Antitrust damages actions in Latin America: on the path to the European model?

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We look at the progress made in relation to damages actions for infringements of competition law in Colombia, Peru, Mexico and Chile.

Competition law essentially protects a public good: economic free competition. However anticompetitive practices do not simply have a general effect on the market: these practices may be broken down according to the agents and the consumers that were affected as a result of the practice (José Miguel de la Calle. *Tratado General de Libre Competencia*. 2022). In other words, an anticompetitive practice may distort the functioning of the market, and simultaneously affect competitors, other companies in the value chain, and the end consumer.

In spite of this, the competition authorities in Latin America are not equipped to decide on the conflicts that emerge from particular disputes. The authorities usually confine themselves to protecting the mentioned legal asset. Moreover, in most cases they do not have sufficient jurisdictional powers to recognize harm in a private sphere. It is therefore needed to strengthen and develop suitable legal tools enabling private parties affected by an anticompetitive practice to seek compensation for the harm caused.

In this connection, in 2014 the European Union (EU) issued Directive 2014/104, which sets out rules governing actions for damages for infringements of competition law. This directive incorporates in EU law the right to full compensation. The aim is for anyone who has suffered harm caused by an infringement of competition law to be able to claim and obtain full compensation which takes into account actual loss and loss of profit plus interest.

To achieve this aim, the directive implemented, among others: (i) more flexible processes for obtaining the disclosure of evidence; (ii) limitation periods not below five years; (iii) joint and several liability for companies that have infringed the competition rules; (iv) pass-on of overcharges; (vi) quantification of harm and presumed harm in the case of cartels; and (vii) incentives for out-of-court dispute resolution.

This directive, which set out minimum common rules for the EU, has had considerable influence in various jurisdictions. In the Spanish case, for example, between 2018 and 2022, more than 2,800 judgments were delivered on damages related to competition law (Centro de Competencia. *Las claves del boom de las acciones de daños en España*. 2022).

In view of this, it is useful to take a look at the progress made in the Latin American region in relation to damages actions for infringements of competition law. This article looks in particular at the legislation in Colombia, Peru, Mexico and Chile, to analyze the need to migrate towards a new model for antitrust damages actions.

I. Colombia

In Colombia there is no settled practice in the recognition of harm and damages relating to competition. In this section we examine the limitations of the Industry and Trade Authority (SIC) in awarding individual damages, we describe the available actions for seeking those damages and share a few thoughts with a view to giving an incentive to this type of action.

In the Colombian legislation, the application of competition rules was entrusted to the Industry and Trade Authority (SIC), an authority of an administrative nature. To discharge this role, the authority has the power to determine the infringement, order cessation or a modification of the anticompetitive practice and impose the fines it considers necessary on both the company and its chief executive officer, director or legal representative (Ingrid Ortiz Baquero. *La aplicación privada del derecho antitrust y la indemnización de los daños derivados de ilícitos contra la libre competencia*. Revista Mercatoria. 2008).

The Industry and Trade Authority is not empowered to rule on the particular effects arising from practices precluded by the competition rules. Due to its administrative nature, it cannot, under any circumstances, declare the existence of civil harm. Therefore, in Colombian law there is no particular regime for awarding damages in respect of harm caused by an anticompetitive practice. It should be noted that the Industry and Trade Authority does not have to render a preliminary decision on restrictive practices. In other words, the judges in the ordinary jurisdiction do not depend on the Industry and Trade Authority in order to declare that the infringement of competition rules caused harm.

Colombian law adopted a hybrid system for applying the rules in competition law. Broadly speaking it consists of a public enforcement system in which the Industry and Trade Authority is responsible for implementing the administrative penalties for violating a public good; such as economic open competition. It also, however, allows the courts to apply the competition rules directly, which is required where the anticompetitive practice has individual consequences for private parties, for both legal entities and individuals. Because there is no particular regime on actions for damages in respect of restrictive practices, the ordinary courts assess these cases from the standpoint of the traditional mechanisms under civil law.

This means that the civil liability rules must be used as the appropriate medium for seeking compensation for the harm caused by an infringement of competition law. Namely, the available types of action are (i) group action and (ii) action for civil liability. Both actions must be brought with judges in the ordinary courts. As a preliminary comment, we must underline that although actions of this type have been brought, no final decision has yet been rendered in the civil courts that recognizes damages in respect of an anticompetitive practice.

