THE PRIVATE COMPETITION ENFORCEMENT REVIEW

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Editors
Ilene Knable Gotts and Kevin S Schwartz

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PREFACE

Private competition litigation can be an important complement to public enforcement in the achievement of compliance with the competition laws. Antitrust litigation has been a key component of the antitrust regime for decades in the United States. The US litigation system is highly developed, using extensive discovery, pleadings and motions, use of experts and, in a small number of matters, trials, to resolve the rights of the parties. The process imposes high litigation costs (both in terms of time and money) on all participants, but promises great rewards for prevailing plaintiffs. The usual rule that each party bears its own attorneys' fees is amended for private antitrust cases such that a prevailing plaintiff is entitled to its fees as well as treble damages. The costs and potential rewards to plaintiffs create an environment in which a large percentage of cases settle on the eve of trial. Arbitration and mediation are still rare, but not unheard of, in antitrust disputes. Congress and the US Supreme Court have attempted to curtail some of the more frivolous litigation and class actions by adopting tougher standards and ensuring that follow-on litigation exposure does not discourage wrongdoers from seeking amnesty. Although these initiatives may, on the margin, decrease the volume of private antitrust litigation in the United States, the environment remains ripe for high levels of litigation activity, particularly involving intellectual property rights and cartels.

Until the last decade or so, the United States was one of the few outliers in providing an antitrust regime that encouraged private enforcement of the antitrust laws. Only Australia had been more receptive than the United States to suits being filed by a broad range of plaintiffs – including class action representatives and indirect purchasers – and to increased access for litigants to information and materials submitted to the antitrust authorities in a cartel investigation. Brazil provided another, albeit more limited, example: it has had private litigation arise involving non-compete clauses since the beginning of the twentieth century, and monopoly or market closure claims since the 1950s. In the past decade, we have seen other regimes begin to provide for private competition litigation in their courts, typically, as discussed below, only after (i.e., as a 'follow on' to) public enforcement. In some jurisdictions (e.g., Argentina, Lithuania, Mexico, Romania, Switzerland and Venezuela), however, private actions remain very rare, or non-existent (e.g., Nigeria), and there is little, if any, precedent establishing the basis for compensatory damages or discovery, much less for arbitration or mediation. In addition, other jurisdictions (e.g., Switzerland) still have very rigid requirements for standing, which limit the types of cases that can be initiated.

The tide is clearly turning, however, with important legislation either recently having been adopted or currently pending in many jurisdictions throughout the world to provide a greater role for private enforcement. In Australia, for example, the government has undertaken a comprehensive review and has implemented significant changes to its private enforcement

law. The most significant developments, however, are in Europe as the EU Member States implement the EU's directive on private enforcement into their national laws. The most significant areas standardised in most EU jurisdictions involve access to the competition authority's file, the tolling of the statute of limitations period and privilege. Member States continue to differ on issues relating to the evidentiary effect of an EU judgment and whether fines should be factored into damages calculations. Even without the directive, many of the Member States throughout the European Union have increased their private antitrust enforcement rights.

The development of case law in jurisdictions also has an impact on the number of private enforcement cases that are brought. In China, for instance, the number of published decisions has increased and the use of private litigation is growing rapidly, particularly in cutting-edge industries such as telecommunications, the internet and standard essential patents. In South Korea, private actions have been brought against an alleged oil refinery cartel, sugar cartel, school uniform cartel and credit card VAN cartel. In addition, the court awarded damages to a local confectionery company against a cartel of wheat flour companies. In contrast, in Japan, over a decade passed from the adoption of private rights legislation until a private plaintiff prevailed in an injunction case for the first time; it is also only recently that a derivative shareholder action has been filed. Moreover, in many other jurisdictions as well, there remain very limited litigated cases. For example, there has been a growing number of private antitrust class actions commenced in Canada; none of them have proceeded to a trial on the merits.

The English and German courts are emerging as major venues for private enforcement actions. The Netherlands has also become a preferred jurisdiction for commencing private competition claims. Collective actions are now recognised in countries such as Sweden, Finland and Denmark. Italy also recently approved legislation allowing for collective damages actions and providing standing to sue to representative consumers and consumer associations, and France and England have taken steps to facilitate collective action or class action legislation. In addition, in France, third-party funding of class actions is permissible and becoming more common. In China, consumer associations are likely to become more active in the future in bringing actions to serve the public interest.

