Public compensation in Brazilian Competition law

A mechanism to enhance the effectiveness of enforcement

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Resumo: O objetivo deste artigo é o aprimoramento do sistema concorrencial brasileiro por meio da institucionalização do mecanismo de compensação pública, pelo qual a autoridade concorrencial passa a ter competência para realizar atividade compensatória no interesse de lesados por condutas anticompetitivas. Partindo de um diagnóstico das ineficiências do sistema de private enforcement são apresentados os argumentos favoráveis à adoção da compensação pública no Brasil. Em seguida, o artigo analisa a legislação e a jurisprudência, demonstrando a compatibilidade da compensação pública com a ordem jurídica brasileira. Por fim, o artigo discorre sobre o modo como este instituto poderia ser recepcionado no Sistema Brasileiro de Defesa da Concorrência.

Palavras-chave: Direito concorrencial – Atuação pública – Atuação privada –Compensação – Tutela coletiva – Compensação pública.

Abstract: This paper has as its object the improvement of the Brazilian system of Competition law, through the institutionalisation of a mechanism by which public enforcement could perform compensational tasks (public compensation). Starting with a diagnostic of the inefficiencies of the private enforcement system, arguments in favour of adopting public compensation in Brazil will be presented. Following that, this paper will draw on an analysis of legislation and case-law to argue that public compensation is compatible with the Brazilian legal system. Finally, it will consider how public compensation should be institutionalised, presenting a possible institutional framework for public compensation.

Keywords: Competition law – Public enforcement – Private enforcement – Compensation – Collective redress – Public compensation.

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I. Introduction

Brazilian[1] Competition law, similarly to other jurisdictions, is characterised by limited private enforcement. Although Competition law enforcement has evolved

1. Prêmio IBRAC TIM 2014 – Categoria: Pós-Graduação/Profissional.

considerably in Brazil over the last 20 years, private enforcement has not delivered the outcome it was expected to. Victims of Competition law infringements are not properly compensated, while wrongdoers are able to keep their illicit gains and are not effectively deterred. Moreover, due to the lack of competition culture and proper incentives to private litigation, the victims cannot rely on an adequate system to seek compensation. To address these shortcomings effectively, this text analyses the public compensation model,[2] ie the use of redress mechanisms within the public enforcement system, whereby not only fines but also compensation can be imposed or agreed.

II. BRIEF DIAGNOSTIC OF PRIVATE ENFORCEMENT IN BRAZIL

Despite the existence of a specific provision (Article 47 of the *Brazilian Competition Act*, hereafter BCA) allowing individual and collective civil actions for damages, private enforcement has proved to be insufficient to ensure that victims of Competition law infringements are properly compensated.[3] At least seven causes contributing to this phenomenon can be summarily described.

First, individual actions will not be brought to court if the right-holders are not aware of their rights or if, for social-economic reasons, they lack the resources to do so.[4] In other words, the current system of private enforcement depends on the willingness and knowledge of right-holders,[5] and on their financial situation.

Second, when the individual loss is small among a large number of victims, individual claims are impracticable and collective action is required.[6] Moreover, complete impossibility and utter certainty that a claim will be brought constitute the extreme ends of a large spectrum; along this spectrum lie many other individual demands which, although not entirely impracticable, are nevertheless unlikely to lead to a claim being brought.

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2. This name and the core of this proposal was elaborated by Ariel Ezrachi and Maria Ioannidou. *Public compensation as a complementary mechanism to damages actions: From policy justifications to formal implementation.* (2012) 3 JEurCL&P 536.
3. See Eduardo Gaban and Juliana Domingues. *Brazilian Competition law: a practitioner's guide* (Kluwer Law International 2013) 247-248.
4. CAPPELLETTI, Mauro and GARTH, Bryant. *Access to justice: a world survey* (Giuffrè 1978) 10-21.
5. See Aidan Robertson. *UK competition litigation: From Cinderella to Goldilocks?* [2010]. Comp Law 275, 290, who mentions a 'degree of consumer apathy' and acknowledges the difficulties of an opt-in system, which are to some extent similar to those of an individual claim.
6. Gerhard Wagner. *Collective redress – Categories of loss and legislative options.* (2011) 127 LQR 55. See also Maria Ioannidou. *Enhancing the consumers. Role in EU private competition law enforcement: A normative and practical approach.* (2012) 8 Comp.L.Rev 59, 73.

Third, procedural issues reduce the chance of both collective and individual redress. Collective actions have suffered considerable restrictions from statutes and case law.[7] Hence, many collective actions have been unsuccessful, including some in Competition law cases.[8] Considering individual redress, civil litigation discourages potential litigators. On the one hand, the length and cost of procedures do not provide right-holders with the certainty of enforcement; on the other, this stimulates wrongdoers to refuse to settle and to engage in unmeritorious litigation.

