

Private Antitrust Litigation 2021

Contributing editor
Elizabeth Morony



Publisher

Tom Barnes

tom.barnes@lbresearch.com

Subscriptions

Claire Bagnall

claire.bagnall@lbresearch.com

Senior business development manager

Adam Sargent

adam.sargent@gettingthedealthrough.com

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Private Antitrust Litigation 2021

Contributing editor**Elizabeth Morony**

Clifford Chance LLP

Lexology Getting The Deal Through is delighted to publish the eighteenth edition of *Private Antitrust Litigation*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Brazil and India.

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Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editor, Elizabeth Morony of Clifford Chance LLP, for her assistance with this volume.



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For further information please contact editorial@gettingthedealthrough.com

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Brazil

Bruno Lanna Peixoto and Ludmilla Martins da Silva

Araújo e PolICASTRO Advogados

LEGISLATION AND JURISDICTION

Development of antitrust litigation

1 | How would you summarise the development of private antitrust litigation in your jurisdiction?

Brazil is experiencing a boost in private antitrust litigation as an increasing and substantial number of private actions for antitrust damages have been filed in recent years.

Antitrust law enacted in 1994 (Federal Law No. 8,884) introduced the statutory basis for private antitrust actions for damages or injunctive relief. However, the first claim for cartel damages dates from 2006 after the Brazilian competition authority (the Administrative Council for Economic Defence (CADE)) imposed severe fines on participants of a collusive scheme in the long steel market. The first collective proceeding for cartel damages was filed in 2010, following a decision from CADE imposing fines for collusion in the medical and industrial gases market. Brazil's current antitrust law enacted in 2011 (Federal Law No. 12,529 (AA)) included the same provisions and grounds for private actions for damages. Subsequently, as CADE became one of the leading competition agencies in the world and prosecuted international cartels along with the European Commission and the US Department of Justice, the number of follow-on damages actions increased accordingly.

Following the EU Directive on Damages Actions, CADE decided to promote private antitrust enforcement. In 2018, it issued a regulation concerning disclosure and access to evidence from its investigations files. As a general rule, documents gathered in the course of administrative proceedings are disclosed after CADE issues a final decision. Notable exceptions are pieces of evidence related to leniency agreements and settlements, including statements provided by applicants on the history of the unlawful conduct. Documents concerning trade secrets and confidential and unrelated business information also remain sealed.

Furthermore, a proposal to amend the AA, to foster private antitrust litigation by introducing double damages as well as alternative dispute resolution and codification of developed case law, is one step away from being approved by Congress and entering into force.

Applicable legislation

2 | Are private antitrust actions mandated by statute? If not, on what basis are they possible? Is standing to bring a claim limited to those directly affected or may indirect purchasers bring claims?

Article 47 of the AA provides that victims of competition infringements are entitled to seek full redress for their losses as well as injunctive relief. In addition, a general provision from the Civil Code enshrining the right to compensation for losses from unlawful conduct also applies.

Standing to bring a claim is not limited to direct or indirect purchasers, although claimants bear the burden of proving infringement, causation and individual damage.

3 | If based on statute, what is the relevant legislation and which are the relevant courts and tribunals?

Private antitrust actions are primarily governed by the AA.

For actions brought by consumers, the Consumer Protection Code (Federal Law No. 8,078/1990 (CDC)) also applies. Under the CDC, consumers – considered as individuals or undertakings who purchased a product or service as the ultimate beneficiary – have standing to sue for double damages.

The Civil Code (CC) applies to private antitrust actions brought under the AA and the CDC. According to the CC, when more than one undertaking infringes the law, those undertakings are jointly and severally liable for redressing any damages derived therefrom (article 942). Companies are strictly and jointly liable for compensating damages from acts of their employees (article 932).

For private antitrust claims filed before domestic courts, the Civil Procedure Code (Federal Law No. 13,105 of 2015) also applies. State courts have jurisdiction to hear private antitrust actions except when a federal agency is party to the litigation, in which case a federal court will have jurisdiction to adjudicate the case. Plaintiffs may choose to file damages actions at the legal venue where the injury occurred or where one of the defendants is domiciled.