Differences will continue to exist from jurisdiction to jurisdiction regarding whether claimants must opt out of collective redress proposals to have their claims survive a settlement (as in the UK), or instead must opt in to share in the settlement benefits. Even in the absence of class action procedures, the trend in Europe is towards the creation and use of consumer collective redress mechanisms. For instance, the Netherlands permits claim vehicles to aggregate into one court case the claims of multiple parties. Similarly, in one recent case in Austria, several parties filed a claim by assigning it to a collective plaintiff. Some jurisdictions have not to date had any private damages awarded in antitrust cases, but changes to their competition legislation could favourably affect the bringing of private antitrust litigation seeking damages. Most jurisdictions impose a limitation period for bringing actions that commences only when the plaintiff knows of the wrongdoing and its participants; a few, however, apply shorter, more rigid time frames without a tolling period for the commencement of damages or injunctive litigation. Some jurisdictions base the statute of limitations upon the point at which a final determination of the competition authorities is rendered (e.g., India, Romania, South Africa and Austria) or from when the agency investigation commences (e.g., Hungary). In other jurisdictions, such as Australia and Chile, it is not as clear when the statutory period will be tolled. In a few jurisdictions, it is only after the competition authority

acts that a private action will be decided by the court. Of course, in the UK – a jurisdiction that has been one of the most active and private-enforcement friendly global forums – it will take time to determine what impact, if any, Brexit will have.

The greatest impetus for private competition cases is the follow-up litigation potential after the competition authority has discovered – and challenged – cartel activity. In India, for instance, as the competition commission becomes more active in enforcement investigations involving e-commerce and other high-technology areas, the groundwork is being laid for future private antitrust cases. The interface between leniency programmes (and cartel investigations) and private litigation is still evolving in many jurisdictions, and in some jurisdictions it remains unclear what weight to give competition agency decisions in follow-on litigation private cases and whether documents in the hands of the competition agency are discoverable (see, for example, Sweden). Some jurisdictions seek to provide a strong incentive for utilisation of their leniency programmes by providing full immunity from private damages claims for participants. In contrast, other jurisdictions, such as the Netherlands, do not bestow any benefit or immunity in a follow-on damages action. These issues are unlikely to be completely resolved in many jurisdictions in the near term.

There is one point on which there is almost universal agreement among jurisdictions: almost all have adopted an extraterritorial approach premised on effects within their borders. Canadian courts may also decline jurisdiction for a foreign defendant based on the doctrine of *forum non conveniens* as well as comity considerations. A few jurisdictions, such as the UK, however, are prepared to allow claims in their jurisdictions when there is a relatively limited connection, such as when only one of a large number of defendants is located there. In contrast, in South Africa, the courts will also consider spillover effects from antitrust cartel conduct as providing a sufficient jurisdictional basis.

The litigation system in each jurisdiction to some extent reflects the respective perceptions of what private rights should protect. Most of the jurisdictions view private antitrust rights as an extension of tort law (e.g., Austria, Canada, France, Israel, Japan, the Netherlands, Norway, South Korea and the UK), with liability arising for participants who negligently or knowingly engage in conduct that injures another party. Turkey, while allocating liability on the basis of tort law, will, in certain circumstances, award treble damages as a punitive sanction. Some jurisdictions treat antitrust concerns as a defence for breaching a contract (e.g., Norway and the Netherlands); others (e.g., Australia) value the deterrent aspect of private actions to augment public enforcement, with some (e.g., Russia) focusing on the potential for unjust enrichment by the defendant. In Brazil, there is a mechanism by which a court can assess a fine to be paid by the defendant to the Fund for the Defence of Collective Rights if the court determines the amount claimed as damages is too low compared with the estimated size and gravity of the antitrust violation. Still others are concerned that private antitrust litigation might thwart public enforcement and may require what is, in essence, consent of the regulators before allowing the litigation or permitting the enforcement officials to participate in a case (e.g., in Brazil, as well as in Germany, where the competition authorities may act as *amicus curiae*).

Some jurisdictions believe that private litigation should only be available to victims of conduct that the antitrust authorities have already penalised (e.g., Chile, India, Turkey and Venezuela). Interestingly, no other jurisdiction has chosen to replicate the United States' system of routinely awarding treble damages for competition claims; instead, the overwhelming majority of jurisdictions take the position that damages awards should be compensatory rather than punitive (Canada does, however, recognise the potential for

punitive damages for common law conspiracy and tort claims, as does Turkey). In Venezuela, however, the plaintiff can obtain unforeseen damages if the defendant has engaged in gross negligence or wilful misconduct, and in Israel, a court recently recognised the right to obtain additional damages on the basis of unjust enrichment law. Finally, in almost all jurisdictions, the prevailing party has some or all of its costs compensated by the losing party, discouraging frivolous litigation.

Cultural views also clearly affect litigation models. Outside the EU and North America, the availability of group or class actions varies extensively. A growing minority of jurisdictions embrace the use of class actions, particularly following a cartel ruling by the competition authority (e.g., Israel). Some jurisdictions (e.g., Turkey) permit group actions by associations and other legal entities for injunctive (rather than damages) relief. Jurisdictions such as Germany and South Korea generally do not permit representative or class actions, but instead have as a founding principle the use of courts for pursuing individual claims. In some jurisdictions (e.g., China, South Korea and Switzerland), several claimants may lodge a collective suit against the same defendant if the claims are based on similar facts or a similar legal basis, or even permit courts to join similar lawsuits (e.g., Romania and Switzerland). In Japan, class actions were not available except to organisations formed to represent consumer members; however, a new class action law came into effect in 2016. In contrast, in Switzerland, consumers and consumer organisations do not currently have legal standing and cannot recuperate damages they have incurred as a result of an infringement of the Competition Act. In Poland, only entrepreneurs, not individuals, have standing to bring claims under the Unfair Competition Act, but the Group Claims Act is available if no administrative procedure has been undertaken concerning the same case.