Fourth, follow-on claims[9] do not receive proper incentive: decisions made by the *Conselho Administrativo de Defesa Econômica* (Administrative Council for Economic Defence, hereafter Cade) and not challenge by the parties, or by the courts have no binding effect except between the parties to the procedure (res judicata).[10] This model threatens the success of claims for compensation, as it is not possible to rely on the findings of law and facts of Cade or the courts.

Fifth, the previous problem is worsened as the current system split the jurisdiction on competition claims. Public enforcement is performed by Cade and reviewed by federal courts, while in general, private enforcement falls within the jurisdiction of state courts which adjudicate standalone and follow-on actions for damages. In none of these courts is there a specific division to deal with competition claims. This situation reduces the coherence of Competition law adjudication and the certainty for victims willing to claim for damages.

Sixth, there is a general lack of knowledge of Competition law among Brazilian legal professionals.[11] This reduces the technical quality of decisions and can lead to inconsistent approaches to compensation claims under the BCA.

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7. For instance, article 16 (*Lei* 7.347/1985, hereafter Collective Actions Act) limits territorially the *res judicata*, so that fewer citizens are benefited by a favourable decision. Many other similar examples of unduly limits on class actions can be found in both legislation and case law. See also Antonio Gidi, 'Class Actions in Brazil' (2003) 51 AJCL 311, 341-344.

8. One of them was the collective claim filed after the findings of the 'Gases Cartel', JF 21ª VARA/TRF3, 0000233-25.2011.403.6100 (São Paulo, 09 March 2013). OECD, *Competition law and Policy in Brazil – A Peer Review* [2010]. [http://www.oecd.org/daf/competition/45154362.pdf]. Accessed: 11 November 2013, 53, reports only one successful case prior to the date the report was issued: a case 'brought by a public prosecutor in the state of Rio Grande do Sul in 2007'.

9. On the distinction between follow-on and standalone claims, see Assimakis Komninos, *EC Private Antitrust Enforcement*: decentralised application of EC Competition law by national courts (Hart Publishing 2008).

10. In Brazil the advantages of follow-on claims are that the decision of the administrative proceedings can be persuasive, and the evidence can be used in the courts.

11. Mauro Griberg, Camila Paoletti and Leonor Cordovil. 'Brazil'. In Albert Foer and Jonathan Cuneo (eds.). The international handbook on private enforcement of Competition law (Edward Elgar 2010) 446.

Seventh, the lack of competition culture in Brazil has not yet been tackled. The system of competition advocacy has the difficult task of advancing more comprehensive educational measures which – alongside the developments brought about by practice – will lead to improvements in private enforcement.[12] Currently, however, advocacy has not been sufficient to foster a culture of competition in Brazilian society or, specifically, to promote compensation claims.

Although some of these problems also affect public enforcement, reducing deterrence and its possible effect on compliance, for the large part they produce more a pernicious outcome in regards to private enforcement.

III. PUBLIC COMPENSATION AS A POSSIBLE SOLUTION

As a result of the private enforcement shortcomings discussed above, although compensation is theoretically possible, it is rarely achieved. One of the consequences of the current situation (virtual absence of compensation) is that the deterrence level is reduced and there is less incentive for firms to comply.[13] Public compensation must be considered a solution capable of producing a practical outcome in Brazilian system as it encourages, but does not depend on, competition culture; provides an effective collective redress mechanism; and leads Competition law to a more coherent system of adjudication and enforcement.

Public compensation can serve as a propulsion for competition culture in Brazil, enhancing the knowledge of victims through their adequate compensation.[14] Concrete benefits received by the injured parties could have the power of making them more aware of Competition law as well as of possible future infringements.[15]

At the same time, public compensation creates a proper mechanism of collective redress, which does not depend on the ability of the victims to recognise an infringement and the harm it produces. This condition for compensation is transferred to Cade: the public authority that investigates the infringement is in a better position to determine whether it has caused harm or not, and also has a superior knowledge of Competition law compared to the victims of antitrust infringements. There is also a great disparity in the access to evidence: while Cade has all the proofs it collects during the investigation, individual parties and their lawyers would have to require the material and proceed to an analysis that in

12. ibid 446.

13. Damages actions for breach of the EC antitrust rules' (Green Paper) COM (2005)) 672 final, 19 December 2005, 3-4.

14. OECD, 'Policy Brief – Competition law and Policy in Brazil' [2005]. [www.seae.fazenda.gov.br/destaque_ingles/brazilpolbrieffinal.pdf]. Accessed: 11 November 2013, 7.

15. Ezrachi and Ioannidou (n 1) 541.

most of the cases is of high complexity. Finally, many competition claims need an economic assessment[16] that can be properly made by Cade, though not by most of the litigants and their lawyers (or at least, not without a high cost).

