule not to sell results, only to render services. Under such ethical principle, a contingency fee basis would not be allowed. However, in some cases, mainly in conducts, there are cases of partial contingency fees being arranged and so far we did not see any problem with them.

- 8.3 Is third party funding of competition law claims permitted?

There are no specific rules about third party funding in competition law claims. However, there must be a clear and legitimate interest of the party who does the funding.

9 Appeal

9.1 Can decisions of the court be appealed?

Yes, decisions of a first instance judge can go to a second instance court and, under some circumstances, decisions of the second instance court can go to the highest courts (one being a constitutional court and the other being a general court).



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Mauro Grinberg is a partner of Barcellos Tucunduva, a traditional firm founded in 1954 and located in São Paulo, Brazil. Mr. Grinberg is a University of São Paulo Law School graduate and has a Master's degree in Business Law from the Federal University of Pernambuco. He was a commissioner of CADE, the Brazilian antitrust agency, from 1986 to 1990, a time when CADE began to assume greater importance in the Brazilian economy. He is also a former attorney of the National Treasury from 1976 to 1998, with retirement at the highest rank of the career (Subprocurador-Geral da Fazenda Nacional). His practice encompasses both merger control and antitrust litigation on behavioural matters, including counselling. A smaller part of his time is dedicated to consumer protection, trade law and public bids. Mauro is member of the International Bar Association, Antitrust and Trade Law Committee since 1999. He is also a founding member and member of the executive board of the Brazilian Institute of Studies of Competition and Consumption Relations (Instituto Brasileiro de Estudos das Relações de Concorrência, Consumo e Comércio Internacional - IBRAC) since 1992, and now he is the President of IBRAC (2008-2009). He joined Barcellos Tucunduva in September 2007, after a successful career in public and private practice. His role included enhancing the firm's antitrust activity and working with some very important clients, some of which are publicly known (eventually mentioned in the Official Gazette) such as Hewlett-Packard, Solvay, Linde, Merck, Merck Sharp & Dome, Abbott, Siemens, Google, Gemplus and United Medical. Under the leadership of Mauro Grinberg, Barcellos Tucunduva became well known nationally and internationally, and featured in Global Competition Review's 'GCR 100'. Mauro has contributed articles to many Brazilian and international publications (including Global Competition Review's Getting the Deal Through: Cartel Regulation and The Antitrust Review of the Americas) and has made speeches in many conferences and workshops, including those of the IBA, ABA, CADE and IBRAC.

10 Leniency

10.1 Is leniency offered by a national competition authority in Brazil? If so, is (a) a successful and (b) an unsuccessful applicant for leniency given immunity from civil claims?

Leniency is offered only by SDE. But there is no immunity from civil claims, mainly those about damages caused by a cartel.

10.2 Is (a) a successful and (b) an unsuccessful applicant for leniency permitted to withhold evidence disclosed by it when obtaining leniency in any subsequent court proceedings?

Leniency is only available through the SDE, this meaning that subsequent court proceedings have nothing to do with leniency. A successful applicant has the obligation of total disclosure.



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Barcellos Tucunduva Advogados is a 54-year-old firm, with large and well-known experience in business law, litigation and administrative procedures, as well as in consulting activities. With a philosophy based on the personal attention to clients, the law firm has highly qualified professionals and provides its legal services with excellence. Its competition area, however, only began to develop in 2007, with the admission of Mauro Grinberg, as a partner, and his entire team, which resulted in the inclusion of Barcellos Tucunduva Advogados in the GCR 100 special edition of Global Competition Review in 2008.

Mauro is an experienced attorney, former commissioner of the Brazilian competition agency and former attorney of the National Treasury, indicated by The International Who's Who of Competition Lawyers, from Global Competition Review, as one of 'the world's leading lawyers' from 2002 to 2008. Natália is specialist in Economic Law and has published articles in Brazil and abroad about merger control and cartels.

Regarding competition, Barcellos Tucunduva represents clients both in merger control and behavioral cases, acting not only before the relevant competition bodies but also in court, whenever necessary.