Jurisdictions that are receptive to arbitration and mediation as an alternative to litigation (e.g., Germany, Japan, the Netherlands, South Korea, Spain and Switzerland) also encourage alternative dispute mechanisms in private antitrust matters. Some courts prefer the use of experts and statements to discovery (e.g., in Chile; in France, where the appointment of independent experts is common; in Japan, which does not have mandatory production or discovery except in narrowly prescribed circumstances; and in Germany, which even allows the use of statements in lieu of documents). In South Korea, economic experts are mainly used for assessment of damages rather than to establish violations. In Norway, the Civil Procedure Act allows for the appointment of expert judges and advisory opinions of the EFTA Court. Other jurisdictions believe that discovery is necessary to reach the correct outcome (e.g., Canada, which provides for broad discovery, and Israel, which believes that 'laying your cards on the table' and broad discovery are important). Views towards protecting certain documents and information on privilege grounds also cut consistently across antitrust and non-antitrust grounds (e.g., no attorney–client, attorney work product or joint work product privileges in Japan; pre-existing documents are not protected in Portugal; limited recognition of privilege in Germany and Turkey; and extensive legal advice, litigation and common interest privilege in the UK and Norway), with the exception that some jurisdictions have left open the possibility of the privilege being preserved for otherwise privileged materials submitted to the antitrust authorities in cartel investigations. Interestingly, Portugal, which expressly recognises legal privilege for both external and in-house counsel, nonetheless provides for broad access to documents by the Portuguese Competition Authority. Some jurisdictions view settlement as a private matter (e.g., France, Japan and the Netherlands); others view it as subject to judicial intervention (e.g., Israel and Switzerland). The culture in some jurisdictions, such as Germany, so strongly favours settlement that judges will require

parties to attend hearings, and even propose settlement terms. In Canada, the law has imposed consequences for failure to accept a reasonable offer to settle and, in some jurisdictions, a pretrial settlement conference is mandatory.

As suggested above, private antitrust litigation is largely a work in progress in many parts of the world. Change occurs slowly in some jurisdictions, but clearly the direction is favourable to the recognition that private antitrust enforcement has a role to play. Many of the issues raised in this book, such as the pass-on defence and the standing of indirect purchasers, remain unresolved by the courts in many countries, and our authors have provided their views regarding how these issues are likely to be clarified. Also unresolved in some jurisdictions is the availability of information obtained by the competition authorities during a cartel investigation, both from a leniency recipient and a party convicted of the offence. Other issues, such as privilege, are subject to change both through proposed legislative changes as well as court determinations. The one constant across almost all jurisdictions is the upward trend in cartel enforcement activity, which is likely to be a continuous source for private litigation in the future.

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Wachtell, Lipton, Rosen & Katz
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Chapter 9

COLOMBIA

Felipe Serrano and Juan Felipe Traber[1]

I OVERVIEW OF RECENT PRIVATE ANTITRUST LITIGATION ACTIVITY

Private antitrust litigation in Colombia is still in its early stages. Although the country has had laws that allow for individual and class actions for several years, no relevant case recognising damages to a plaintiff in a private antitrust action has been concluded. Even in follow-on civil lawsuits in which the national competition authority, the Superintendence of Industry and Commerce (SIC), has publicly declared in administrative investigations that a company violated antitrust laws (even suggesting the exact price increase suffered by consumers), claimants have been unsuccessful in their pursuits.

Antitrust violations in Colombia have been primarily dealt with under public enforcement by the competition authority, which, following an administrative procedure, investigates and then imposes monetary sanctions paid by way of fines to the public treasury.

Few private antitrust cases have been discussed before courts; most private litigation in this area has occurred in arbitration procedures where debates arise on whether contractual clauses, including exclusivity rights, resale price maintenance and non-compete clauses, violate antitrust laws.

Several issues have been identified as possible explanations for this phenomenon, including:

a the ordinary judges' lack of knowledge of antitrust law;
b the two-year statute of limitations to file a class action, which begins on the date on which the conduct ceases (usually when the SIC starts an investigation);
c reluctance to file lawsuits against product or service providers in a closed economy; and
d the length of judicial procedures, which sometimes last up to 10 years.

The closest event to an antitrust private damages action occurred in 2018 when the Administrative Court of Cundinamarca decided on a 'popular action' against Odebrecht and other private companies for bid rigging in a road infrastructure contract. The Court ordered the defendants to pay the Ministry of Transportation (as a victim) the sum of approximately US$260 million (by 2018).[2] Although the action was initiated by the Attorney General of the Nation, any person is entitled to file an action against a company that violates collective rights to free competition. At the time of writing, the case was pending on appeal.

