LIABILITY OF PARENT COMPANIES FOR DAMAGES RESULTING OF ANTITRUST VIOLATIONS: DRAWING THE LINE BETWEEN CIVIL AND ADMINISTRATIVE PROCEEDINGS UNDER BRAZILIAN COMPETITION LAW

Responsabilidade das Controladoras por Danos Decorrentes de Infrações Antitruste: *A delimitação do processo civil e administrativo no direito brasileiro da concorrência*

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Abstract: This article examines the limits of parent company liability for antitrust damages under Brazilian law, distinguishing between administrative and civil enforcement mechanisms. While Article 33 of the Brazilian Competition Act allows for joint and several liability within corporate groups in administrative proceedings, civil liability for antitrust damages is governed by the general tort regime of the Civil Code and requires proof of fault, causation, and individual harm. The article also analyzes the restrictive conditions under which a parent company may be held liable—either by acting as a de facto manager or through piercing the

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corporate veil. Finally, it explores the role of the objective good faith principle in preventing contradictory procedural conduct across administrative and civil fora.

Keywords: Antitrust; Civil Liability; Shareholder liability; Corporate groups; Compensation for competition damages.

Resumo: Este artigo examina os limites da responsabilidade de controladores por danos concorrenciais causados por entidades controladas, diferenciando os mecanismos de responsabilização administrativa e civil. Enquanto o artigo 33 da Lei 12.529/2011 permite a responsabilização solidária de grupos econômicos no âmbito administrativo, a responsabilidade civil por danos concorrenciais é regida pelo regime geral de responsabilidade extracontratual do Código Civil e exige prova de culpa, nexo causal e dano. O artigo também analisa as condições sob as quais um controlador pode ser responsabilizado—seja por atuar como administrador de fato, seja por meio da desconsideração da personalidade jurídica. Por fim, explora o papel do princípio da boa-fé objetiva em casos que envolvam tanto ações civis quanto processos administrativos.

Palavras-chave: Antitruste; Responsabilidade civil; Responsabilidade de acionistas; Grupo econômico; Ação de reparação de danos concorrenciais.

1. Introduction

When Law No. 14.470/2022 amended Law No. 12.529/2011 (the Brazilian Competition Act, from Portuguese "*Lei de Defesa da Concorrência*" – "LDC") to complement provisions regarding private enforcement actions seeking compensation for antitrust damages – including a provision of double compensation for torts suffered as a result of anticompetitive conduct[4] – it raised expectations that those civil lawsuits would disseminate in Brazil. However, those expectations were frustrated, since private actions for compensation for antitrust damages continue to be

[4] BRAZIL. *Law No. 12,529/2011* (Competition Act – "Lei de Defesa da Concorrência"). Brasília, 2011, Art. 47, §1, as amended by Law No. 14.470/2022.

rare. According to Ragazzo and Veloso,[5] some of the main reasons why such private actions are rare in Brazil relate to legal and procedural uncertainties, such as limitation periods, access to evidence, and lack of antitrust experience in the judicial system.[6]

In addition to those uncertainties, aspects of civil liability applicable to antitrust damages raise important questions, such as whether the joint and several liability of corporate groups, as provided for in Article 33 of the Brazilian Competition Act, may be extended beyond the administrative realm into private damages claims. Aiming to shed light on this issue, this article examines the boundaries between administrative and civil liability in Brazilian antitrust law, with a systemic analysis of the legal bases for antitrust damages and civil liability, namely Articles 33 and 47 of the Brazilian Competition Act and Articles 186, 187, 275, 927 and 942 of the Brazilian Civil Code ("CC").

It argues that Article 33 of the Competition Act—designed to ensure the effectiveness of public enforcement—does not create an autonomous basis for civil liability, nor does it alter the general rules of tort liability under the Civil Code. Instead, claimants must satisfy the traditional requirements of wrongdoing, fault, causation and damage on a defendant-by-defendant basis. The article also examines the conditions under which a parent company may be held liable for the conduct of its subsidiary, either by acting as a *de facto* manager or through piercing the corporate veil—mechanisms subject to restrictive legal standards in Brazilian law.

Finally, the article addresses the application of the principle of *nemo potest venire contra factum proprium* in litigations for damages caused by anticompetitive conduct, highlighting how procedural good faith limits the possibility of bringing claims that contradict prior conduct in administrative or judicial proceedings. By clarifying these issues, the article

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[5] RAGAZZO, Carlos; VELOSO, Isabel. *Ações de reparação de danos Concorrenciais no Brasil*: Obstáculos e sugestões. FGV Direito Rio, 2023. Disponível em: https://direitorio.fgv.br/sites/default/files/arquivos/2023_07_19%20Vers%C3%A3o%20Final%20relat%C3%B3rio%20FDD_site.pdf. Acesso em: 08/05/2025.

[6] *Ibidem*.

aims to contribute to the ongoing debate on the proper scope of civil liability in antitrust enforcement and to what extent Brazilian law protects controlling shareholders from exposure to liability for anticompetitive conduct of controlled companies.