Public compensation could also simplify procedural difficulties. Firstly, it does not depend on collective actions, which have been subject to restrictions in Brazilian law. Secondly, when compensation is decided by Cade, the same court has jurisdiction over fines and damages. Primarily, the federal court, which has been reviewing decisions of Cade since its creation, possesses a greater knowledge of Competition law. Besides that, it enhances coherence and reduces costs of enforcement: on the one hand, review of the merits is done by a single court, avoiding different conclusions on the occurrence of the infringement; on the other, fines and compensation can be simultaneously defended in court, settled or enforced.

III.I Public compensation vis-à-vis *the Brazilian competition system*

Brazil's analytic and very comprehensive constitution states not only general and specific principles for the economic order, but also rules which design a basic framework on how this order should be organized. None of these rules prohibit either compensation for victims from being the outcome of an administrative procedure (as those carried out by Cade), or any public authority from engaging in activities with this aim.

Public compensation is also consistent with the goals pursued by the BCA; it is not prohibited in any of its provisions, and is expressly allowed by one of them. This is crucial because of the principle of legality established in the Constitution (article 37, *caput*): activities performed by public agents need to be permitted by legislation in order to be legal; it is insufficient for them just not to be expressly forbidden.[17]

The BCA (article 47) recognises the right of victims to compensation and entitles some entities to file collective claims, but it does not state whether Cade could also perform this function in the administrative proceedings or not. If on the one hand this provision does not provide any express restriction on public compensation, on the other, by reference to the class action legislation,[18] it

16. See BIS, 'Private Actions in Competition law: A Consultation on Options for Reform' (April 2012). [www.bis.gov.uk/assets/biscore/consumer-issues/docs/p/12-742-private-actions-in-competition-law-consultation.pdf]. ('BIS Consultation') accessed: 15 December 2012, 14.

17. See Leopoldo Pagotto, 'Are the Brazilian Competition Authorities being Responsive? An Analysis based on the Benign Big Gun Model' (2006) 29 WC 285, 302.

18. The general framework of collective redress in Brazil comprises the Collective Actions Act and the Consumer Protection Code (*Lei* 8.078/1990). Both are subsidiary sources of the BCA (Article 115).

recognises Cade as one of the entities that can legitimately bring collective claims for compensation.[19] In this sense, the Brazilian competition system acknowledges that compensation via private enforcement is functionally consistent with public enforcement and, as such, also fosters deterrence (a mainly public enforcement goal).[20]

A further possibility is to perform compensation through a public mechanism: this "partial fusion of the compensatory function" "transcends the dichotomy" between public and private enforcement, deterrence and compensation.[21] It demands a "formal implementation"[22] of a "positive extension of the role played by the public enforcer".[23] In Brazil, the formal implementation of public compensation does not depend on legislative amendment, as it can be ordered based on article 38, VII (BCA),[24] which states:

"Art. 38. Without prejudice to the penalties set forth in article 37 of this Law, when so required according to the seriousness of the facts or public interest, one or more of the following penalties may be imposed:

(...)

VII – any other action or measure necessary to eliminate the harmful effects to the economic order".[25]

Public compensation fulfils the requirements of this provision. Firstly, the most severe competition infringements are generally the ones that cause great harm to consumers, such as hard-core cartels. Secondly, public compensation operates in favour of the general public interest, as can be seen by its consistency with the goals of the Constitution and the protection of the collectivity it entails. Thirdly, the absence of compensation has a hindering effect on the economic order: the fact that in practice a wrongdoer competitor can keep illicit gains, obtained through the harm caused to consumers or competitors, goes clearly against most of the principles of the Brazilian economic order. Indeed, article 38 (BCA) is sufficiently comprehensive to allow the imposition of compensational measures. It grants

19. The same power is granted to other public entities and associations. It includes the possibility of carrying out investigations and entering into agreements known as *Termo de Ajustamento de Conduta* (Conduct Adjustment Agreement, hereafter TAC).

20. Komninos (n 8) 9.

21. Ezrachi and Ioannidou (n 1) 538.

22. ibid.

23. ibid 539.

24. In the former legislation (*Lei 8.884/1994*) this provision was integrated with another one. However, in the current legislation they have been detached, indicating that they refer to two different powers.

25. Official Translation.

considerably extensive powers to Cade and enumerates a wide range of sanctions and remedies that can be ordered.[26]

The second issue regards the absence of previous restrictions on the content of an administrative decision made by Cade. Two provisions, article 79 and article 93 (BCA), impose relevant concerns. article 79, I, establishes that Cade's decisions, beside the imposition of the fine, should indicate measures for the infringement to cease, but say nothing about measures to address its impact on the victim. However, if this provision is interpreted literally, it would leave no room for article 38 (BCA), which lists powers to order the undertaking to perform activities that are not intend to cease an infringement, but only to address its effects. A similar issue involves article 93: it defines the Cade decision as an extrajudicial enforcement order that can impose either a fine or obligations to do something or to abstain from doing something (which can be converted to a pecuniary sum if the court recognises the performance is impossible). It does not mention any type of compensation. However, as some collective forms of compensation in Brazilian law can be technically considered orders that impose obligations to do something,[27] the absence of the word "compensation" must be understood either as a mere inconsistency or as a preference for non-monetary remedies.[28] Whatever the conclusion, one must recognise that the framework of article 79 and article 93 do not exclude compensation. In fact, it seems adequate to understand the possible content of the decisions with a reference to the powers granted by the BCA to Cade (and not the opposite).