1 Felipe Serrano is a founding partner and Juan Felipe Traber is an associate at Serrano Martinez.

2 Attorney General's Office (2018), *Histórico fallo: Tribunal de Cundinamarca acoge petición del Procurador y ordena una indemnización de más de $800 mil millones por corrupción de Odebrecht*, Bulletin 664.

Although private antitrust litigation is not yet fully developed in Colombia, it is expected that recent strong enforcement by the SIC will promote the initiation of private actions. Colombia has traditional litigation mechanisms to bring before judges and courts cases in which private compensation is sought due to anticompetitive conduct, including:

a individual actions for civil liability;
b individual actions for unfair competition;
c class actions;
d popular actions (where the protection of a collective right (i.e., free competition) is sought); and
e arbitration (which is limited to the occurrence of the anticompetitive conduct within a contractual relationship).

II GENERAL INTRODUCTION TO THE LEGISLATIVE FRAMEWORK FOR PRIVATE ANTITRUST ENFORCEMENT

A victim of an antitrust violation may file one of the following actions to claim damages (each with its own individual requirements and rules): a civil liability lawsuit; an unfair competition action; a class action; and a popular action.

In all of these actions, the plaintiff must prove that a cartel, an abuse of dominance or any other antitrust violation with effects in Colombia has occurred (as provided by Law No. 155 of 1959, Decree 2153 of 1992 and Law No. 1340 of 2009, in addition to laws for special sectors). Additionally, if the claimant wishes to obtain compensation, he or she must demonstrate that the damage arose as a result of the antitrust conduct. Judges will only award the plaintiff with damages that have been effectively demonstrated. No punitive damages will be awarded in favour of the plaintiff.

Although the passing-on defence has not been discussed in a relevant judicial decision, it is likely to prevail in any of the actions if proposed by the defendant, considering the structure of Colombia's civil liability rules. A judge will only award the damages effectively suffered by the plaintiff, without applying presumptions or shortcuts to determine the amount of the damages.

i Civil liability lawsuit

Civil liability lawsuits may be filed before an ordinary judge of the place where the defendant is domiciled or where the conduct occurred. Depending on the amount of damages claimed by the plaintiff, an appeal will be available, as well as a revision of the case by the Supreme Court of Justice through an extraordinary cassation appeal.[3]

The claimant party may be formed by one or several victims. As there is no incentive to file this action in a class, it may be more suitable for victims that individually suffered a significant monetary loss because of the conduct. The statute of limitations for this action is 10 years from the moment of execution of the anticompetitive conduct.[4]

A civil liability action may be labelled as 'contractual'[5] or 'extra-contractual',[6] depending on the relationship between the infringer and the victim. If the infringer and the victim have

3 General Code of Procedure, Articles 15 to 20 and 25 to 33.
4 Civil Code, Article 2536.
5 id., at Article 1602 et seq.
6 id., at Article 2341 et seq.

a contract, the action will be labelled as contractual. This will occur, for example, in the case of a cartel where the infringer is a regular provider of the victim. If not (for example, in a case where the infringer forecloses a competitor with predatory pricing), the action will be labelled as extra-contractual. The action may even be based on the abuse of the right to compete by the infringer, on the basis of Article 830 of the Commercial Code, which provides that 'the one who abuses his or her rights will be obliged to compensate the damages he or she causes'.[7]

Apart from requesting damages using this action, the claimant may request the judge or arbitrator to declare the nullity of a clause that infringes antitrust laws (for example, an exclusivity clause or a non-compete clause). Pursuant to the legal regime, conduct that affects free competition is illicit by object, which is why any contract clause supporting the conduct will be declared null and void.[8]

ii Unfair competition action

In Colombia, Article 18 of Law No. 256 of 1996 (the Unfair Competition Act) provides that the acquisition of a competitive advantage through the violation of a legal rule (including antitrust laws) is unfair. For example, an undertaking that forecloses a competitor through predatory pricing may be subject to an unfair competition action in which the victim may claim damages. Accordingly, it is possible that the same act or behaviour simultaneously infringes the legal systems of antitrust and unfair competition, and that public antitrust investigations and judicial proceedings may be conducted simultaneously.

This action (which is a form of civil extra-contractual liability) may be filed before an ordinary judge or before the SIC's court (a division within the SIC where cases are judicially adjudicated). The action has a statute of limitations of two years from the moment the entitled party became aware of the person who carried out the unfair act or three years from the act taking place.[9] Although unfair competition in Colombia has different foundations from the antitrust regime, as well as its own special regulation (Law No. 256), the Constitutional Court has stated that both regimes have a central axis, which is, precisely, competition.[10]

Accordingly, in some cases, the infringement of antitrust rules could give rise to private litigation for those seeking compensation for damages suffered through unfair competition actions.