2. The scope of Article 33 LDC

In order to ascertain the scope of Article 33 LDC, one must first understand the Brazilian Competition Act's structure. Article 33 is placed within Title V, which regulates prosecution of violations of the economic order by the Brazilian competition authority, CADE ("*Conselho Administrativo de Defesa Econômica*"). Therein, Article 33 is part of Chapter I, which establishes general provisions. The key provisions in Title V are in Chapter II (Article 36), which provides definitions of "violations of the economic order",[7] and Chapter III (Articles 37 to 45), which concerns the sanctions for such violations.

It must be noted that Chapter III does not provide for indemnification or redress of damages to the affected parties. All penalties provided under Articles 37 to 45 are strictly administrative in nature and may be applied solely by CADE. These include monetary fines as well as compulsory licensing, divestiture, disqualification from public tenders, et cetera. Sanctions imposed for violations of the economic order are designed to protect collective interests and the public good. They do not include any sort of indemnification or redress of damages and are solely punitive in their scope. Accordingly, pursuant to Article 28, paragraph 3 LDC, fines levied by CADE must be allocated to the Fund for the Defense of Diffuse Rights,

[7] According to Law 12,529/2011, Article 36, any "*acts which under any circumstance have as an objective or may have the following effects shall be considered violations of the economic order, regardless of fault, even if not achieved: I - to limit, restrain or in any way injure free competition or free initiative; II - to control the relevant market of goods or services; III – to arbitrarily increase profits; and IV - to exercise a dominant position abusively*". (Our translation) Article 36 then provides a long, non-exhaustive, list of possible antitrust violations, such as collusive agreements, discriminatory pricing, predatory pricing, bundling, *et cetera*. (BRAZIL. *Law No. 12,529/2011* (Competition Act – "Lei de Defesa da Concorrência"). Brasília, 2011).

a fund managed by the Federal Government – and not to any aggrieved party.

It is therefore clear that violations of the economic order are solely within CADE's purview and are solely a type of administrative illicit. It follows that Article 33, which provides for joint and several liability for violations of the economic order, must apply solely within CADE's own proceedings and within the scope of public (administrative) antitrust enforcement.

On the other hand, Chapter V (titled "Right of Action") consists solely of Article 47 and Article 47-A, providing that any aggrieved party "may take legal action in defense of their individual interests or shared interests, so that the practices constituting violations of the economic order cease, and compensation for the losses and damages suffered be received" and that the "decision of the Court's Plenary mentioned in Article 93 of this Law constitutes sufficient grounds for granting evidentiary relief, enabling the judge to issue a preliminary ruling in the actions provided for in Article 47". Article 47 and 47-A do not reference any test for such compensation, from which it follows that the legal basis for an individual indemnification claim must be the general civil liability regime provided by the Civil Code.

Title V's structure is not without reason. One can clearly glean from all its provisions that violations of the economic order are solely within CADE's purview and are solely a type of administrative illicit. It follows that Article 33, which provides for joint and several liability for *violations of the economic order*, must apply solely within CADE's own proceedings and within the scope of public (administrative) antitrust enforcement.

Brazilian scholarship is very clear on this issue.[8] According to Taufick,[9] Article 33 is meant to ensure efficacious collection of fines

[8] CADE's own scholarly journal, the Competition Defence Review, has published a number of papers on this issue, which unanimously support this reading. According to a paper authored by Alexandre Dietzel Faraco, for instance: "*The interpretation advanced herein of Article 33 does not intend to ignore the legal text, which states that the responsibility will be joint and several within the group when at least one of the members commits the violation. The existence of an economic unit does not require that all the companies have had direct participation in the act. In this case, the joint and several liability would exist as a result of those companies being co-authors of the illicit act and the text of article 33 does not deal with co-authorship. The economic unity that characterizes the existence of a group - and allows the application of the solidarity rule - derives from the existence of the same decision-making center to which the infringing act may be referred. The other companies of the group have integrated their behavior with what was decided, even if their administrative bodies or employees have not participated in that decision*." (our translation) (FARACO, Alexandre Ditzel. Responsabilidade solidária no grupo econômico por infrações da ordem econômica. *Revista de Defesa da Concorrência*, Brasília, v. 10, n. 2, p. 126-139, 2022).
In another essay, Renan Cruvinel de Oliveira states that *"Article 33 of Law 12.529/2011 cannot generically apply regarding the accountability for antitrust violations. In fact, the generic application of said article harms a series of constitutional guarantees applicable to the administrative sanctioning process, such as the principles of guilt, due process of law and legal certainty. These guarantees are even more important when dealing with economic groups, a very flexible and elastic concept from a corporate viewpoint, and so important legally and economically"* (our translation). DE OLIVEIRA, Renan Cruvinel. A Responsabilidade Solidária entre Sociedades Empresárias de um mesmo Grupo Econômico por Infrações ao Direito da Concorrência. *Revista de Defesa da Concorrência*, v. 6, n. 2, p. 130-160, 2018.