PRIVATE ACTIONS

Availability

4 | In what types of antitrust matters are private actions available? Is a finding of infringement by a competition authority required to initiate a private antitrust action in your jurisdiction? What is the effect of a finding of infringement by a competition authority on national courts?

Private actions for damages are available in the case of any infringement to the Antitrust Act (AA) (ie, against anticompetitive conduct), irrespective of a previous investigation by the Administrative Council for Economic Defence (CADE). Courts will award damages provided that a plaintiff successfully proves the existence of an infringement, losses and causation.

For actions brought following a CADE investigation, plaintiffs may rely on CADE's decision to demonstrate the infringement. Courts have reaffirmed that it represents unequivocal evidence of an antitrust infringement. Importantly, in 2019, the Supreme Court issued a decision stating that courts of law should defer to CADE's findings of fact, given the agency's expertise and resources to find whether an investigated conduct produced anticompetitive effects on the Brazilian

market (*Comal Combustíveis Automotivos v CADE*, Supreme Court, Regimental Appeal on Extraordinary Appeal No. 1.083.955/DF, issued on 28 June 2019).

Required nexus

5 | What nexus with the jurisdiction is required to found a private action? To what extent can the parties influence in which jurisdiction a claim will be heard?

In terms of subject matter, the AA applies to actions concerning anti-competitive conduct that produced direct or indirect effects, or had the potential to produce those effects, on the Brazilian market.

In terms of parties, the Brazilian courts have jurisdiction to hear a claim in cases where a defendant is domiciled in Brazil, or relevant facts or acts giving rise to the claim (ie, cause of action) occurred or were performed in Brazil.

Restrictions

6 | Can private actions be brought against both corporations and individuals, including those from other jurisdictions?

There are no restrictions on bringing private actions against corporations or individuals, including those from other jurisdictions.

PRIVATE ACTION PROCEDURE

Third-party funding

7 | May litigation be funded by third parties? Are contingency fees available?

Third parties may fund private antitrust litigation in Brazil. Under the Civil Code (CC), creditors may assign to a third party their right to claim compensation, provided that the nature of the obligation, the law or an agreement with the debtor do not preclude the assignment.

Contingency fees are available and according to the Brazilian Bar Association must be reasonable and not abusive. In addition, the Civil Procedure Code provides for statutory attorney fees paid by the losing party in the amount of 10 to 20 per cent of the amount under dispute.

Jury trials

8 | Are jury trials available?

No. In the first instance, one federal or state judge will hear the case. On appeal, a case is reviewed by a panel of three judges. On further appeals filed before the Superior Court of Justice or the Supreme Court, cases are adjudicated by panels of five or more judges.

Discovery procedures

9 | What pretrial discovery procedures are available?

Pretrial discovery procedures in Brazil are available to a limited extent. Claimants may initiate a court proceeding for primary or immediate production of evidence, provided that there is a reasonable concern that it may become impossible or difficult to obtain the evidence or prove specific facts during the damages action itself or that the evidence sought is relevant for triggering a settlement agreement, or if prior evidence of events may avoid the filing of a private action.

Admissible evidence

10 | What evidence is admissible?

Parties may use all legal and morally legitimate means to prove facts grounding the statements made in a claim or defence. Evidence

including but not limited to the following is allowed: documentary evidence, expert evidence, disclosure of documents, oral testimonies and inspections by judges.

In the existing private antitrust actions, plaintiffs have been relying on expert evidence to demonstrate and calculate their losses. Expert evidence is normally produced by a court-appointed expert upon request of one or more parties, who may also submit their own experts' reports. Judges are also allowed to rule based solely on expert reports or documents submitted by the parties.

Legal privilege protection

11 | What evidence is protected by legal privilege?

Attorney-client communication is privileged irrespective of whether it concerns outside or in-house counsel. According to the law that regulates the practice of law and the Brazilian bar association, legal privilege encompasses any communications and files related to an attorney-client relationship. Counsel may lawfully refuse to provide courts with documents and to testify about facts protected by legal privilege, including trade secrets.

Criminal conviction

12 | Are private actions available where there has been a criminal conviction in respect of the same matter?

Yes. Cartels characterise criminal conduct under Brazilian law, and a criminal investigation tolls the limitation period for bringing private antitrust actions.