The idea that public compensation is not forbidden and in fact is expressly permitted under Brazilian law was confirmed in the practice of Cade in an agreement proposed by the undertakings involved in the "juice industry cartel", though in the end it was not implemented. The members of this cartel, who were accused of exploiting fruit growers, included a compensation scheme as the core

26. Among the sanctions, it is notable the prohibition on companies to contract with the public administration for at least five years and the prohibition on individuals to engage in commercial activities in his name or representing a company for no more than five years. Among the remedies, Cade may order the undertaking to publish the content of its decision in newspapers; recommend to public officials to revoke tax benefits conceded to the undertaking or to compulsory license intellectual property rights; determine structural measures such as the divestiture of assets and the dissolution of the company. On the description of Cade's powers see also Sérgio Arenhart, 'Decisões estruturais no direito processual brasileiro' (2013) *RePro* 225/389, 405. São Paulo: Ed. RT, 2013.

27. The same is true in the case that Cade orders an undertaking to create a compensatory scheme.

28. Civil procedure doctrine argues that non-monetary remedies are usually preferable over compensation. Luiz Marinoni, *Técnica Processual e Tutela dos Direitos* (3. ed, São Paulo, Ed. RT 2010).

of their settlement proposal.[29] Against it, an interested party filed a claim seeking a remedy to impede Cade from entering into the agreement with the undertakings. The noticeable aspect of this case is that the judicial decision refused to accept the interested party's arguments, acknowledging the power of Cade to enter into compensation agreements.[30] Notwithstanding, after an unfavourable opinion from one of the members of the council, Cade decided (for reasons not related to the compensation scheme) not to enter the agreement and to continue the proceedings.[31] What is most relevant about this case and article 38 is the recognition by Cade and the federal court an agreed form of public compensation is adequate to the current framework of the BCA.

III.II Forms of public compensation adopted in Brazil outside Competition law

There are some forms of compensation undertaken by public entities which are related to the representative actions regime. Although collective redress depends fundamentally on judicial decisions, its regime provides other mechanisms that do not. The most important is the TAC,[32] an administrative agreement which can be entered by wrongdoers and the public entities responsible for representative claims.[33] By this agreement, the concerned party commits to adjust its conduct to the law and, in most of the cases, ensures compensation for those who suffered harm caused by such conduct.[34]

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29. 'Indenização: Indústrias de citrus concordam em pagar R$ 100 milhões' (*Sistema Ocepar*, 24 August 2006) [www.paranacooperativo.coop.br/ppc/index.php/sistema-ocepar/comunicacao/2011-12-07-11-06-29/ultimas-noticias/34119-34119]. Accessed: 9 January 2014.
30. JF 17.ª VARA/TRF1, 2006.34.00.020380-5 (18 August 2006).
31. Cade, PA 08012.008372/1999-14 (23 November 2006) (Rigato Vasconcelos). For a brief description of the case, see 'Brazil orange juice probe goes on' *BBC News* (23 November 2006) [http://news.bbc.co.uk/2/hi/business/6176178.stm]. Accessed: 9 January 2014.
32. See n 18. Similarly to CADE decisions, these agreements are extrajudicial enforcement orders.
33. Article 5.º (§ 6.º) (Collective Actions Act).
34. However, it should be noted that the use of this mechanism on issues related to Competition law by other entities (such as the Public Prosecution Service) has been criticised: TAC's have been used incorrectly not to compensate the victims of anticompetitive infringements, but in attempts to resolve competitive problems by fixing prices and thus chilling, even more, the competition in some markets. On this topic, see Carlos Ragazzo and Rutelly Silva, 'Aspectos Econômicos e Jurídicos sobre Cartéis na Revenda de Combustíveis: uma Agenda para Investigações' (2006) SEAE/MF Documento de Trabalho 40 [www.seae.fazenda.gov.br/central-de-documentos/documentos-de-trabalho/documentos-de-trabalho-2006/DT_40.pdf]. Accessed: 9 January 2014.

These entities can agree with undertakings on the compensation of victims without accessing the judiciary for this purpose. However, those entities cannot directly impose compensation on the wrongdoers. Cade could promote this form of public compensation within the current legal framework, for two main reasons: firstly, Cade is entitled to enter into TACs; secondly, anticompetitive infringements can be tackled within the Brazilian system of collective actions.[35] If Cade is entitled to enter into compensation agreements outside its normal administrative activity, there is no reason why it cannot come to agreed solutions within it. In fact, the main difference between TACs and the other types of agreements provided under the BCA[36] is that the former case involves the compensation of victims and the latter have been used mostly for the punishment of wrongdoers. Although TACs do not represent situations in which compensation is provided in the course of administrative proceedings or imposed by public authorities, they demonstrate that it can be provided regardless of civil litigation by the activity of public entities.