[9] TAUFICK, Roberto Domingos. *Nova lei antitruste brasileira: avaliação crítica, jurisprudência, doutrina e estudo comparado***.** São Paulo: Grupo Almedina, 2019.

imposed by CADE.[10] Ana Frazão[11] also supports this understanding, emphasizing the difference between liability for payment of administrative fines *versus* several and joint liability for antitrust infringement:

> One thing is to recognize that the parent company can and must answer for the consequences of the sanctions imposed on the subsidiary, notably the payment of the fine and the compliance with the non-personal obligations that were imposed on the subsidiary. Another thing, very different, is to assert that the parent company can be considered jointly and severally liable and condemned, directly suffering all the consequences of the punishment, including recidivism. In fact, in the case of administrative liability, of a punitive nature, some consequences of the sanction have very personal effects, due to the principle of personal nature or non-transferability of penalties. Thus, the application of a double fine to a certain legal entity due to the conviction of another member of the economic group, for example, does not automatically follow from article 33 of Law 12,529/2011.[12]

CADE's practice endorses these assertions, since it adopts Article 33 LDC as a safeguard to the enforcement of administrative prosecution on competition law, not as a blank check to prosecute any agent belonging to the economic group being investigated for an infringement of the economic

[10] "*The central point of art. 33 is in the joint liability of the group due to the antitrust violation committed by one of its members. This does not imply that, under the terms of art. 37, the basis for calculating fines is necessarily the turnover of the economic group to which the company belongs - given that the objective of the law is to individualize the penalty according to the offenders' turnover and in proportion to the damage caused by them. Solidarity means that the group's assets are jointly and severally liable for the fine imposed exclusively on the violating company's revenues - the center of imputation (always depending on the participation of the entire group in the anticompetitive practice)*." (Our translation). TAUFICK, Roberto Domingos. *Op. Cit.* p. 197.

[11] FRAZÃO, Ana. *Direito da concorrência*: pressupostos e perspectivas. São Paulo: Saraiva, v. 1, 2017.

[12] Our translation. FRAZÃO, Ana. *Op. Cit.* p. 312-313.

order. In fact, CADE only ever applies Article 33 LDC in three well-defined instances.

First, in violations of the economic order committed by foreign companies. Article 2, §2 LDC[13] (territorial jurisdiction clause) enables CADE to prosecute foreign undertakings for violations that, despite happening abroad, caused anticompetitive effects in Brazil. Whenever this happens, instead of pursuing direct action against foreign entities, CADE may apply Article 33 to prosecute undertakings based in Brazil and undertakings related to those that caused the actual infringement.

Second, in cases where the infringing person or entity cannot be clearly identified. When it is difficult to establish which entity committed an alleged violation, CADE may opt to make use of Article 33 to prosecute the whole economic group (or the fraction of agents who indistinguishably partook in the action). This can happen, for example, due to a complex corporate arrangement within the group, or when there is reasonable suspicion of fraud via the formation of several legal entities.

Third, in judicial collection of administrative fines. Where an agent is convicted but does not comply with the sanctions, CADE may proceed with the judicial execution of the measures against the agent itself or its controller, based on Article 33.[14]

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[13] BRAZIL. *Law No. 12,529/2011* (Competition Act – "Lei de Defesa da Concorrência"). Brasília, 2011. "Art. 2º This Law applies, without prejudice to any conventions and treaties to which Brazil may be a signatory, to practices committed in whole or in part within the national territory, or that produce or may produce effects therein. […] §2º The foreign company will be notified and served of all the procedural acts provided for in this law, regardless of power of attorney or contractual or statutory provisions, in the person of the agent or representative or person responsible for its branch, agency, branch, establishment or office installed in Brazil." (Our translation)

[14] "Even if there is no evidence of the practice of competition offenses by the represented entities, which is why the administrative proceeding was dismissed with respect to them, it is possible to hold them liable for the fine imposed on the Committee they are part of, that is, even if they have not been personally convicted of economic offenses, they are liable with their assets for the conviction of the entity in which they participated, due to the solidarity contained in art. 33 of Law 12.529/11." (BRAZIL. CADE. *Note No. 4/2017/CGCJ/PFE-CADE/CADE/PGF/AGU*, Administrative Proceeding No. 08012.002540/2002-71. Published on 04/03/2017).

An illustrative example of the limited application of Article 33 is the investigation of the sea fender market cartel. In that case, the General Superintendence[15] decided to exclude *Copabo Equipamentos de Infraestrutura Portuária Ltda*., *Flexomarine S.A.* and *1001 Indústria de Artefatos de Borracha* from the defendants list because other companies in their economic group were responsible for the products related to the investigated market.[16] Therefore, CADE adopts a restrictive posture in relation to the inclusion of additional agents under Article 33 when unrelated to the investigated practice.[17]

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[15] CADE's General Superintendence (SG) is the investigative branch of the authority.