An unfair competition action may be filed by any person who participates in, or demonstrates his or her intention to participate in, the market, and whose economic interests have been harmed or threatened by acts of unfair competition. There is no need to demonstrate that the claimant and defendant are competitors to file or process the action. This action also may be initiated by professional and trade associations when the interests of their members are seriously affected, associations whose purpose is consumer protection, and the Attorney General on behalf of the state.[11]

7 Miranda Londoño, Alfonso, *La indemnización de los perjuicios causados por las prácticas restrictivas de la competencia*, Centro de Estudios de Derecho de la Competencia, 2011.

8 ibid.

9 Law No. 256 of 1996, Article 23.

10 Constitutional Court, Ruling C-535 of 1997.

11 Law No. 256 of 1996, Article 21.

iii Class actions

Class actions are regulated by the provisions of Law No. 472 of 1998 (Law No. 472/1998), particularly Articles 46 to 69. Through this action, a group of persons that suffered the same damage may obtain recognition and payment of damages suffered as a consequence of an antitrust violation.

Class actions may be filed by natural or legal persons who have suffered individual damage. Law No. 472/1998 provides that the group shall consist of at least 20 persons. However, the Constitutional Court has stated that it is not necessary to have 20 people to file the suit, but that a member of the group, acting on its behalf, indicates in the lawsuit the criteria that allow the identification of the affected group.[12]

This type of action must be brought within two years of the date on which the damage was caused or the infringing action ceased, and it can be directed towards public entities or private companies.

Finally, Article 65 of Law No. 472/1998 provides that the victims' attorney will receive a special fee if the class action succeeds, corresponding to 10 per cent of the compensation obtained by each group member who has not been represented in court. The Council of the State has explained that the coordinating attorney is entitled to obtain that sum, to compensate him or her for his or her work and prevent those who did not intervene in the process from taking free legal advice and representation.

iv Popular actions

Popular actions are also provided within Law No. 472/1998, in Articles 9 to 45. Popular actions seek the protection of collective rights (such as free competition, public morality or the environment), mainly through the adoption of measures that prevent their infringement or maintenance. Their purpose is not to obtain monetary compensation for damage suffered. Thus, they seek to protect a collective interest, avoid contingent damage, stop the danger, threat, violation or aggravation of collective rights and interests, and restore things to their previous state, when possible.[13]

While popular actions are not compensatory in nature, this does not mean that damages cannot be recognised, as seen in the *Odebrecht* case discussed in Section I. Under the umbrella of 'restoring things to their previous state', private individuals have been condemned to return to the state the overpriced sums obtained through bid rigging.

Popular actions may be brought while the threat or danger to the collective right subsists, so they do not have a statute of limitations as such.

v Procedural rules

The procedural rules for initiating the majority of the types of actions described above are contained in the General Code of Procedure (Law No. 1564 of 2012), except for class and popular actions, which are regulated by Law No. 472/1998 and Law No. 1437 of 2011. However, when a violation of the antitrust rules occurs within a contractual relationship

12 Constitutional Court, Ruling C-116 of 1998.

13 Bejarano Guzmán, Ramiro, *Procesos Declarativos, Arbitrales y Ejecutivos*, Editorial Temis. Bogotá, Colombia, 2019.

and an arbitration clause had been entered into between the parties, damages can be sought through an arbitration panel, according to the rules contained in the Arbitration Statute (Law No. 1563 of 2012).

III EXTRATERRITORIALITY

Article 2 of Law No. 1340 of 2009 provides that antitrust rules shall apply to anyone carrying out any conduct that has, or is likely to have, whole or partial effects on the Colombian markets. In this sense, anticompetitive conduct developed in Colombia or that has effects in Colombia could be publicly prosecuted and, if the damage was caused in Colombia, privately sued. A victim may pursue a civil liability action, an unfair competition action, a class action or a popular action.

Moreover, in accordance with Andean Decision 608 of 2005, the Andean Community (CAN) is competent to deal with anticompetitive conduct that is carried out in one of the CAN Member States with effects in another Member State or when the conduct is carried out in a non-Member State but has effects in two or more Member States. Nevertheless, the transnational authority has investigated and imposed sanctions on only one occasion: an anticompetitive agreement on toilet paper, paper towels, napkins and tissues in 2018.

IV STANDING

Standing can vary depending on the action that is intended. Civil actions may be filed by whoever has suffered damage or whoever seeks to have a contractual clause declared null and void. Therefore, the claimant party may be formed by one or several victims.

Regarding unfair competition actions, any person who participates or demonstrates his or her intention to participate in the Colombian market, and whose economic interests are harmed or threatened by acts of unfair competition, can bring a case against the defendants. It is not necessary to demonstrate that claimants and defendants are competitors. Unfair competition actions may also be initiated by professional and trade associations when the interests of their members are affected, associations whose purpose is consumer protection, and the Attorney General on behalf of the state.

Class actions may be filed by one or more natural or legal persons, as long as it can be shown that there is a group of no less than 20 persons that have been affected by the same cause.

Finally, popular actions may be filed by:

a any natural or legal person;

b non-governmental organisations or popular or civic organisations;

c public entities that have control, intervention or surveillance functions, provided that the threat or violation of collective rights and interests has not originated in their own action or omission;

d the Attorney General, the Ombudsman or district and municipal officials; or

e mayors and other public servants who, by reason of their functions, promote the protection and defence of collective rights.