Finally, there is also one proper example of non-agreed public compensation, which occurred recently in the electricity sector. Sectoral regulators have powers to deter violations of consumers' rights and, frequently, some of them (particularly in the telecommunication and electricity sectors) impose fines on undertakings. Recently, however, the *Agência Nacional de Energia* Elétrica (National Office of Electricity, hereafter Aneel) went further: following its decision to quash the review of tariffs undertaken by AES Eletropaulo (one of the biggest electricity distributors in Brazil), Aneel ordered the undertaking to compensate the consumers because of the difference in the tariff price. The total amount is approximately R$ 626 million and will be paid in the next four processes of price review.[37] As a result, once Aneel has acknowledged its power to order public compensation in the benefit of consumers, it is probable that this measure will be used against other undertakings in the tariff review procedure. This is a case of imposed public compensation with only two differences in relation to the Ezrachi/Ioannidou model:[38] firstly, the approach of Aneel is incidental and not yet formally implemented; secondly, the decision is not on Competition law.

35. Article 1.º (V) (Collective Actions Act).

36. Leniency agreement and *Termo de Compromisso de Cessação de Prática* (Commitment to Cease an Infringement, hereafter TCC). The TCC comprises an obligation of the undertaking to stop and not repeat the infringement; a payment in substitution to the fine and other obligations that Cade may consider appropriate (Article 85 (§ 1.º) (BCA)).

37. 'Aneel determina restituição aos consumidores da Eletropaulo' (*Aneel*, 17 December 2013) [www.aneel.gov.br/aplicacoes/noticias/Output_Noticias.cfm?Identidade=7623&id_area=]. Accessed: 9 January 2014.

38. See n 1.

In summary, considering that Cade was granted comprehensive powers in order to take any measure to eliminate the effects of infringements in the economic order; that compensation has been provided in Brazil outside judicial procedures, by public entities and, in some cases, as a result of public enforcement proceedings; the provision of compensation by Cade would be compatible with and authorised by the Brazilian legal order.

IV. IMPLEMENTATION OF PUBLIC COMPENSATION IN THE BRAZILIAN SYSTEM

In order to consider issues regarding the internalisation of public compensation in the system, the first part of this chapter analyses structural issues and indicates how public compensation could be internalised, the structure and the procedure it should comprise. The second section provides a critical assessment of the limits involved in the proposal to internalise a public compensation system in the terms outlined in the previous sections.

IV.I Institutionalisation of public compensation in Brazil

The only proposal to implement public compensation in Brazil was a bill draft proposed by the *Secretaria de Direito Econômico* (Secretary for Economic Law, hereafter SDE). However, a legislative amendment, though capable of making the existent provisions more precise, is not necessary: Cade already has sufficient powers to issue compensational orders. Considering legislation, case law and the administrative practice of other public entities, public compensation is already accepted but not yet institutionalised. Although it would generally follow the standard procedure used by Cade for finding facts and imposing fines, it needs a more detailed framework, one that cannot consistently emerge from case law.[39] A regulation (*Decreto*) would suffice for this purpose. Among the issues that should be considered in the regulation, the most relevant are the way compensation should be ordered and quantified, and who should receive the benefits.

Regarding the technical issue of how compensation should be ordered, it must be part of one of the three possible outcomes of Cade's *ex post* activities: decision, TCC or leniency agreement. In the decision, public compensation should be provided as one of the measures addressing the effects of the anticompetitive infringement and supplementing the fine. In the TCC, public compensation could be one of the complimentary obligations imposed on the undertaking. Finally, in the leniency procedure, compensation should be stipulated as a necessary condition

39. In Brazil, administrative decisions are not jurisdictional and there is no tradition to respect precedents. See Luiz Marinoni, *Precedentes Obrigatórios* (2. ed. São Paulo: Ed. RT 2010).

for the agreement in the terms of Article 86 (§ 3.°) (BCA).[40] In any case, public compensation should not depend on the good will of the undertaking:[41] either it is imposed with the fine or should be considered a mandatory clause of the TCC and the leniency agreement whenever an infringement is found.