[16] "In the defense of Copabo Equipamentos de Infraestrutura Portuária Ltda. ("Copabo Equipamentos"), Fernando Graziano and Juliana Botelho André it was alleged that the legitimate defendant is Copabo Infraestrutura Marítima Ltda. and not Copabo Equipamentos de Infraestrutura Portuária Ltda., because that is the one responsible for manufacturing sea fenders. With this, the Technical Note suggested that the passive pole be rectified, with Copabo Infraestrutura Marítima Ltda. as the defendant, since it is the procedural representative of the Copabo Group.
In their defense filings, Flexomarine S.A. ("Flexomarine"), Pagé Indústria de Artefatos de Borracha Ltda. ("Pagé"), 1001 Indústria de Artefatos de Borracha ("1001"), Gustavo Loureiro Ferreira Leite, Maria Lúcia Peixoto Ferreira Leite Ribeiro de Lima and Silvio Jorge Rabello alleged that Flexomarine and 1001 are illegitimate because they do not manufacture sea fenders or any product related to this market.
However, at the time this case was processed, there was a material error that suggested the rectification only in relation to Copabo, not being the same measure suggested in relation to Pagé Indústria de Artefatos de Borracha Ltda. which acted with the same procedural loyalty when informing the legitimate represented party. Therefore, the rectification of the passive pole is applicable to both defendants". (Our translation) BRAZIL. CADE. *Technical Note No. 66/2017/CGAA7/SGA2/SG/***.** Administrative Proceeding no. 08700.011474/2014-05. Published on 08/13/2017.

[17] The same understanding can be observed in the investigation of anticompetitive conduct in the foreign exchange market. At that time, the General Superintendence also understood it was correct to rectify the passive pole in relation to the company directly involved in the violation: "In their petition, Credit Suisse Brasil and Credit Suisse AG request the substitution of Credit Suisse Brasil by Credit Suisse AG, in the passive pole of Administrative Proceeding 08700.004633/2015-04, on the grounds that the individuals mentioned in the Technical Note of Initiation have never been managers or employees of Credit Suisse Brasil. The plaintiffs claim that such individuals are employees of Credit Suisse AG. With the rectification of the passive pole, Credit Suisse AG is considered to be cited in these proceedings. Initially, a copy of the power of attorney granted by Credit Suisse AG was enclosed, and the original copy was enclosed on November 17. For Credit Suisse AG, answering for the Credit Suisse Group, to be

Therefore, the structure of the LDC, Brazilian scholarship and CADE's case law all point to a narrow reading of Article 33. This provision applies solely to public (administrative) antitrust enforcement against violations of the economic order.

In its turn, civil liability and compensation for damages caused by a given conduct must be obtained directly by the aggrieved parties, through a damages claim before the judiciary. Article 47 provides for such a right of action and will be examined henceforth.

3. Civil compensation for antitrust damages

Parallel, prior or subsequent to public antitrust enforcement by CADE, any party who considers itself aggrieved by the conduct of another can resort to the judiciary to claim compensation for losses and damages.

Though certainly interrelated, each of these spheres – the administrative enforcement by CADE and the private enforcement before the courts – is ultimately independent of the other[18]; the same set of facts may be evaluated differently by each approach. Administrative investigation and sanctioning by CADE are intended to protect competition as a collective interest and public good,[19] while civil actions are intended to

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able to defend itself in its own name and directly participate in the investigations, its inclusion in the passive pole of the present proceedings in lieu of Credit Suisse Brasil is deemed appropriate, without prejudice to the application of the solidarity rule, pursuant to articles 32 and 33 of Law 12,529/11, when applicable." BRAZIL. CADE. *Technical Note No. 117/2015/CGAA8/SGA2/SG/CADE***.** Administrative Proceeding No. 08700.004633/2015-04. Published on 12/17/2015.

[18] See, inter alia, judgment by the Superior Court of Justice (STJ): "[...] given the independence between the civil, criminal, and administrative spheres, the fact that the Administrative Council for Economic Defense (CADE) concluded that there was no cartel formation does not prevent the Public Prosecutor's Office, based on the evidence produced during the investigative procedure, from finding that a crime against the economic order was committed. [...]" BRAZIL. Superior Tribunal de Justiça (STJ), *RHC 97036/PR*, 5th Chamber, Reporting Justice Jorge Mussi, Sentenced on 14/05/2019.

[19] BRAZIL. *Law No. 12,529/2011* (Competition Act – "Lei de Defesa da Concorrência"). Brasília, 2011. "Art. 1. This Law structures the Brazilian System for Protection of Competition - SBDC and sets forth preventive measures and sanctions for

compensate the losses and damages suffered by an individual company impacted by the conduct of another company, which must have caused such damage by fault.

The Brazilian Competition Act expressly provides in Article 47 the private right of action for parties who consider themselves aggrieved by the conduct of another. *Verbatim*:

> CHAPTER V - RIGHT OF ACTION
> Art. 47. The aggrieved parties, by themselves or by someone legally entitled referred to in Article 82 of Law No. 8078, of September 11th, 1990[20], may take legal action so as to safeguard their individual interests or individual homogeneous interests, so as to cease any practices constituting violations of the economic order, and/or obtain compensation for damages incurred, regardless of any investigations or administrative proceedings, which will not be stayed while judicial proceedings are pending.