A. Action for civil liability

Action for civil liability is enshrined in articles 1604 to 1617 and article 2341 of the Colombian Civil Code. In particular, article 2341 of the Civil Code provides as follows: “A person who has committed an offense or been at fault, which has caused harm to another, has an obligation to indemnify, without prejudice to the primary penalty that the law may impose for having been at fault or committed an offense”. It therefore makes it clear that any person who engages in an anticompetitive practice is liable for the harm that their actions cause to private parties.

This action gives rise to an ordinary civil liability proceeding in which the judge has to study the interplay of the elements composing civil liability: harm, fault and the causal link between the two. If these elements are proved to exist, the judge will order the defendant to provide compensation for the harm caused to the victim. Moreover, as mentioned above, the judge has the authority to determine the occurrence of harm without needing to wait for a decision by the competition authority on the same case. However, in view of the difficulties to provide proof and the lack of expertise of a civil judge in competition matters, without a decisive ruling by the Industry and Trade Authority, it is quite unlikely that the harm alleged by the private party will be recognized.

B. Group action

Law 472 enacted in 1998 introduced provisions on group actions, which are designed to obtain the recognition and the payment of damages where the harm was caused to a number of parties. In particular, group action may be brought where at least (20) victims are brought together, and the harm caused to them comes from the same event. If this requirement is fulfilled, the claimants may take the case to court jointly to seek compensation for the harm caused by the restrictive practice. This action, essentially, brings all the private parties together with the intention of bringing a civil liability action and allows them to use a single proceeding. It has the benefit of simplifying access to the justice system for victims of an anticompetitive practice.

However, unlike civil liability action which has a ten (10) year statute of limitations period, the right to bring a group action becomes statute-barred two (2) years after the anticompetitive practice has ceased. This makes it difficult to bring together and organize the victims of an anticompetitive practice for the purpose of taking the case to the ordinary courts and seeking damages.

Therefore, although the civil judges may apply the competition rules directly to recognize harm, this has not become a settled practice. The competition rules in Colombia were designed and have been implemented as a system that seeks to protect a public good. The administrative penalty, however, is not a strong enough deterrent for the market agents. The current model needs the addition of a suitable mechanism for compensating individual harm.

This thought should not, however, be taken as an invite to broaden the jurisdictional powers of the Industry and Trade Authority. The recommendation is to implement rules that empower individuals to seek compensation for harm caused by anticompetitive practices. This means working towards a competition culture in which the civil judges are responsible for applying the competition rules and the protection of this legal asset is not entrusted solely to the Industry and Trade Authority.

Therefore secondary rules are required which serve as guidance for claimants and for judges, who, due to the design of the Colombian institutional structure, have been left out of the application of competition rules. The experience gained from European Directive 2014/104 is an example of how general rules on civil liability are not sufficient to serve as an incentive to this type of legal practices in the country.

II. Peru

In Peru, there has been progress in legislative terms to promote actions to defend the diffuse and collective interests of consumers. Despite this, class actions have not yet materialized. These would enable it to be verified whether the model is effectual for achieving effective compensation for customers or consumers affected by practices prohibited by the Law on Containment of Anticompetitive Practices (approved by Legislative Decree 1034 (2008) and the related revised wording approved by Supreme Decree 030-2019-PCM).

Although both instruments are recognized, the Peruvian legislation gives preference to public over private enforcement. And especially since, within public enforcement regarding antitrust matters, the Law on Containment of Anticompetitive Practices has recognized “primary” powers for the public authority, the National Antitrust and Intellectual Property Institute of Peru (Indecopi), which determines the public authority's power to act against potential anticompetitive practices, whereas the courts have the power to review the agency’s decisions.

With regard to civil actions for damages in respect of a prohibited practice (a cartel or abuse of a dominant position, for example), article 52 of the Law on Containment of Anticompetitive Practices provides the following rules:

i. The judiciary is responsible for hearing claims for damages.

ii. Damages may only be claimed where the decision of the authority that declared the administrative infringement has become final; in other words, it can no longer be challenged to either an administrative or a judicial authority.

iii. It is not necessary for the claimant, who may be either an individual or a legal entity, to have been a party in an administrative proceeding at the National Antitrust and Intellectual Property Institute of Peru.

iv. The claimant must be able to prove a causal link between the anticompetitive practice and the suffered harm.

v. The Antitrust Commission, after obtaining a favorable report by the Technical Secretary's Office (now the National Directorate for Research and Promotion of Competition), has the authority to initiate claims for damages on behalf of the "collective interests" and the "diffuse interests" of consumers.

