

## **WORKSHOPS ON ACTION FOR DAMAGES RESULTING FROM ANTICOMPETITIVE PRACTICES March 2021**

### **I. BACKGROUND**

Enforcement of competition law has historically been attributed to public administrative authorities whose purpose is to detect and punish anti-competitive conduct. In recent years, private claims for the compensation of damages suffered by parties harmed by anti-competitive practices is increasing. For instance, in 2014, the European Union adopted Directive 2014/104/EU on Competition Damages Actions, which aims to help citizens and companies claim damages if they are victims of competition law infringements. In Brazil, Article 47 of its Competition Act stipulates that parties injured by anticompetitive conduct may seek an injunction to cease the anticompetitive behaviour and claim damages.

The Administrative Council for Economic Defence (Conselho Administrativo de Defesa Econômica, CADE) and the Organization for Economic Co-operation and Development (OECD) have signed an agreement to review Brazilian Federal Public Procurement regime. These workshops are part of this project. During the workshops, judges from different jurisdictions including Brazil and experts will discuss different topics related to claims for damages caused by anti-competitive conduct.

The workshops will be hosted by CADE and are addressed to Brazilian judges.

## II. PROGRAMME

### DAY 1 – 15 March 2021 – 10:30 am Brasilia time

#### Session 1 – Determination of the damage caused by an anti-competitive conduct and how to establish the causal link between the damage and the anti-competitive conduct

This session will focus on how damage caused by anti-competitive conduct is determined including: (i) its nature (compensatory, punitive or exemplary); (ii) the advantages and disadvantages of treble damages (or double damages as proposed by the Brazilian Bill of Law No. 11,275/2018); (iii) the difference between damage calculated by the competition authorities in their decisions on fines and harm caused to consumers; (iv) indirect damages (passing-on); (v) umbrella damages.

To establish causation, plaintiffs will have to identify which elements of the anti-competitive behaviour caused them harm and how. This session will also address the following issues: (i) probative methods; (ii) economic methods for the determination of causality; (iii) the role of experts in determining causation; (iv) the role of legal presumptions in simplifying the assessment of the causal link; and (v) the role of the judge in analysing expert or technical evidence.

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#### Welcome remarks – 10 min

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#### Presentation of international and national experience – 1h 15 min

*Speakers* – Justice Silvia Evers (Hof Arnhem-Leeuwarden), the Netherlands.

Rodrigo Belon, Deputy Attorney General at CADE.

Ana Paula Martinez, partner at Levy & Salomão Advogados.

*Moderador*

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#### Interactive discussion based on thematic agenda -45 min

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### DAY 2 – 16 March 2021 – 10:30 am Brasilia time

#### Session 2 – Coexistence and complementarity of the public and private enforcement of competition law

This session will address issues related to the coexistence of public and private enforcement of competition law. For example, (i) the impact of competition damage actions on leniency applications and settlements; (ii) the disclosure of leniency documents in competition damage claims; (iii) statute of limitation of competition damage claims; (iv) administrative fines and private claims for damages; (v) the dissuasive nature of competition damages compensation.

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#### Introduction to the session – 5 min

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#### Presentation of the international and national experience – 1h 10 min

*Speakers* – Mercedes Pedraz, judge at the Audiencia Nacional, Spain.

Márcio Schusterschitz, Federal Prosecutor at the Federal Prosecution Services of the State of São Paulo

Jose Marcos Lunardelli, Justice at the Regional Federal Court of Brazil

*Moderator* Alden Caribé, Head of Leniency Unit at CADE

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#### Interactive discussion based on thematic agenda – 40 min

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**DAY 3 – 22 March 2021 – 11:00 am Brasilia time**

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**Session 3 – Collective actions for damages in competition cases**

This session will focus on collective competition damage claims. The issues that could be addressed are: (i) should compensation for damages be made individually to the members of the group?; (ii) the individualization of the evidence; (iii) the role of the public prosecutor's office and the consumer associations in claiming collective competition damages; (iv) the risk of abuse of collective actions by legal representatives/lawyers (frivolous actions); (v) collective opt-in actions (those in which the claimants have to express their consent to be included in the claim and be taken into account for the compensation of damages) and opt-out actions, which affect all members of the community and give the possibility to individuals to dissociate themselves from the action (opt-out right)

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**Introduction to the session by the moderator- 5 min**

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**Presentation of international and national experience – 1h 15 min**

*Speakers* – the Honourable Paul Crampton, Chief Justice of the Federal Court, Canada.

Antônio Gidi (academic) TBC

João Carlos Mayer Soares, Federal Judge at the Regional Federal Court of Brazil

*Moderator* Diogo Thomson, Deputy Superintendent at CADE

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**Interactive discussion based on thematic agenda – 45 min**

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**DAY 4 – 23 March 2021 – 10:30 am Brasilia time**

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**Session 4 – Methodologies to quantify damages and the treatment of this and other competition damage issues by specialised courts.**

This session will also address the following issues: (i) data needed to quantify the damage; (ii) different ways of obtaining such data (such as in-trial discovery or the possibility of obtaining documents from investigations conducted by competition authorities); (iii) economic methods for the quantification of damages; (iv) the role of experts in the calculation of damages; (v) the role of the judge in evaluating the calculation of damages.

This session will address how specialized courts in other jurisdictions (UK, Mexico and Chile, for example) have dealt with individual and collective competition damage actions and how they interact with other jurisdictional bodies as well as competition authorities.

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**Introduction to the session by the moderator- 5 min**

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**Presentation of international and national experience – 1 h 15 min**

*Speakers* – Peter Roth, President of the UK Competition Appeals Tribunal and national experts

Gunnar Niels, Partnet at Oxera.

Silvia Fagá, economic consultant at LCA Consultores.

*Moderator*

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**Discussion based on thematic agenda – 45 min**

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**Closing remarks – 10 min**

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