Article 47 of the LDC entails three key takeaways. First, CADE's administrative procedure and civil procedure are independent of each other to reach their own conclusions. Administrative antitrust liability does not entail civil antitrust liability or vice versa. Under Brazilian law, it is perfectly possible for CADE to convict a set of companies for a violation of the economic order and that the judiciary dismisses damages claims against these same companies.[21]

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violations against the economic order, guided by the constitutional principles of free competition, freedom of initiative, social role of property, consumer protection and prevention of the abuse of economic power. Sole paragraph. The people are the holders of the legal interests protected by this Law."

[20] Law No. 8,078/1990 provides for the Brazilian Consumer Code and for class actions on behalf of affected consumers.

[21] See, inter alia, the following rulings by the São Paulo State Court of Justice: SÃO PAULO. Court of Justice of São Paulo (TJSP). *Civil Appeal No. 1076734-73.2017.8.26.0100*; 5th Private Law Chamber of the Court of Justice of São Paulo; Reporting Judge Moreira Viegas; Judgment Date: 09.25.2019; SÃO PAULO. Court of Justice of São Paulo (TJSP); *Civil Appeal No. 1077205-89.2017.8.26.0100*; 30th Chamber of Private Law of the Court of Justice of São Paulo; Reporting Judge Carlos Russo; Trial Date: 27/11/2019; SÃO PAULO. Court of Justice of São Paulo (TJSP).

Second, CADE's administrative procedure and a civil procedure before the courts will not be contingent on, or take precedence over, each another. Article 47 of the LDC states both courses of action are to occur "regardless" of each other. In fact, parties can present claims at any given time both to CADE and the judiciary, with no pre-established determination of order. Before CADE, claims are presented regarding public interest "*violations of the economic order*", while before civil courts, claims are presented over individual interests, such as claims for reparation over losses and damages.

Third, any compensation for losses and damages is to be pursued under civil liability law, with no special rules arising. Evidently, for a special liability regime to apply, there must be a special and explicit clause or statute on such a regime. In Brazilian law, such a regime exists, for instance, in consumer protection law. The Consumer Protection Code[22] provides several stipulations on a vendor's liability. This Code allows, for instance, for a strict liability test for faulty products or services acquired from vendors, manufacturers, contractors, and importers (Article 12). It also provides that a vendor shall be held liable whenever the manufacturer is unknown (Article 13); for vendor liability for inadequate or insufficient information on the product (Article 14); and for joint and several liability of all manufacturers involved in a faulty product's supply chain (Article 18). The Consumer Protection Code, therefore, provides a very comprehensive regime of liability, which takes precedence over the Civil Code on issues of consumer law. However, this is not the case under Brazilian competition law.

4. Legal test for civil liability

The Brazilian Civil Code ("CC") regulates civil liability in Articles 186, 187 and 927, which read as follows:

Common Civil Procedure No. 1047853-52.2018.8.26.0100; 39th Civil Court of the Central Forum Dr. Daniela Pazzeto Meneghine Conceição; Trial Date: 30/4/2020.

[22] BRAZIL. *Law No. 8,078/1990* (Consumer Protection Code – "Código de Defesa do Consumidor"). Brasília, 1990.

> Art. 186. Whoever, through voluntary action or omission, negligence or imprudence, violates a right and causes damage to another, even if exclusively moral, commits an illicit act.
> Art. 187. The holder of a right who, in exercising it, manifestly exceeds the limits imposed by its economic or social purpose, good faith or good customs, also commits an illicit act.
> Art. 927. Whoever, through an unlawful act (arts. 186 and 187), causes damage to another is obliged to repair it.
> Sole Paragraph. There will be an obligation to repair the damage, regardless of guilt, in the cases specified by law, or when the activity normally developed by the author of the damage implies, by its nature, risk to the rights of others.

Pursuant to these provisions, civil liability in Brazil requires at least three concurrent conditions: (i) a civil wrongdoing (the illicit act referred to in Articles 186 and 187); (ii) that the aggrieved party has suffered damage (be it material or non-material, pursuant to Articles 186 and 927); and (iii) that there be a link or causal connection between the former and the latter.

Brazilian law recognizes two types of liability tests, which are provided for in Article 927 CC: (i) fault-based liability, which requires the aggrieved party to establish that the wrongful conduct occurred either intentionally or through negligence; and (ii) strict liability, wherever the law so provides or wherever a party's activities generally entail a risk to others.