Although only individuals face criminal charges, under the CC, employers are strictly, jointly and severally liable for redressing losses caused by their employees. Therefore, victims can rely on a decision held in a criminal proceeding to bring an action for damages against a company of which the executives or employees participated in unlawful conduct.

Utilising of criminal evidence

13 | Can the evidence or findings in criminal proceedings be relied on by plaintiffs in parallel private actions? Are leniency applicants protected from follow-on litigation? Do the competition authorities routinely disclose documents obtained in their investigations to private claimants?

Criminal proceedings' records are generally public, and plaintiffs may rely on them to support their claim for damages in parallel private actions. Even when a criminal proceeding runs under secrecy, plaintiffs suing for cartel damages may petition the court to request the relevant criminal files.

Leniency agreements grant immunity from criminal charges. However, beneficiaries of leniency agreements remain liable for redressing damages derived from their conduct.

Importantly, the Superior Court of Justice (STJ) has decided that the Administrative Council for Economic Defence (CADE) must disclose to claimants pieces of evidence gathered during its investigations, including information provided by beneficiaries of leniency agreements and settling parties, after CADE has concluded its investigation and issued a definitive decision (see *Electrolux do Brasil SA v Whirlpool SA*, Special Appeal No. 1.554.986-SP, Third Panel, adjudicated on 8 March 2016). The STJ has reasoned that those documents are not allowed, under the Federal Constitution, to remain perpetually sealed given its relevance to the public.

Reacting to the ruling and seeking to strike a balance between public and private enforcement, CADE issued a regulation introducing a disclosure regime for its files. According to this regulation, CADE

will proactively disclose part of its files upon issuing a final decision. Notable exceptions to this rule are pieces of evidence related to leniency agreements and settlements, including statements provided by applicants on the history of the unlawful conduct. Documents concerning trade secrets and confidential and unrelated business information also remain sealed.

Stay of proceedings

14 | In which circumstances can a defendant petition the court for a stay of proceedings in a private antitrust action?

The Civil Procedure Code lays down the circumstances in which a defendant can petition the court for a stay of proceedings. The court will grant the request in the following cases:

- death or loss of procedural capacity of any party, their legal representative or their attorneys;
- agreement among the parties;
- filing of a motion to disqualify the judge for conflict of interest; and
- admission by a Court of Appeal of a request to rule on multiple claims grounded on an identical matter.

Defendants may also request a stay when a ruling on the merits of a case depends on a decision concerning another lawsuit. In private actions brought following a decision by CADE, defendants have sought stays based on the fact that parallel claims challenging CADE's findings and seeking annulment of CADE's decision were brought. However, the courts have denied those requests based on a plaintiff's right to bring a stand-alone action and produce evidence it deems appropriate.

Standard of proof

15 | What is the applicable standard of proof for claimants? Is passing on a matter for the claimant or defendant to prove? What is the applicable standard of proof?

There is no generally applicable standard of proof for claimants. Under the Brazilian legal system, judges can rely on their analysis and evaluation to rule on cases after reviewing the evidence produced during the proceeding.

Claimants must present evidence demonstrating the existence of anticompetitive conduct, individual damage and causation.

For private actions following a decision by CADE, claimants may rely on this ruling to demonstrate the existence of the infringement. CADE's decision is presumably a piece of truthful and lawful evidence as it is an administrative act issued by a specialised agency with powers and unique expertise to detect and verify anticompetitive conduct. On those grounds, the Supreme Court recently affirmed that Brazilian courts should defer to CADE's findings on the merits since only CADE has the technical expertise to verify competition infringements (see *Comal Combustíveis Automotivos v CADE*, Supreme Court, Regimental Appeal on Extraordinary Appeal No. 1.083.955/DF, adjudicated on 28 June 2019).