This last point was amended by legislation approved in 2018 (by Legislative Decree 1396, 2018), because the original mechanism (Legislative Decree 1250, 2015) provided that the authority to bring a claim lay with the National Antitrust and Intellectual Property Institute of Peru – as an institution – rather than with a particular technical body (such as the Commission). The purpose of the amendment was to strengthen the functional independence of the Commission, as the antitrust authority, in such a way that the decision to claim comes to depend on a technical body rather than on a governing body of the National Antitrust and Intellectual Property Institute of Peru.

With the aim of implementing the power to claim damages, the Directorate published a draft for comments, and later the Commission approved the "Guidelines on compensation for harm caused to consumers as a result of anticompetitive practices". The guidelines, approved in April 2021, contain rules on the selection of cases in which the Commission will bring claims for damages, among other procedural elements, including:

i. The power to claim damages may only be exercised on behalf of "end" consumers (in terms of the Consumer Protection and Defense Code - Law 29571), and the definition only includes individuals who are the end customers for the products and services, in areas outside their business or professional activities (the Consumer Code also considers legal entities end customers for products and services and in areas outside their business activities; as well as micro companies in circumstances where there is information asymmetry with respect to products and services outside their business operations).

ii. The consumers on behalf of whom claims may be brought are only the "direct purchasers" of the goods or services affected by the anticompetitive practice; which avoids any discussion over passing on the harm to third parties.

iii. The Commission prioritizes actions for compensation in cases involving cartels, due to being infringements that are subject to an absolute prohibition (and illegal *per se*); as well as cases in which it is considered that the compensation for consumers will be higher than the funds that the process may generate for the authority.

iv. Under the Peruvian Civil Code, actions for damages are subject to a two-year statute of limitations from when the decision declaring the defendant's liability became final.

v. In cases where there is more than one liable party for an infringement (cartels, for example), the claim may be brought against any of them, who are jointly and severally

liable for the total amount of damages payable. Claims may also be brought against cartel facilitators. The decision is not required to be final with respect to all of them.

vi. The Commission does not exercise this power against a whistleblower under the Leniency Program which it has classified for Type A Leniency; in other words against a whistleblower who was the first to file an application for benefits before the authority had heard about the infringing practice.

vii. The Commission publishes the admission of the claim and allows consumers to opt out of the claim in writing which means they retain their right to bring their own action.

viii. Priority for receipt of compensation will be given to any affected consumers who may be identified individually. Otherwise, indirect compensation or fluid recovery may be employed for a class of affected consumers or for charity or non-profit entities. This is a way of seeking to implement the compensatory and deterrent effect of civil liability.

As may be seen, the law has taken great strides to provide favorable conditions for bringing action for damages in respect of harm to the collective and diffuse interests of consumers, caused by anticompetitive practices. Although there are elements remaining be defined, Peruvian law is aligned, generally, with the practices observed in the most representative jurisdictions in competition matters.

To date, however, this has not translated, in practice, into a greater number of claims actually brought by the authority or by private parties to seek compensation for affected consumers. This may be due, among other factors, to the length of administrative proceedings and the possibility that a final decision may taken several years to obtain.

Moreover, the incentives for affected consumers to bring private actions remain low, which is probably due, among other factors, to the costs of bringing this type of action, the low individual amounts that may be claimed, the need to have a prior decision by the authority, and the uncertain thresholds of proof that may be required by the courts.

There is great potential for studying the bringing of class actions in Peru, not only by the National Antitrust and Intellectual Property Institute of Peru but also by private agents, including studies by lawyers and trade associations. The occurrence of a first private “class action” could be a signal that the antitrust system in Peru is acquiring a new level of maturity and technicism that would bring it to the forefront in the region.

III. Chile

Compensation for harm caused by restraints on competition has not always had it own specific rules. Initially it was based on the general liability provisions in the Chilean Civil Code.

Recently in 2003 action for damages was explicitly included in Decree Law 211 (DL 211). The decree stated that it could be brought with the civil courts, in a summary proceeding and as a result of a final judgment issued by the Antitrust Tribunal (TDLC).

Later, in 2016, following the enactment of Law no 20,945, amending DL 211, a new set of liability rules was created.

Exclusive power to hear civil claims for damages in respect of anticompetitive practices was conferred by this amendment on the Antitrust Tribunal. Through the amendment the legislature precluded civil courts from hearing these cases, whether filed individually or collectively.

Article 30.1 of DL 211: “Any action for damages that takes place as a result of the Antitrust Tribunal rendering a final enforceable judgment shall be brought with that same Tribunal (…)”.

The described legal amendment kept the process for handling these claims (the summary proceeding) and the requirement for action for damages to be based on a prior judgment by the Antitrust Tribunal.