Under the Civil Code and Competition Act rules, Brazilian scholarship holds that antitrust civil liability is fault-based. First, because antitrust doctrine allows, e.g., efficiency defenses, which implies that anticompetitive intent must be taken into account in any damages claim. Furthermore, the Brazilian Federal Constitution, under Article 173, § 4,[23]

[23] BRAZIL. *Federal Constitution*. Brasília, 1988. "Article 173. Except for the cases set forth in this Constitution, the direct exploitation of an economic activity by the State shall only be allowed whenever needed for the imperative necessities of the national security or for a relevant collective interest, as defined by law. (…)
Paragraph 4. The law shall repress the abuse of economic power that aims at the domination of markets, the elimination of competition and the arbitrary increase of profits".

provides that conduct *aimed* at dominating markets and eliminating competition is to be prosecuted. This is reinforced in Article 36 LDC, pursuant to which acts that under any circumstance have have the *objective* of dominating markets are to be deemed violations of the economic order.[24-25] Former CADE Commissioner Maurício Oscar Bandeira Maia explains as follows:

> Unlike Professor Tércio Sampaio Ferraz Júnior on the objective nature of civil liability arising from cartel damage, one must agree […] on the subjective nature of this duty, since, even if from the administrative antitrust enforcement standpoint the illegal cartel has an objective dimension, and it is unnecessary to prove faulty conduct for its characterization, when we transpose the facts to private law, this same liability does not arise from the relevant normative command (Arts. 927 of CC and 47 of the LDC), therefore, all requirements for liability must be met, namely: a) tort; b) culpable conduct of the agent; c) causal connection; and d) damage.[26]

Therefore, to successfully claim damages under the Civil Code, the claimant must concurrently establish conditions (i) to (iii) and establish

[24] BRAZIL. *Law No. 12,529/2011* (Competition Act – "Lei de Defesa da Concorrência"). Brasília, 2011. "Art. 36. The acts which under any circumstance have as an objective or may have the following effects shall be considered violations of the economic order, regardless of fault, even if not achieved: I - to limit, restrain, or in any way injure free competition or free initiative; II - to control the relevant market of goods or services; III – to arbitrarily increase profits; and IV - to exercise a dominant position abusively" (Our translation).

[25] "In Brazilian Law, if the intention is not directly present, the volitional element is undeniably present […]. It is difficult to deny in both situations the existence of (some) intentional element. The Federal Constitution refers to acts that "aim at" dominating the markets, restricting competition or arbitrarily increasing profits. On the other hand, Law 12,529/2011 mentions as illicit those acts that "have as their object". (Our translation) SALOMÃO FILHO, Calixto. *Direito concorrencial*. São Paulo: Malheiros, 2013, p. 400.

[26] MAIA, Mauricio Oscar Bandeira. *Elementos das ações reparatórias por danos concorrenciais decorrentes de cartel.* Belo Horizonte: Editora Dialética, 2021.

negligence or intent by the defendant, even if intent is to be interpreted here under the dictates of antitrust doctrine.

This test must be met for each defendant separately. Pursuant to Articles 275 and 942 CC, two or more defendants may be found jointly and severally liable *whenever more than one party concurrently caused indemnifiable damage*. The relevant provisions read as follows:

> Art. 275. The creditor is entitled to demand and receive from one or more of the debtors, partially or totally, the common debt; if payment has been partial, all other debtors remain jointly and severally liable for the remainder.
> Art. 942. The property of the person responsible for the offense or violation of another's right shall be subject to compensation for the damage caused; and if there is more than one offender in the offense, all shall be jointly and severally liable for the compensation.
> Sole Paragraph. Co-authors and the persons designated in art. 932 are jointly and severally liable with the authors.

Therefore, under Brazilian law's general liability regime, it is essential to prove that the defendant's conduct, individually considered, caused the alleged damage. Consequently, the possibility of pursuing parent companies for torts caused by subsidiaries' anticompetitive conduct shall be analyzed in the context of shareholders' liability under Brazilian corporate and civil law.

5. Joint stock companies' shareholder's liability under Brazilian law

In many cases of anticompetitive conduct subject to administrative or judicial review, offenders are joint-stock companies (from the Portuguese, "S.A."), regulated by the Brazilian Corporate Law (Law No. 6,404/76, "LSA"). After registering with the local Trade Board, a company obtains its own legal personality and status, in accordance with Article 985 CC. Thereafter, the company maintains its assets and autonomy under the law, as a legal subject able to assume and carry out obligations vis-à-vis

third parties and public authorities in its day-to-day business. The company is deemed to be a legal person distinct from its shareholders (Article 49-A CC).

On the other hand, shareholders with voting rights participate through the General Meeting to resolve legal matters (Article 122 LSA), in addition to matters defined in the Company's Bylaws, respecting the provisions of the Shareholders' Agreement. As a general rule, the decisions of the Shareholders' Meeting, except for special situations defined in law and in the provisions of its Articles of Association, shall be adopted by an absolute majority of votes, and blank votes shall not be counted (Article 129 LSA).

Considering the autonomous legal personality of joint stock companies, the general regime of civil liability, and the inapplicability of Article 33 CA to civil damage actions, two venues remain for holding shareholders liable for damages caused by subsidiaries: (i) shareholders acting as *de facto* directors of their subsidiary, or (ii) piercing the corporate veil.

(i) Shareholder acting as de facto director of its subsidiary

The LSA provides that a company's controlling shareholder and its administrators may only be held liable for damages caused by their acts proven and perpetuated in fraudulent management; with abuse of power or violation of the law or the company's bylaws (articles 116 and 117 LSA). In this respect, the Superior Court of Justice (in Portuguese, Superior Tribunal de Justiça or "STJ") has decided:

> […] especially in corporations, the rule prevails that only the company's managers and its controlling shareholder can be held responsible for the management acts and for the abusive use of power; It is also true that their responsibility requires robust proof that the shareholder effectively used its power to direct the social activities and guide the company's bodies.[27]

[27] BRAZIL. Superior Tribunal de Justiça (STJ), *Special Appeal No. 1412997/SP*, 4th Chamber, Reporting Justice Luis Felipe Salomão, judged on 08/09/2015.