Passing on is a matter for a defendant to prove. Under the Civil Procedure Code, a defendant bears the burden of proving facts that hamper, modify or extinguish the claimant's right to compensation. Applying this provision, the Court of Appeal of Sao Paulo recently ruled on a private action following a CADE decision imposing fines on the cement industry, ruling that defendants bear the burden of proving alleged passing on, and courts should impose the burden on them from the start of the proceedings (see *Paez de Lima Construções e Comércio Ltda e outros v Votorantim Cimentos S/A e LafargeHolcim (Brasil) SA*, TJ-SP, Appeal No. 1050035-45.2017.8.26.0100, 19th Private Law Chamber, adjudicated on 28 August 2019).

Time frame

16 | What is the typical timetable for collective and single party proceedings? Is it possible to accelerate proceedings?

There is not a typical timetable for collective and single party proceedings. A private action's timetable depends on several factors, such as the complexity of the case, procedural strategy and which court has jurisdiction to hear the case.

In complex litigation, it takes at least three to five years for a court of first instance to rule on a case. If the losing party appeals, the Court of Appeal may take from one to two years to issue a decision. Finally, when it is possible to appeal to the Superior Court of Justice or the Supreme Court, it takes at least two additional years. To accelerate the proceedings, claimants may file motions for interim remedies or injunctive relief.

To shorten the length of antitrust damages proceedings, a bill under analysis in Congress amends the Antitrust Act, introducing arbitration. The bill provides that as a requirement for settling investigations with CADE, applicants must agree to submit damages claims resulting from the investigated conduct to arbitration provided that the claimants agree to and request it.

Limitation periods

17 | What are the relevant limitation periods?

As a general rule, a three-year limitation period applies to individual recovery actions, while a five-year limitation period applies to collective claims.

Appeals

18 | What appeals are available? Is appeal available on the facts or on the law?

Appeals on the law and facts are available to challenge interlocutory and final rulings by courts of first instance. At Courts of Appeal, a judge will write a report and an opinion on the case, and a panel of three judges will issue a ruling on the adjudication session. Following a decision from a Court of Appeal, parties may seek to further appeal solely on the issues of law to the Superior Court of Justice and, when there is a constitutional issue involved, to the Supreme Court.

COLLECTIVE ACTIONS

Availability

19 | Are collective proceedings available in respect of antitrust claims?

Two types of collective actions may be (concurrently) brought to remedy anticompetitive practices: class actions for defence of 'homogeneous individual rights' and public civil actions. The latter aims at halting or remedying a conduct that affects collective or diffuse interests not specifically individualised and is often brought by a public prosecutor's office, seeking payment of compensation to a public fund. The former – a hybrid of representative and opt-out class actions – aims at obtaining damages or injunctive relief for a class of plaintiffs.

Class actions must be brought by an adequate representative, typically trade or consumer associations that meet certain requirements. Representatives seek a broad declaratory decision establishing that defendants must pay damages (eg, for overcharges imposed) to a class. Subsequently, the injury suffered by each member of the class is collectively or individually calculated and recovered through the specific procedure of liquidation. Injured companies may opt out and file an individual action. Conversely, parties that filed individual actions before the class action have the option to request that their actions be stayed until

a final decision concerning the collective action is issued, which will be binding with regard to their claims only if it is decided in favour of plaintiffs. Otherwise, the individual processes are resumed.

Applicable legislation

20 | Are collective proceedings mandated by legislation?

Yes. In addition to the Antitrust Act, the Consumer Protection Code, the Public Civil Actions Act (Federal Law No. 7,347/1985) and the Civil Procedure Code apply to collective proceedings.

Certification process

21 | If collective proceedings are allowed, is there a certification process? What is the test?

There is no certification process under the Brazilian legal system, and class actions are brought by adequate representatives, typically trade or consumer associations that meet certain requirements

22 | Have courts certified collective proceedings in antitrust matters?

Although there is no certification process in Brazil, examples of collective proceedings in Brazil include a class action initiated by associations of construction companies from different states following an infringement decision from the Administrative Council for Economic Defence concerning collusion in the steel industry, and class actions by associations of hospitals from three different states following an infringement decision concerning collusion by producers of medical and industrial gases.

Opting in or out

23 | Can plaintiffs opt out or opt in?

Injured companies or individuals can opt out from a class action to bring individual claims.

Conversely, parties that filed individual actions before the class action have the option to request that their actions be stayed until a final decision concerning the collective action is issued, which will be binding with regard to their claims only if it is decided in favour of plaintiffs. Otherwise, the individual processes are resumed.