V THE PROCESS OF DISCOVERY

Pursuant to the procedural rules mainly contained in the General Code of Procedure, claimants may request any document from the defendant or the competition authority for use in the procedure, provided the document has a direct relationship with the dispute and is not covered by professional secrecy, confidentiality or privilege. The extent of the secrecy and protection will be decided on a case-by-case basis by the judge when reviewing the evidence in the case. Even documents and communications that were part of a leniency proceeding may be requested to be produced as evidence in a private proceeding. In some cases, the competition authority itself publishes the documents (emails, chats, etc.) that prove the anticompetitive agreement in the final decision.

The General Code of Procedure grants evidentiary value to the declaration of the party, witness testimonies, documents, requests for the exhibition of documents (including communications related to the infringement), expert opinions, judicial inspections and 'any other means that are useful for the formation of the conviction of the judge'.

Generally, the evidence is requested and reviewed by the judge within a judicial proceeding. Nonetheless, procedural rules also permit the request and usage of extra-procedural evidence, even without the presence of the opposing party (such as testimonies of third parties). Finally, it is important to note that any person has the right to request information, both from public and private entities, and the information must be provided, unless it is confidential or reserved according to the Constitution and law.

VI USE OF EXPERTS

The General Code of Procedure expressly recognises and grants evidentiary value to expert opinions.

Although by law an expert opinion has no more value than other evidence (such as documents and testimonies) within a legal procedure, and the judge will value the evidence in conjunction, in practice expert opinions have gained importance and are particularly used in proceedings in which damages are discussed. Therefore, their use is not only allowed, but strongly recommended. Judges usually grant high evidentiary value to expert opinions by economists and financial experts.

To bring an expert opinion to the judicial proceeding, it is necessary to fulfil several formal requirements established in the procedural rules. Parties may choose, and pay the fees of, their own expert that will provide a report to the judge. The other party will have the opportunity to question the expert and also to bring a new expert opinion to rebut the other party's expert's opinion.

VII CLASS ACTIONS

Class actions are provided for in Article 88 of the Constitution and were developed by Law No. 472/1998. According to Article 3 of Law No. 472/1998, class actions are 'those actions filed by a plural number or a group of persons who meet uniform conditions regarding the same cause that caused individual damage to such persons'.

It has been stated by jurisprudence and doctrine that class actions are, in essence, actions to obtain recognition and payment of damages for a group of people that have suffered a common damage as a consequence of the same violation or infringement. To bring a class action, it is not necessary to demonstrate the violation of a collective right or interest, but

rather, the nature of these actions is compensatory for the transgression of particular interests to a group of persons. These actions are most suited to lawsuits for antitrust infringements in which the victims are numerous and diffuse.

Class actions shall be brought by at least 20 persons, without it being necessary for all of them to appear as plaintiffs, but rather that they must either fully identify themselves in the complaint or provide clear criteria for their identification.

Likewise, the group of persons must meet uniform conditions in regard to the cause of the damages and regarding the elements that make up the liability (i.e., malice, fault, negligence, etc.). It is important to bear in mind that any class action shall be exercised through an attorney.

Class actions have a statute of limitations of two years from the date on which the damage was caused or the infringing action ceased. This short period has generated multiple difficulties for the initiation of actions of this nature in Colombia. This is particularly true for violations of antitrust rules because, although it is not necessary for the competition authority to have penalised an anticompetitive conduct prior to the instigation of private litigation, class actions are usually filed based on the decision and the evidence collected by the authority, which takes more than two years.

Article 65 of Law No. 472/1998 provides that the victims' attorney will receive a special fee if the class action succeeds, corresponding to 10 per cent of the compensation obtained by each group member who has not been represented in court, to compensate him or her for his or her work in the action and to prevent those who did not intervene in the process from taking free legal advice and representation.

Class actions are different to popular actions (see Section II.iv), although both types of actions are provided for in Article 88 of the Constitution and regulated by Law No. 472/1998.

VIII CALCULATING DAMAGES

In the Colombian legal system, two types of damages are recognised: economic damages (which include actual damages and loss of profit) and extra-patrimonial damages (which refer to moral damages that could include, depending on the situation, pain and suffering, loss of consortium and loss of companionship).

The damages that are recognised in Colombia are those that are effectively caused and can be demonstrated within the proceeding. In this sense, the basis of civil liability in Colombia is the full reparation of the victim (the compensatory function of civil liability) (i.e., to place the victim in the situation in which he or she would have been if the illegal conduct had not occurred, but not to award damages beyond the harm that the victim suffered due to the infringement). Thus, under the current legal system, there are no punitive damages as in other jurisdictions, which can also be interpreted as a disincentive to initiate private antitrust actions.

Based on the typology of damages in Colombia, in antitrust cases it is difficult to recognise extra-patrimonial damages as they refer to the pain that a person may suffer or the physical or mental impairment or any other type of harm that he or she may have to continue to live with.