Therefore, Brazilian law requires three concurrent conditions: a) that the defendant is a controlling shareholder; b) strong evidence of abuse of power[28], fraud or a breach of its fiduciary duties, as provided for in Article 117 LSA; and c) that the claimant suffered direct damages as a result of the shareholders' actions.

(ii) Piercing the corporate veil

Other than holding controlling shareholders responsible for abusive acts causing damage, claimants may pursue joint and several liability between a controlled entity and its controller, under the Civil Code, by piercing the corporate veil, so as to hold a shareholder accountable for any civil wrongdoings attributable to the subsidiary. Article 50 CC provides the relevant criteria for doing so:

> Article 50. In case of abuse of legal personality, characterized by deviation of purpose or confusion of assets, the judge may, at the request of the party, or of the Public Prosecutor's Office when it is up to him to intervene in the process, pierce it so that the effects of certain and specific obligation relationships are extended to the private assets of administrators or partners of the legal entity directly or indirectly who were benefited by the abuse.

Therefore, as it is generally understood under Brazilian Civil and Corporate Law, piercing the corporate veil requires one of two conditions: (i) asset confusion, or (ii) deviation of purpose. Asset confusion can derive from a lack of patrimonial separation between the partners and the company, e.g., through the use of the company's financial resources to pay for a partner's debts. In turn, deviation of purpose is present when the legal

[28] Cases of abuse of power provided for in Article 117 LSA include: directing the company towards an objective other than in accordance with its corporate purposes clause or harmful; providing for a statutory amendment, an issue of securities or an adoption of policies or decisions which are not in the best interests of the corporation but are intended to cause damage to the minority shareholders; knowingly electing unfit or unqualified corporate officers; inducing unlawful action from a corporate officer or member of the audit committee; approving irregular accounts as a means for personal gain, or failing to investigate such accounts et cetera.

personality is used to defraud creditors or perform wrongdoings. These two tests are understood to be directed at restricting the use of veil piercing to situations where there is, in fact, an abuse of the legal personality.

The Civil Code also expressly provides in Article 50, §4, that the mere existence of an "economic group" does not in itself authorize veil piercing if absent the aforementioned conditions (asset confusion and deviation of purpose).[29]

Thus, Brazilian law does not authorize the indiscriminate exposure of shareholders for damages caused by anticompetitive conduct of subsidiaries. Liability of shareholders can only take place under the well-defined hypotheses of abuse of controlling power (as per Article 117 LSA), and asset confusion or deviation of purpose (as per Article 50 CC).

6. Limits to the rights of action in litigations for antitrust damages

Although civil and administrative venues are independent and actions seeking redress for anticompetitive damages under Article 47 LDC are not tied to CADE's decisions, in cases brought to the judiciary after an administrative decision, claimants must observe limitations imposed by the principle of objective good faith ("*boa-fé objetiva*").

Article 5 of the Brazilian Code of Civil Procedure ("CPC"), considered jointly with Article 422 CC, provides for the parties' duty to act "in good faith" in any legal proceedings, including both administrative and judicial ones.[30] Even before the current CPC entered into force, in 2015, the STJ had already recognized that the general principle of good faith applied to the behavior of parties in legal proceedings, and considered it an illicit act to exercise one's rights before the courts in a manner that would be

[29] BRAZIL. *Law No. 10,406/2002* (Civil Code – "Código Civil"). Brasília, 2002. "Article 50, §4, The mere existence of an economic group without the presence of the requirements mentioned in the head of this article does not authorize the veil piercing".
[30] BRAZIL. *Law No. 13,105/2015* (Civil Procedure Code – "Código de Processo Civil"). Brasília, 2015. "Article 5. All who, in any way, participate in the proceedings shall act in good faith."

contrary to good faith and Article 187 CC.[31] According to the STJ's reasoning, Article 187 CC already provides for the application of the principle of good faith not only in contractual relations, but also with respect to general tort obligations and civil proceedings.

The Brazilian Constitutional Court (from Portuguese, Supremo Tribunal Federal or "STF") has also recognized that there is a "prohibition of contradictory behavior" (in accordance with the *nemo potest venire contra factum proprium* principle) in civil procedural relations. That prohibition derives both from the objective good faith principle and duties of cooperation among the parties, which made the *nemo potest venire contra factum proprium* recognized in national case law.[32] Similarly, the STJ applied this same reasoning when deciding on a writ of mandamus ("Mandado de Segurança").[33]

The prohibition of contradictory behavior is also effective even when considering different legal proceedings filed by the same party. Brazilian case law is abundant in examples of contradictory behavior in such cases: the STJ has held, for instance, that when a party files a claim before a foreign jurisdiction and loses, such party is prohibited from filing a similar claim in Brazil to obtain a different outcome.[34]

Thus, within the scope of procedural legal relationships, whatever their nature, Brazilian law provides for the *nemo potest venire contra factum proprium* principle, which stems from the objective good faith principle ("princípio da boa-fé objetiva") provided for in Article 5 of the Civil Procedure Code and in the Civil Code.