When the court holds a decision favourable to plaintiffs in class proceedings, this ruling produces erga omnes effects. As a consequence, injured parties may enforce this decision in a liquidation proceeding.

Judicial authorisation

24 | Do collective settlements require judicial authorisation?

Collective settlements do not require judicial authorisation but in certain cases may require authorisation from the Public Prosecutor's Office.

National collective proceedings

25 | If the country is divided into multiple jurisdictions, is a national collective proceeding possible? Can private actions be brought simultaneously in respect of the same matter in more than one jurisdiction?

Federal law governs both private antitrust actions and collective proceedings.

Different plaintiffs may simultaneously bring private actions in respect of the same matter in more than one state depending on the infringement's scope.

Although the Superior Court of Justice has ruled the territorial jurisdiction of the court that awarded damages does not prevent the

victims from bringing liquidation proceedings before other domestic courts – which allows for a national collective proceeding (see *Instituto Brasil de Defesa do Consumidor v Caixa Econômica Federal and others*, Special Appeal No. 1.134.957-SP) – the scope of the rulings in collective proceedings is currently being debated in a constitutional appeal pending before the Supreme Court (see Extraordinary Appeal No. 1101937).

Collective-proceeding bar

26 | Has a plaintiffs' collective-proceeding bar developed?

A few firms have focused on representing plaintiffs in recovery actions for cartel damages, but a proper plaintiff's collective-proceeding bar has not yet developed.

REMEDIES

Compensation

27 | What forms of compensation are available and on what basis are they allowed?

Injured parties may seek compensation of actual losses, lost profits, and non-pecuniary losses (ie, damage to a company's 'image' and 'moral damage'). Double damages apply for claims brought by consumers under the Consumer Protection Code. A bill currently in Congress (House of Representatives Bill No. 11,275 of 2018) proposes to expand the scope of double damages to other recoveries against cartels.

Other remedies

28 | What other forms of remedy are available? What must a claimant prove to obtain an interim remedy?

Aggrieved parties may also go to court seeking interim remedies and injunctive relief.

To obtain an interim remedy or preliminary injunctive relief, claimants must demonstrate *fumus boni iuris* and *periculum in mora*. The courts may also grant injunctions when there is prima facie evidence supporting the claim, and the defendant does not produce evidence raising a reasonable doubt.

The law does not require evidence of injury or fault when injunctive relief aims at inhibiting unlawful conduct, halting the continuation of wrongdoing or eliminating an infringement.

Punitive damages

29 | Are punitive or exemplary damages available?

Double damages apply for claims brought by consumers under the Consumer Protection Code. A bill currently in Congress (House of Representatives Bill No. 11,275 of 2018) proposes to expand the scope of double damages to other recoveries against cartels.

Interest

30 | Is there provision for interest on damages awards and from when does it accrue?

Damages are adjusted for inflation and statutory interest pursuant to the Civil Code (CC). Under Binding Precedent No. 54 of the Superior Court of Justice, interest accrues from the date the infringement occurs.

Consideration of fines

31 | Are the fines imposed by competition authorities taken into account when setting damages?

No.

Legal costs

32 | Who bears the legal costs? Can legal costs be recovered, and if so, on what basis?

Court costs

Legal costs comprise costs of court proceedings, compensation for travel expenses, fees of retained experts and the travel expenses of witnesses.

As a general rule, parties bear the costs of acts they perform or request in a proceeding, advancing the payment of it. Parties requesting expert evidence will share the costs of producing it. The final ruling will impose on the losing party the obligation to reimburse the prevailing party for the expenses advanced.

Plaintiffs in collective proceedings receive a waiver both from anticipating legal costs (including expert witness fees and costs of pleadings) and paying attorneys' fees and court costs if they lose.

Attorneys' fees

In individual claims, the losing party pays statutory attorneys' fees to the attorneys of the prevailing party. The judge sets the attorney fees in a range of 10 to 20 per cent of the awarded damages or the amount under dispute in view of the following factors: the attorneys' diligence, the place where the service was rendered, the nature and the relevance of the claim, the work performed and the time spent by the attorneys.