Finally, it is standard in judicial proceedings for court expenses and attorneys' fees to be requested by the parties and recognised by the judge or the courts. However, attorneys' fees

are normally calculated based on the rates defined by the Higher Council of the Judiciary, which are, on a general basis, substantially lower than the legal fees negotiated by the parties with their respective attorneys.

IX PASS-ON DEFENCES

This is a matter that has not been addressed by the courts or by law in Colombia. Notwithstanding this, based on existing institutions in the Colombian legal system, such as the principle of unjust enrichment, we consider that an antitrust infringer who eventually becomes a defendant in a private antitrust case, may present the passing-on defence against a direct buyer who transferred overcharges to another agent in the value chain or to the final consumer, or both.

X FOLLOW-ON LITIGATION

Follow-on and stand-alone actions are allowed in Colombia, which means that it is not essential that the competition authority has entered a decision before a private action can be brought.

This is widely accepted by doctrine, which has pointed out that, although the SIC is the only authority competent to carry out administrative investigations, impose fines and adopt other measures for the infringement of antitrust rules, nothing prevents individuals from going directly to civil judges to seek compensation for damage caused by an antitrust infringer.

However, if seeking to initiate a private action for infringement of antitrust rules, provided that the statute of limitations allows it, it is advisable to file a follow-on action considering the evidential value that the authority's decision would have, as well as that of the evidence collected during the administrative proceeding. This is especially true considering that in Colombia the competition authority usually publishes a complete public version of the decision where it declares that parties have committed an antitrust violation, and makes the evidence available to the public.

Furthermore, there are no limits on private actions against parties that have been subject to public (administrative or criminal) enforcement action. As an example, one of the main criticisms of the leniency programme in Colombia is that whistle-blowers are not granted criminal immunity, even when it is a case of bid rigging involving criminal liability or, for other cases, possible civil liability.

XI PRIVILEGES

Although in Colombia there are no attorney–work product and joint work-product defences as such, the Constitutional Court and other authorities have ruled extensively on attorney–client privilege. In this sense, the Constitutional Court has recognised that:

> *the inviolability of professional secrecy turns out to be a mechanism through which rights such as privacy, honour, technical defence, and the guarantee not to be forced to testify against oneself, among others, are directly protected. Likewise, it is also indirectly a mechanism for protecting the right to receive truthful and impartial information and to practice a profession or trade . . . .*[14]

Particularly regarding the attorney–client privilege, the SIC has stated that, to establish whether certain information or communication is covered by professional secrecy, the content of such information or communication shall be analysed. Thus, for example, it has held that:

> *Professional secrecy refers to the custody to which it is called, in these cases the lawyer, with respect to 'reserved information' that he or she has learned as a result of his [or her] professional practice. In other words, the lawyer is covered by the Constitution to safeguard professional secrecy when he or she adopts a passive position, consisting of receiving information and acting as a 'confidant' for his [or her] client.*[15]

However, the competition authority also clarified that not all communication or information shared between attorney and client is protected by professional secrecy, but that such protection is subject to the content of the communication or information:

> *As far as legal professionals are concerned, they also have the duty to observe the constitutional guarantee of professional secrecy. However, given that the inviolability of this guarantee is not absolute, it is up to the lawyer in each case to assess whether, in view of the content and constitutional scope of the law, the information provided to him or her by his or her client or vice versa is actually protected by professional secrecy or whether, on the contrary, it exceeds the right protected by our Constitution.*[16]

Accordingly, in the case of a breach of the attorney–client privilege, the judicial proceeding or the judgment could be nullified or could even constitute a violation of fundamental rights, such as due process. Evidence obtained by breaching attorney–client privilege will be declared null and will be excluded from any procedure.

XII SETTLEMENT PROCEDURES

Although no relevant settlement in an antitrust action is known in the country, settlements in private antitrust actions are possible and available. In fact, in the case of pure civil actions and unfair competition actions, Law No. 640 of 2001 establishes that before filing a lawsuit (and unless precautionary measures are requested), claimants must initiate an extrajudicial

14 Constitutional Court, Ruling C-951 of 2014.

15 Superintendence of Industry and Commerce (SIC), Resolution No. 10081 of 2014.

16 SIC, Resolution No. 7676 of 2017.

settlement procedure. If the settlement procedure fails, a lawsuit may be filed. In addition, in the course of the procedure, there will also be a stage where the parties may settle their dispute, which the judge must encourage.

The extrajudicial and judicial conciliation has the effect of res judicata, so that if a settlement is achieved, the agreement is immutable, binding and definitive.

Regarding class actions, the judge has the obligation to convene a conciliation proceeding during the proceeding, with the purpose of the parties reaching an agreement, which would have the effect of a judgment. The Ombudsman or his or her delegate or, eventually, the Attorney General or his or her delegate, may intervene in this hearing. If a class action is settled at this or any other stage, unless otherwise agreed, the aforementioned benefit of 10 per cent in favour of the coordinating attorney shall not be granted (see Section VII) because this amount is calculated only once a ruling is entered.