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[31] BRAZIL. Superior Tribunal de Justiça (STJ), *REsp 758.518/PR*, 3rd Chamber, Reporting Justice Vasco Della Giustina, judged on 17/06/2010. p. 10, mentioning, in this respect, scholar Fredie Didier Jr. In this precedent, STJ deemed that the claimants had breached the objective good faith principle given the delay in filing the lawsuit.

[32] BRAZIL. Supremo Tribunal Federal (STF). *Ag. Reg. in Rcl 25.379*, 1st Chamber, Reporting Justice Luiz Fux, judged on 19/10/2016.

[33] BRAZIL. Superior Tribunal de Justiça (STJ), *RMS 29.356/RJ*, 1st Chamber, Reporting Justice Benedito Gonçalves, judged on 06/10/2009.

[34] BRAZIL. Superior Tribunal de Justiça (STJ), *MC 15.398/RJ*, 3rd Chamber, Reporting Justice Nancy Andrighi, judged on 02/04/2009.

In the case of civil actions for redress of competition damages filed after an administrative proceeding, the application of these reasonings entails that the claimant cannot seek redress from entities other than the ones it first accused in administrative proceedings. Even though civil proceedings are independent of the administrative antitrust proceedings, filing a civil action directly against a parent company for damages arising from antitrust violations committed by a subsidiary would be a violation of objective good faith, contradicting the claimant's behavior in the administrative proceeding (or vice versa if filing first a civil action).

Therefore, even in the case of a shareholder acting as *de facto* director of its subsidiary, the shareholder's liability and inclusion as a party to the proceeding must be claimed in both civil and administrative proceedings alike. If a claimant fails to do so when first filing a claim, and absent any new facts or evidence that justify a change in allegations, the subsequent procedure should dismiss such claim not on grounds of maintaining the same findings as the first procedure (since they are independent), but to enforce the principle of objective good faith in procedures, namely the *nemo potest venire contra factum proprium*. Thus, in this scenario, the only remaining possibility of pursuing shareholders' liability would be through piercing the corporate veil.

7. Concluding remarks

The Brazilian legal framework provides clear structural boundaries between the administrative enforcement of competition law and the civil pursuit of damages arising from anticompetitive conduct. While Article 33 of the Brazilian Competition Act plays a pivotal role in ensuring the effectiveness of public enforcement by attributing joint and several liability to members of an economic group for the purposes of administrative sanctions, this provision cannot be transposed into the civil sphere.

Private actions seeking redress for damages caused by anticompetitive conduct, as provided for by Article 47 of the Competition Act, are under the domain of civil liability, governed by the general tort

regime under the Brazilian Civil Code, particularly Articles 186, 187, and 927, which require a demonstration of wrongdoing, fault, causation, and harm. Liability for damage caused by anticompetitive conduct is fault-based, since there is no special regime determining otherwise. The fault-based liability test must be met for each defendant separately. In the case of two or more defendants, there may be joint and several liability whenever the defendants concurrently caused indemnifiable damage, pursuant to Articles 275 and 942 CC. Therefore, redress must be sought from the entity whose faulty action caused damage – not from any entity in a given corporate group.

Consequently, the possibility of pursuing parent companies for torts caused by subsidiaries' anticompetitive conduct only exists in the context of shareholders' liability under Brazilian corporate and civil law, with two scenarios: (i) controlling shareholder acting as a *de facto* director of the subsidiary, whose acts were performed with abuse of power, fraud or breach of its fiduciary duties (as provided for in Article 117 LSA) and caused the damage; or (ii) piercing the corporate veil, seeking redress from a shareholder when there is either asset confusion or deviation of purpose (as per Article 50 CC). Thus, Brazilian law does not authorize indiscriminate exposure of shareholders for damages caused by anticompetitive conduct of subsidiaries.

Even in the case of a controller acting as a de facto director with abuse of power, claimants must observe the principle of objective good faith ("*boa-fé objetiva*") when acting in both the administrative and civil spheres. Brazilian law adopts the *nemo potest venire contra factum proprium* principle, therefore prohibiting contradictory conduct across legal proceedings. In practice, this means that claimants cannot adopt inconsistent litigation strategies across proceedings—such as omitting a controller from administrative allegations and later attempting to impose civil liability on it without justifiable new facts.

Ultimately, the pursuit of antitrust damages in Brazil must be firmly anchored in the legal principles that govern civil liability and procedural conduct. The mere existence of corporate affiliation does not suffice to extend liability, and claimants must articulate consistent, well-

substantiated claims within and across legal fora. Only by respecting both the substantive and procedural requirements of Brazilian law can private enforcement serve as a legitimate and effective complement to the public enforcement of competition norms.

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