

A Silent Revolution? The Revamped Brazilian Private Enforcement System and Third-Party Funding

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In Brazil, individual and collective redress for antitrust damages is based on Art. 47 of the Brazilian Competition Law (“LDC”), allowing injunctive and compensatory relief for stand-alone and follow-on claims. Law n. 14.470/2022, as enacted on 17 November 2022 (“Law”), introduces four innovations to collective redress for antitrust damages set by the LDC, which positively impact the prospects for litigation funding of such claims in Brazil.

Firstly, the LDC explicitly places on the defendant the burden of proof for passing-on defenses (Art. 47, § 4º). A pass-on defense is a litigation strategy frequently used by cartel members, arguing that claimants did not suffer any damage because the losses resulting from the antitrust infringement were passed on to the next supply chain level. The LDC now determines that cartel members (not the claimants) must prove an allegation of passing-on.

The second innovation is that the LDC (under Arts. 46-A, § 1º and § 2º) codifies case law that sets the time limit trigger for follow-on antitrust claims (REsp n. 1.971.316/SP). The LDC now stipulates that the ‘date of knowledge’ is the period from when time limits accrue for follow-on claims. The five-year statute of limitations for bringing follow-on claims is thus triggered by the final decision on the infringement by the Brazilian Competition Authority (CADE). The applicability of the time limit rules set by the Law for stand-alone claims will likely be determined upon review and guidance from case law.

Another novelty is the introduction of double damages for claims based on cartel agreements and concerted practices (Art. 47, § 1º). Investigated parties entering into leniency or settlement agreements are exempted from (i) the double damages sanction; and (ii) joint liability for damages caused by the other cartel members (Art. 47, § 2º) as a means to maintain the incentives for such agreements. This is aimed at encouraging the disclosure and revelation of material information about a cartel’s formation with a view to destabilizing its operation.

Finally, the LDC now allows a competent court to grant provisional relief (*tutela de evidência*) when CADE’s plenary court has issued a final ruling on the infringement (Art. 47-A). The *tutela de evidência* is an innovation within Brazil’s civil justice system, introduced by the procedural reform enacted in 2015. Such relief is **not** conditioned to the traditional civil law preliminary injunctions requirement of urgency (*periculum in mora*). The aim of the *tutela de evidência* is not to preserve the *status quo* but to provide claimants with the possibility of enjoying the benefits of their rights in circumstances where delaying such enjoyment is not justified.

The Law stipulates that CADE’s decisions extend to granting advance provisional relief, including monetary compensation. Importantly, provisional relief can be granted at any time during the proceedings. This innovation follows the Brazilian Supreme Court’s decisions that give deference to CADE decisions in light of CADE being the competition law specialized authority (notably, RE 1.083.955/DF).

In practice, this means that when a final ruling on infringement has been issued by CADE’s plenary, the cessation of the unlawful practices can be ordered by a judge in collective redress proceedings without hearing the defendant. Although the granting of compensation in such proceedings will depend on several elements such as facts, legal and quantum-related issues, state courts across Brazil have done so in other civil liability contexts,

such as those concerning loss of revenue (e.g., the High Court of Pará [here](#)) or where a court-appointed expert demonstrates causality, establishing a nexus between law infringement and damages (e.g., the High Court of São Paulo [here](#)).

The innovations brought by the Law will also likely be welcomed by third-party funders considering whether to finance private enforcement in Brazil. Already used in arbitration, the High Court of São Paulo has recently determined the legality of third-party funding in Brazil (see [here](#)). The availability of financial compensation via *tutela de evidência* is attractive, as earlier returns typically result in positive results for funders. Like other investments, a funder's profitability is measured by its internal rate of return (**IRR**), which decreases exponentially over time. Prolonged court litigation, therefore, potentially negatively impacts a funder's IRR, making it a less attractive investment. Faster resolutions, such as a settlement or compensation payment via *tutela de evidência*, can yield better returns. Likewise, the double damages novelty means that claimants are compensated in full and still have room to share a part of the proceeds with a funder who bears the dispute costs and risks.

Building on the excellent quality (and reputation) of CADE's investigations and decisions, the Law may help to jumpstart antitrust private enforcement in Brazil. In that sense, third-party funding can be an ally in providing access to justice by covering the extensive costs of follow-on claims (lawyers, economic experts, court fees, etc.) and helping to overcome the common hurdles of obtaining and administering vast amounts of information and claims against harmful anticompetitive behavior.

Nivalion AG - Lucas Macedo and Eduardo Silva de Freitas

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