It needs to be explained that the existence of a prior judgment by the Antitrust Tribunal not only constitutes a requirement for action for damages to be able to be brought, but also it determines, with respect to the anticompetitive practices on which it will be rendered, whether there is a causal link with the evidenced harm.

In other words, once the Antitrust Tribunal delivers a final judgment declaring the existence of an anticompetitive practice, the claimants seeking indemnification only have to prove the suffered harm and how that harm is directly related to the anticompetitive practice that was declared to exist. The facts established in the Antitrust Tribunal’s judgment are binding and can no longer be questioned in the damages proceeding.

Lastly, Law 20,945 also amended article 51 of the Antitrust Law, by adding a further subarticle on the special proceeding for protection of the collective or diffuse interests of consumers. This new subarticle allows consumers to file a collective action for damages for competition infringements.

Article 51 no 10 of the Antitrust Law: “Notwithstanding the provisions in article 30 of the decree with the force of law no 1, of 2004, by the Economy, Development and Reconstruction Ministry, which adopts the revised, coordinated and organized wording of decree law no 211, of 1973, and without limitation to any individual actions that are allowed, any action for damages that is brought with the Antitrust Tribunal, as a result of infringements of that legislation, declared by an enforceable final judgment, may be handled in the proceeding established in this paragraph where the collective or diffuse interests of consumers are affected”.

Under the Antitrust Law, the collective proceeding may be initiated by a claim filed by the National Consumer Service (Sernac), a consumer association or a group of at least 50 affected consumers who have been properly identified and have a common interest.

In these cases, evidence of the “contractual relationship binding the infringer to the affected consumers” is laid down as a primary requirement. This means that only consumers who have actually concluded agreements with the infringer may file a claim against it. Therefore, the choice of a collective action precludes the possibility of obtaining damages for consumers affected indirectly by the infringement, either because they entered into an agreement with another supplier who passed on the overcharge to them or because they ceased to do so because of the excess price created by the penalized unlawful practice.

Based on a similar argument, the Tenth Civil Court of Santiago rejected the claim filed by Conadecus and National Consumer Service (Sernac) against paper company SCA Chile S.A., fined by the Antitrust Tribunal in a case involving collusion in relation to tissue paper and examined under the former rules which attributed jurisdiction to hear these cases to the civil courts. This was based on the absence of standing to be sued.

The tribunal noted that, according to the documents filed as evidence, SCA Chile S.A. did not have a direct contractual relationship with the consumers, instead its relationship was through intermediaries. It therefore concluded that the defendant did not fulfill the requirements to be supplier under article 1 of Law 19,496. In other words, the tribunal held that the defendant did not have standing to be sued and, as a result, the filed action had to be dismissed, because it did not relate to

a relationship between consumers and suppliers, which is a necessary requirement for the filed claim.

In similar cases, such as the "Pollos" case, the courts also ruled similarly by concluding that the defendants did not have standing to be sued due to not being suppliers or having a direct contractual relationship with the consumers for the products in question.

These decisions refer to the position of the civil courts in relation to the issue of standing to be sued with respect to damages actions as a result of an infringement of DL 211. It is important to note that jurisdiction for these matters now lies with the Antitrust Tribunal, a tribunal which has not yet established any case law on this subject from which we can draw conclusions or know its position in this respect.

In addition to the collective action, the claimant for damages always has the freedom to bring an individual action to seek compensation for the harm caused, regardless of their relationship with the infringer, and of the direct or indirect nature of the harm caused. However, they will have to present arguments supporting that harm and evidence that harm in the required manner.

This is because article 30 of DL 211 states that the right to indemnification may be exercised individually, provided the suffered harm is evidenced in the required manner. In this way, the general rules on civil liability are made applicable, without restricting the standing to seek their implementation, which does occur in a collective proceeding.

IV. Mexico

A. Anticompetitive practices in the Economic Competition Federal Law

The applicable legislation in Mexico is the Federal Economic Competition Law (LFCE), which sets out the cases in which the acts of economic actors are considered anticompetitive. The Federal Economic Competition Law prohibits those practices, namely: absolute or relative monopolistic practices, illegal mergers or acquisitions and barriers that reduce, harm, prevent or condition competition and choice in the markets.

Article 53 of the Federal Economic Competition Law states that absolute monopolistic practices are illegal and comprise any acts between competing economic agents, which are designed to manipulate the sale price for goods or services in any way; to lay down an obligation not to produce for any actor; to divide up the market for goods or services; or to exchange information for any of these purposes, among others. Furthermore, under article 54 of the Law, relative monopolistic practices are any act, agreement or contract which: is carried out by one or more economic agents with substantial market power and which unduly displace another economic agent or impose prices, among other practices.