For popular actions, Law No. 472/1998 provides a specific stage called the 'compliance agreement' hearing, which essentially aims to seek conciliation between the parties and determine the form of protection of the collective rights and interests and the restoration of things to their previous state, if possible. The intervention of the Attorney General's Office and the responsible entity for protecting the collective right or interest will be mandatory in this proceeding.

XIII ARBITRATION

Law No. 1563 of 2012 issued the Colombian National and International Arbitration Statute. Arbitration is an alternative dispute mechanism that seeks to have the parties belonging to a contractual relationship settle their disputes with arbitrators, either for matters of free disposition of the parties or those authorised by law. For an arbitration panel to have jurisdiction, there must be an arbitration agreement, whose purpose is to oblige the parties to submit to arbitration the disputes that have arisen or may arise between them. In this sense, the consequence of this agreement will be the waiver of the parties to assert their claims before judges of the ordinary justice system.

The arbitration awards that have dealt with antitrust matters in Colombia have focused on three main issues:

a competence of the arbitration panels to rule on the free competition regime;
b validity of clauses agreed according to the antitrust regulation; and
c damages.[17]

By and large, arbitration panels in Colombia have agreed that they may adjudicate matters related to antitrust violations, provided they are related to the contract or matter under which the arbitration pact was agreed.

17 See *Cellular Trading de Colombia Ltda. (Cellpoint) v. Comunicación Celular S.A. (Comcel)* (2002); *Acuantioaquia S.A. E.S.P. (En liquidación) v. Conhydra S.A. E.S.P.* (2005); *Andrés Pardo v. World Management Advisors Ltda. and others* (2013); *Cales y Derivados Calcáreos Río Claro Naranjo y Compañía S.C.A. v. Acerías Paz del Río S.A.* (2017); and *Bertrand Jacques Emile Roger Jequier v. Industria y Tecnología Symtek S.A.S. and others* (2018).

Private antitrust litigation has been developed to a greater extent in arbitration courts than in the ordinary jurisdiction in Colombia. In 2002, there was an iconic arbitration award in which the plaintiff was awarded damages and the defendant was declared as dominant within the contractual relationship between the plaintiff and the defendant.[18]

Finally, the Colombian legal system provides other alternative dispute mechanisms, such as settlement and amicable solutions, though these instruments have not had a real impact on private enforcement of antitrust law.

XIV INDEMNIFICATION AND CONTRIBUTION

Colombian procedural rules allow a party to request in the lawsuit or within the term to respond to it, the resolution of a legal or contractual relationship by which it demands from another the indemnification of the damage it has suffered or the total or partial refund of the payment it must make because of the judgment entered in the process.

This legal institution is similar to the mechanism of impleader that exists in other jurisdictions. The lawsuit for which it is brought shall comply with the same formal requirements as exist for any other lawsuit. The party joining the process due to impleader has the same rights as the original defendants, including seeking indemnification or contribution from third parties, co-defendants and cross-defendants.

To conclude, Article 2344 of the Civil Code establishes that if extra-contractual damages are produced by two or more persons (e.g., by several cartel members), each one will be jointly and severally liable for the payment of the totality of the damage caused. Thus, if a cartel member is condemned to pay all damages for his or her antitrust violation, he or she may seek redress against the other cartel members.

XV FUTURE DEVELOPMENTS AND OUTLOOK

Regulatory developments within the Colombian antitrust regime often follow changes to the regimes and guidelines of the European Union and the United States.

However, at the time of writing, there were no reform projects with that objective nor serious proposals for modifying the legal regime under way. Likewise, there were no known private, popular or group actions in progress that would significantly influence jurisprudence on the matter.

Nonetheless, as a result of recent strong public enforcement by the SIC, it is likely that private parties will pursue actions to seek compensation for antitrust damage that they have suffered.

18 See *Cellular Trading de Colombia Ltda. (Cellpoint) v. Comunicación Celular S.A. (Comcel)* (2002).

Appendix 1

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Felipe Serrano is a founding partner at Serrano Martinez, and focuses his practice on competition law, data privacy and corporate litigation. Before founding Serrano Martinez, Felipe was chief adviser and deputy head of Colombia's antitrust agency.

He is adjunct professor of competition law at the Pontifical Xavierian University, the University of the Andes and Externado University, all based in Colombia. He was a member of the Expert Commission appointed by the President of Colombia in 2015 to reform Colombia's antitrust leniency regime.

He has published papers in different law reviews and is a frequent speaker at national and international events related to his areas of practice. Felipe is admitted to practise in Colombia and the State of New York.

At Serrano Martinez, Felipe represents and advises major companies in competition law matters and commercial litigation cases, including clients in the oil and gas, retail, airline, ports, high-tech and beverages sectors. Felipe has been recognised by *Chambers and Partners* and *The Legal 500* for heading one of the leading competition practices in Colombia.

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