Joint and several liability

33 | Is liability imposed on a joint and several basis?

Under the CC, offenders and co-offenders are jointly and severally liable for damages derived from unlawful practices. Moreover, employers are jointly and severally liable for compensating damages derived from an unlawful act performed by an employee or executive.

The Antitrust Act (AA) also provides for joint and several liability among companies of the same economic group, establishing, therefore, joint and several liability beyond classical parental liability. Pursuant to the AA, this provision applies both to administrative and civil liability (ie, private actions for damages).

Contribution and indemnity

34 | Is there a possibility for contribution and indemnity among defendants? How must such claims be asserted?

Under the CC, defendants have the right to seek contributions from other co-debtors or co-defendants in cases where one of them is obliged to pay claimants for the entire amount of the awarded damages.

If one defendant is or becomes insolvent, his or her share will be equally divided among the other co-defendants, who will bear the burden of paying the outstanding amount. Defendants who have settled, however, might not bear the insolvent defendant's share if a plaintiff grants a 'remission' to the settling parties, extinguishing their share of the debt.

Partial payment by a debtor or remission from the creditor regarding one debtor does not affect the joint and several liability of the other co-defendants for the outstanding amount. Nonetheless, claimants deduct, from the total claim, a settling party's share of the debt.

ARAÚJO E POLICASTRO

A D V O G A D O S

Bruno Lanna Peixoto

bpeixoto@araujopolicastro.com.br

Ludmilla Martins da Silva

lsilva@araujopolicastro.com.br

R. Leopoldo Couto de Magalhães Jr

758, 4 Andar

São Paulo, SP

Brazil

Tel: +55 11 3049 5700

www.araujopolicastro.com.br

Passing on

35 | Is the 'passing-on' defence allowed?

A passing-on defence is allowed, and it is a matter for the defendant to prove. Under the Civil Procedure Code, a defendant bears the burden of proving facts that hamper, modify or extinguish the claimant's right to compensation.

Applying this provision, the Court of Appeal of Sao Paulo recently ruled on a private action following an Administrative Council for Economic Defence (CADE) decision imposing fines on the cement industry, ruling that defendants must prove alleged passing on (see *Paez de Lima Construções Comércio e Empreendimentos Ltda e outros v Votorantim Cimentos S/A e Lafargeholcim (Brasil) SA*, TJ-SP, Appeal No. 1050035-45.2017.8.26.0100, 19th Private Law Chamber, adjudicated on 28 August 2019).

Other defences

36 | Do any other defences exist that permit companies or individuals to defend themselves against competition law liability?

The court will award damages when a plaintiff proves the existence of an infringement, individual damage and causation; hence, defendants may rely on pieces of evidence to refute a plaintiff's narrative, demonstrating the lack of one of those requirements.

Alternative dispute resolution

37 | Is alternative dispute resolution available?

Under the Civil Procedure Code, the judge must encourage the parties to settle the case during a conciliation (or mediation) hearing that precedes the filing of a response and the statement of defence. Arbitration is also available when parties expressly agree to submit the claim to an arbitration panel or sole arbitrator.

Importantly, a bill under analysis in Congress amends the AA to promote private antitrust enforcement and provides that as a requirement for settling investigations with CADE, applicants must agree to submit damages claims resulting from the investigated conduct to arbitration provided that the claimants agree to and request it.

UPDATE AND TRENDS**Recent developments****38 | Are there any emerging trends or hot topics in the law of private antitrust litigation in your country?**

House of Representative Bill No. 11,275 of 2018 is one step away from being approved and entering into force. It will significantly foster enforcement, establishing double damages applicable to recovery actions for cartel damages against parties that have neither executed a leniency agreement nor subsequently settled with the Administrative Council for Economic Defence (CADE).

It also establishes as a new requirement for settling with CADE that settling parties agree to submit private disputes on cartel damages to arbitration provided that a claimant agrees or requests it. This requirement is not applicable to parties that have executed leniency agreements with CADE.

The Bill also codifies the case law from Brazil's higher courts on limitation, the passing-on defence and the effect of CADE's decision on follow-on litigation, enhancing certainty and securing the conditions required for the flourishing of private antitrust enforcement.

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