In Brazil, public compensation can effectively be "additional and independent" with regard to the fine[42] since they rely on different provisions: the limit established for the fine (article 37, BCA) does not affect compensation *a priori*.[43] However, the complex issue of quantifying damages in antitrust cases[44] also affects public compensation. In light of that, considering its deterrent function, one could argue that disgorgement would also be a suitable remedy under this mechanism.[45] Indeed, in cases where the calculation of losses (either individual or collective ones) is excessively complex, disgorgement might be useful to reduce the burden of the competition authority. Certainly this is not the ideal, but rather a halfway, solution:[46] it could provide a fund held in escrow for follow-on claims ascertaining the damages (impeding the undertaking to make use of its illicit profits during this period).[47]

Finally, in order to create a so-far inexistent nexus between public enforcement and the injured group,[48] public compensation can have *a priori*

40. See Cornelis Canenbley and Till Steinvorth, 'Effective Enforcement of Competition law: Is There a Solution to the Conflict between Leniency Programmes and Private Damages Actions?' (2011) 2 JEurCL&P 315. Although they expressly propose public compensation in leniency procedures, in light of the Brazilian system, it is controversial the disclosure of documents obtained through leniency to victims or private enforcement could be restricted.

41. Ezrachi and Ioannidou (n 1) 542.

42. ibid 542.

43. Hence, 'fine plus' or 'fine minus', methods of calculation in which the 'total sum paid by the violator remains below the maximum fine level as set in legislation' [Ezrachi and Ioannidou (n 1) 542], are not necessary in Brazil. Furthermore, the proposal that part of the fine should be 'channelled back to the affected class' is possible irrespective of public compensation. However, legislation should be amended in order to ensure that fines, which are paid to the FDD, are used to the benefit of the victims.

44. Commission (EU), 'Quantifying Harm in Actions for Damages based on Breaches of Articles 101 and 102 of the Treaty on the Functioning of the European Union' (Draft Guidance Paper—Public Consultation, June 2011), [http://ec.europa.eu/competition/consultations/2011_actions_damages/draft_guidance_paper_en.pdf]. Accessed: 22 January 2014.

45. On disgorgement, see Einer Elhauge, 'Disgorgement as an antitrust remedy' (2009) 76 ALJ 79.

46. Contrary, defending that in a model of public compensation damages should be based on the illicit profits rather than on the actual losses, see Canenbley and Steinvorth (n 39) 326.

47. Elhauge (n 44) 94-95.

48. See Ezrachi and Ioannidou (n 1) 541. Although fines are paid to the FDD, its amount is used without any correlation to the harm. In 2013, Cade's activity was responsible for

two different sets of beneficiaries: individuals or collectivity.[49] Although the contribution of public compensation would be more pronounced in the second case, there is still a role for it to perform in individual claims.[50] In this case, compensation obtained by individuals would have to be deducted if they succeed in subsequent claims.[51]

IV.II Limitations of public compensation in Brazil

The suggestion that public compensation should be adopted in Brazil has, nonetheless, left some unanswered questions and, consequently, some space for criticism. This section aims to analyse possible limitations of public compensation in the Brazilian system considering three different aspects: the role performed by Cade; the rights protected through public compensation and the position of public compensation in the enforcement system of Competition law.

One possible drawback to public compensation is whether the structure of Cade is suited to undertake such a function. The restricted capacity of Cade is the most intrinsic limitation on public compensation: Cade's limited resources and personal turnover have been consistently considered major problems of Brazilian competition authorities.[52] Three arguments would support this perspective. Firstly, although public compensation may reduce costs from a systemic perspective, it would increase the costs of enforcement incurred by Cade. Secondly, the quantity of work may increase dramatically for the *Procuradoria do Cade* (Legal Service of Cade, hereafter ProCade), either because undertakings might be more willing to seek judicial review if their loss is greater (fine and compensation summed), or because public compensation involves, when judicial review is sought, a representative claim; that is, a collective procedure where issues and evidence tend to be more complex. Thirdly,

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75% of the contribution to the FDD (approximately £ 23 million). See FDD, 'NOTA – Relacionamos abaixo os valores recolhidos ao FDD, de acordo com suas finalidades até o dia 31 de dezembro de 2013' [2014]. [http://portal.mj.gov.br/services/DocumentManagement/FileDownload.EZTSvc.asp?DocumentID={2E9C42A4-DF21-4C71-AB15-D54A6BF74B01}&ServiceInstUID={59D015FA-30D3-48EE-B124-02A314CB7999}]. Accessed: 19 February 2014.

49. See Ezrachi and Ioannidou (n 1) 541-542. With regard to this division in Brazilian law, see Gidi (n 6) 354-360.

50. See Ezrachi and Ioannidou (n 1) 541-542. However, this hypothesis is subjected to restrictions in Brazilian law (n 58).

51. Ezrachi and Ioannidou (n 1) 543-544. Individual claims would not be affected where harm to collective rights are compensated.

52. OECD, *Peer Review* (n 7) 1.

procedure could be delayed not only because of more complex calculations involved in compensation, but also because of the concurrent interests in public compensation (infringers and victims).