B. Determining liability and claiming damages

In relation to those monopolistic practices, article 53 (final paragraph) of the Federal Economic Competition Law states that economic agents who engage in such practices will be liable for the fines determined in the law, without limitation to any civil and criminal liability that may arise. In other words, in addition to the imposition of fines which may be decreed by the Federal Economic Competition Authority (COFECE) or the Federal Telecommunications Institute (IFT) against the economic agent engaging in these practices; affected parties may claim damages as a civil remedy. The Federal Civil Code, for its part, states that anyone acting illegally and causing harm to another is required to provide compensation for that harm. Compensation for the harm consists of the payment of damages.

Article 134 of the Federal Economic Competition Law itself provides that a person who has suffered harm as a result of a monopolistic practice or an illegal merger or acquisition may bring legal action to defend its rights with the courts specialized in economic competition, radiobroadcasting and telecommunications matters, after the decision of the Federal Economic Competition Authority (COFECE) or the Federal Telecommunications Institute (IFT) has become final. Following the final decision delivered in the proceeding conducted as a trial, the illegal nature of the actions of the economic agent will be considered to be evidenced, for the purposes of the action for damages (under the Federal Economic Competition Law, the statute of limitations period for claiming damages is tolled on commencement of the investigation decision by the Federal Economic Authority).

Similarly to the legislation of the other countries studied in this article, the definition of harm is set out in the civil legislation, namely in the Federal Civil Code. Besides defining those items, article 2110 provides that the harm must be an immediate and direct consequence of failure to fulfill the obligation, regardless of whether it has been caused or will necessarily be caused. Therefore, in damages actions in Mexico it is absolutely necessary to establish and prove that causal link.

C. Collective actions

In 2012, a legal reform came into force in Mexico which made changes to a number of laws, including the Federal Economic Competition Law, the Federal Civil Code, the Federal Civil Procedure Code and the Federal Consumer Protection Law, for them to expressly envisage and regulate collective actions.

As a result, article 585 of the Federal Civil Procedure Code provides that, among other agencies, the Federal Economic Competition Authority has standing to initiate collective actions. To be able to do so, the action must challenge acts harming consumers or users of public or private goods or services, or the environment, or relate to acts that have harmed the consumer due to the existence of undue mergers or acquisitions or monopolistic practices, declared to exist by a final decision issued by the Federal Economic Competition Authority. This is consistent with the provisions in article 53 and article 134 of the Federal Economic Competition Law, which were mentioned above.

Very little use has been made of this mechanism. Only four collective actions have been filed, of which two have failed: the first was a claim by Canel's, S.A. de C.V. against Grupo Warner Lambert México; and, the second, a claim against Coca Cola for harm caused to Big Cola. The third and fourth cases are currently in progress. The third relates to a claim filed by IMSS against pharmaceutical companies for the cartel they operated between 2005 and 2009 with respect to the sharing of contracts awarded by tender for insulin and drips (Jesús Eduardo Aguilar Cortés. *El papel de la reclamación de daños y perjuicio en el derecho de competencia económica en México*, Tirant lo Blanch, Mexico, 2019). The fourth and last is collective claim 1/2019 brought by Acciones Colectivas de Sinaloa, S.A. de C.V., on behalf of several insurance companies. The action was prompted by the determination by the Federal Economic Competition Authority on August 29, 2013 of absolute monopolistic practices by hospitals (including Grupo Santa Bernardette, Operadora de Hospitales Ángeles or Hospital Terranova, among others). At the date of writing the trial is still in progress, and therefore any person that had suffered harm caused by the acts of the hospitals which engaged in anticompetitive practices could join the claim.

D. Situation in practice

It therefore needs to be asked whether the fact that the option of bringing legal action for the harm caused by an anticompetitive practice exists in the law is sufficient to provide effective protection for the rights of the general public and whether the tools it provides are sufficient to assert those rights. In reply to the first question, in our examination we determined that there has been a very small number of individual actions brought with the Federal Economic Competition Authority or the

Federal Telecommunications Institute and ultimately seeking the determination of harm, according to the available public information.

The lack of action by market actors who have been affected by anticompetitive practices is due to a range of factors, such as: unawareness of the existence of these legal mechanisms; nonexistence of a clear procedure for claiming damages; the difficulty to prove in the litigation process the causal link between the conduct and the claimed damages, among others. Because of all these factors, the right conditions have not yet been created for actions to claim damages by the affected parties to take off. The Legislative Power needs to regulate the procedures for bringing action for damages in relation to competition, so that the parties affected by anticompetitive practices who bring action can obtain compensation where compensation is due.

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