The increases in cost, time and work are possible.[53] However, it should be considered that the BCA granted Cade more extensive powers and authorised the hire of 200 new employees as well as the tripling of its budget.[54] On the one hand, more cases can now be dealt with; on the other hand, the improved structure is still not sufficient to deal with all infringements. A strict policy of prioritisation determines which cases are to be investigated – and the same is applicable for public compensation.[55] The advantage of public compensation with regard to costs, is that Cade will spend more only when it is certain that an infringement has occurred: otherwise, there is no point in considering compensation. As long as the increase in cost is reasonable compared to the results achieved, public compensation will offer a more efficient allocation of resources. Although possibly enhancing the costs of Cade, this is expected to reduce the overall cost of enforcement – which is also rational from a policy perspective.

Another potential limitation of public compensation is the nature of the rights involved, and the consequent difficulty of addressing all of them (ie for the compensation to deal with all the losses caused by the infringement). When compensation concerns collective rights, it can be done in two different ways: by fluid recovery,[56] or by a contribution of the undertaking to the FDD. Although currently this is not the case, the amount should be used to benefit consumers in the affected market.[57] However, the issue is more complex when individuals are considered, not only because their identification or the quantification of damages may be more difficult,[58] but also because transferring them the money

53. It should be considered though that according to Article 118 (BCA), CADE is invited to join all the claims that involve the BCA. Possibly, considering that in some of these actions CADE's participation is important, public compensation would lead to a reduction in the quantity of actions in which CADE would be invited to join.

54. See Lu Otta and Célia Froufe, 'Super Cade terá mais poderes que a PF' *Estado de São Paulo* (Brasília, 7 October 2011). [www.estadao.com.br/noticias/impresso,super-cade-tera-mais-poderes-que-a-pf-,782254,0.htm]. accessed: 9 January 2014.

55. As the use of these powers represent the performance of a public service they must be provided in a reasonable and proportionate manner. See Adrian Zuckerman, 'Civil Litigation: a Public Service for the Enforcement of Civil Rights' (2007) 26 CJQ 1, 2.

56. On fluid recovery, see Roberto Amore and Albert Foer 'Cy Pres as an Antitrust Remedy' (2005) AAI Working Paper 05/09 [http://papers.ssrn.com/sol3/papers. cfm?abstract_id=1103595]. Accessed 22 January 2014.

57. See Ezrachi and Ioannidou (n 1) 542.

58. ibid 542.

would be problematic.[59] Indeed, there is a need for a more flexible approach to address this issue.[60]

It could also be suggested that public compensation might considerably reduce the chance of subsequent litigation without offering full compensation to individuals.[61] However, two arguments refute this possibility. First, despite the possible lack of incentive created by public compensation, it is still preferable over a situation of non-enforcement. Second, the disincentive on small claims does not represent a problem: these claims are impracticable without a collective procedure and those who can file a representative claim will have a duty to do so regardless of the economic incentives the right-holders might have. Clearly, public compensation can achieve better results if compared to the current situation.

In relation to the position of public compensation in the enforcement system of Competition law, both the public and private aspects should be considered. As regards private enforcement, the analysed limitations make clear that there is a complementary relationship:[62] on one hand, public compensation is a reactive tool that stems from the underperformance of private enforcement;[63] on the other, its limits signify that private enforcement is still necessary. In other words, public compensation reduces the Competition law system's dependence on private enforcement, but is not sufficient to replace it.[64]

It has also been argued that allowing a competition authority to order compensation ensures consistency of enforcement and avoids over-deterrence.[65] In turn, public compensation changes public enforcement, because it introduces a new goal (corrective justice)[66] and strengthens the powers of Cade. These changes

59. On one hand, if the undertaking seeks the judicial review of compensation, how would the interested parties join the procedure or, in case the decision is set aside, how would the beneficiaries be obliged to give restitution in the case they were directly paid? On the other hand, if the authority receives the compensation, how would the amount be transferred to the undertakings? In Brazil, there is a complex issue regarding the transfer of money from the government to citizens. Tax rebates could be one creative, though *de lege ferenda* solution to this problem.

60. See Pagotto (n 16) WC 287.

61. See Ezrachi and Ioannidou (n 1) 544.

62. See ibid 544. Contrary, see Canenbley and Steinvorth (n 39) 325.

63. See Ezrachi and Ioannidou (n 1) 544.

64. See ibid 543.

65. BIS Consultation (n 15) 37.

66. For a traditional perspective on the division between the functions of public and private enforcement, see Wouter Wils, 'The Relationship between Public Antitrust Enforcement and Private Actions for Damages' (2009) 32 WC 3.

may lead to two inconsistencies: a major risk of capture, and disproportionally severe sanctions caused by the sum of fine and compensation.

The first issue involves the recognition that when an authority is empowered to regulate the market, there is a risk of it becoming 'owned' by the interests it is designed to regulate; and furthermore, that this risk increases if its powers are expanded.[67] In this case, the goals of public compensation could suffer at the hands of three different competing and regulated interests: political (from the government seeking to protect its industrial policies), economic (from the players of the market in order to avoid competition) and social (from the public trying to obtain over-protection and possibly chilling competition). It is difficult to predict the effective capture of Cade if its powers are enhanced to accommodate public compensation. However, given that it has not been captured so far, there is a strong possibility that this will not happened in the future, so long as appropriate mechanisms to ensure accountability are put in place.

Although public compensation may also enhance the deterrence effect of the fine (without liability for the losses, an undertaking on which the fine is imposed may keep its illicit gains),[68] if the aim was purely to foster deterrence, an increase in the fine would suffice. This complex relationship exposes another one, between the compensation and the fine, particularly in agreements. It has been suggested that compensation should integrate the fine up until its maximum level,[69] establishing a cap that may be different from the total of losses. Although this is justified in Europe as matter of policy (also to avoid the necessity of legislative amendments), the situation in Brazil is different. As the fines are already paid to a fund for the protection of collective rights (FDD), channelling resources back to victims depends more on rules regarding the management of FDD than rules related to public compensation itself. However, considering that another solution, a pure sum of compensation and fine, may impose a disproportional burden on the undertaking, public compensation should be ordered together with a reduced fine.[70]

In the case of agreements, public compensation could potentially create a disincentive. One reason is that undertakings faced with the excessive burden of compensation and fine may prefer not to settle in order to seek judicial review; another and more relevant reason is that leniency applicants may be discouraged from whistleblowing if the agreement would grant them immunity from the fine,

67. Christopher Hood, *Explaining economic policy reversals* (Open University Press 1994) 21-22.

68. See Elhauge (n 44) 80.

69. See Ezrachi and Ioannidou (n 1) 542.

70. The sum of the fine and the compensation should be reasonable: Canenbley and Steinvorth (n 39) 324.

but not from compensation.[71] As leniency has been a particularly important tool to fight hard-core infringements, threatening its success would risk the success of enforcement as a whole.[72] However, considering that at present leniency does not impede compensation (the difference from a public compensation system is that leniency currently depends only on private enforcement), it is arguable that public compensation would not threaten the success of the leniency programme, but on the contrary, could be used to preserve it.[73] Indeed, public compensation could be used as a tool to integrate public and private enforcement 'whilst at the same time maintaining the benefits offered by leniency programmes'.[74]

The most severe criticism against public compensation in Brazil concerned the roles of Cade and of the courts in the enforcement of Competition law. In short, it was alleged that a decision from an administrative authority, instead of a judiciary one, ordering compensation would violate the constitutional principle of separation of powers.[75] However, as has been demonstrated, public authorities do have the power to order compensation for individuals, and likewise to sanction them. In both cases, article 5.°, (XXXV), (Constitution) which determines that no right shall be previously excluded from judicial analysis, is applicable: every administrative decision can, as a matter of principle, be submitted to judicial review.[76] Hence, a decision of public compensation can also be reviewed in the courts: Cade does not adjudicate in their place. Clearly, the principle of separation of powers is observed in the same way it is observed by administrative decisions that only impose fines.

V. CONCLUSION

This paper is concerned with the situation of under-enforcement in brazilian Competition law, particularly caused by shortcomings in private litigation. It has analysed public compensation as a proposal to address the above-mentioned problem. It suggests that public compensation creates a viable, desirable and

71. See Canenbley and Steinvorth (n 39) 326.

72. See ibid 320.

73. ibid 324.

74. ibid 325.

75. See IBA, 'Formulário de sugestões – Consulta Pública 17' [2011] [http://cade.gov.br/upload/IBA.pdf] accessed 9 January 2014, 4; IBRAC, 'Formulário de sugestões – Consulta Pública 17' [2011] [http://cade.gov.br/upload/IBRAC.pdf]. Accessed 9 January 2014, 12; OAB-DF, 'Formulário de sugestões – Consulta Pública 17' [2011] <http://cade.gov.br/upload/CCOAB%20DF.pdf> accessed 9 January 2014, 3; OAB-SP, 'Formulário de sugestões – Consulta Pública 17' [2011] [http://cade.gov.br/upload/CECORE.pdf]. Accessed: 9 January 2014, 6.

76. See Arenhart (n 25) 398.

adequate alternative to address the shortcomings faced by the private enforcement of Competition law in Brazil. However, it is noteworthy that if the formal implementation of public compensation involves both public and private aspects of the enforcement system, its success depends on the adequate integration of these two aspects. To some extent, public compensation encompasses both forms of enforcement, and their adequate performance is fundamental for public compensation to achieve its best results.

This paper has sought to apply the ideas of Ezrachi and Ioannidou in order to promote corrective justice and democratic values in brazilian Competition law. It is expected that this humble effort will contribute to the improvement of the brazilian system of Competition law in its fight against anticompetitive infringements, and will help lead to the fair compensation of victims.

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