Competition Law and Policy in Latin America

Recent Developments

Edited by

Paulo Burnier da Silveira

Wolters Kluwer

Published by:
Kluwer Law International B.V.
PO Box 316
2400 AH Alphen aan den Rijn
The Netherlands
Website: www.wolterskluwerlr.com

Sold and distributed in North, Central and South America by:
Wolters Kluwer Legal & Regulatory U.S.
7201 McKinney Circle
Frederick, MD 21704
United States of America
Email: customer.service@wolterskluwer.com

Sold and distributed in all other countries by:
Quadrant
Rockwood House
Haywards Heath
West Sussex
RH16 3DH
United Kingdom
Email: international-customerservice@wolterskluwer.com

Printed on acid-free paper.

ISBN 978-90-411-6047-8

e-Book: ISBN 978-90-411-8688-1
web-PDF: ISBN 978-90-411-8689-8

Printed in the United Kingdom.

Editor and Contributors

Paulo Burnier da Silveira is Commissioner at the Brazilian Competition Authority (CADE) and Associate Law Professor at the University of Brasilia (UnB). He holds a PhD in International Law from the University of Paris II and the University of São Paulo (USP), a LLM from the Catholic University of Lisbon and a BA from the Catholic University of Rio de Janeiro. The views hereby expressed are personal and do not necessarily reflect those of the organizations involved.

Aldo Henrique Cáder Camilot holds a Law degree, is notary, Salvadoran and Italian national, with over ten years of experience in Competition Law; since 2009, and is the head of investigations for the Superintendence of Competition from El Salvador. In addition, he is Professor of Civil and Commercial Law at the Higher School of Economics and Business (ESEN). He has been juridical assistant, coordinator and secretary in the Salvadoran Constitutional Chamber of the Supreme Court of Justice.

Alejandro Lucero is a Lawyer graduated from Mar del Plata University, Argentina and Licenciado en Derecho in Spain. He holds a Specialist in Regulation of Public Services degree from Austral University, Argentina and a LLM in European Law from Radboud University, The Netherlands. He worked in Utilities Companies and in the National Competition Authority of Argentina. Currently is an International Independent Consultant in Competition Law and works in International Projects for UNCTAD.

Amanda Athayde is Head of the Leniency Unit at CADE. She holds a PhD in Commercial Law from the University of São Paulo (USP), a BA in Law from the Federal University of Minas Gerais (UFMG) and a BA in Business Administration in the UNA Centre. She is a Professor of Economic and Competition Law at the Public Law Institute (IDP) and a volunteer Professor of Commercial Law at the University of Brasilia (UnB). E-mail: amandathayde@gmail.com.

Ana Frazão is a Law Professor at the UnB. She holds a PhD in Law from the Pontifical Catholic of São Paulo, a LLM from the UnB and a BA from the UnB. She is a private attorney and was a Commissioner at the CADE from 2012 to 2015. E-mail: frazao@unb.br.

Angelo Gamba Prata de Carvalho is a Law student at the UnB and former trainee at the CADE.

Ania Thiemann is the Head of Global Relations at the OECD's Competition Division. She is also in charge of the OECD Competition Committee's Working Party N°2 on Competition and Regulation. Before joining the OECD in 2009, she was Senior Economist at the Economist Intelligence Unit in London from 2000–2009. Ania holds an MSc in Economics from Birkbeck College, University of London; an MPhil in International Relations and Strategy from the Panthéon Sorbonne, Paris I; and an MSc in European Studies and International Relations from the London School of Economics. Ania.Thiemann@oecd.org.

Antonio Gomes is Head of the Competition Division at the OECD since November 2016. He has been President of the Portuguese Competition Authority (2013-2016), having previously served as a Senior Competition Expert in the OECD's Competition Division in 2013. Prior to joining the OECD in 2013, he was Director of the Merger Department of the Portuguese Competition Authority. Since 2005, he has been an Assistant Professor at the Universidade de Aveiro, Portugal. Antonio Gomes holds a Doctorate Degree in Economics from the University of York, United Kingdom, and Master's Degrees in Economics from the University of York and the Universidade Nova de Lisboa.

Carlos Mena Labarthe is Head of the Investigation Authority in the Federal Economic Competition Commission and university professor. The following opinions are expressed in a personal capacity and with the freedom that an academic discussion allows. As former Head of the Planning, Institutional Relations and International Affairs Unit, and former Director General for Cartels, comments may reflect such experience.

Cynthia Andino is of-counsel at AntiTrust Consultores & Abogados®, Quito-Ecuador. She holds a Master in Droit des Affaires from the University of Strasbourg 14', a European Master in Transnational Trade Law and Finance from the University of Deusto and the University of Tilburg 13'. She also has an International Commerce degree from the Universidad Americana of Asunción 09'. Mrs. Andino participated in the Commission that drafted Paraguay's Competition Law. The author thanks the contribution of Charles Reeves and David Sperber. The views hereby expressed are exclusively of the author and do not necessarily reflect those of the aforementioned organizations.

David A. Sperber is a Partner at AntiTrust Consultores & Abogados, Quito – Ecuador www.antitrust.ec. He holds a Juris Doctor from the Pontificia Universidad Católica del Ecuador '01, an LLM from Harvard Law School '02, and a PhD from Universidad de Barcelona '12. He teaches law at the Universidad Internacional del Ecuador.

Eduardo Caminati Anders is the Partner at Lino, Beraldi, Belluzzo and Caminati Advogados, Head of the Antitrust area. He is the Chairman of the Board of Directors of

Brazilian Institute of Studies of Competition, Consumer and International Trade – IBRAC and a member of the Applied Corporate Law Institute – IDSA. He was Chairman of the Commission on Competition Studies and Economic Regulation (CECORE) of the Brazilian Bars Association – Sao Paulo Section (OAB-SP) (2010/2012). He graduated from the Faculty of Law of the USP in 1999.

Eugênia Cristina Nilsen Ribeiro Barza is Associate Professor at Recife Law School of the Federal University of Pernambuco, where she teaches Private International Law, International Trade Law and Latin American Integration Law. She holds a PhD, a LLM and a Law degree from the Federal University of Pernambuco. She leads the research group Regional Integration, Globalization and International Law.

Fabián Pettigrew is economist from Mar del Plata University, Argentina. Member of the Board of the *Comisión Nacional de Defensa de la Competencia*. Argentina. During his mandate he was in charge of this investigation. Currently, he is an independent consultant in competition issues.

Francisco Javier Núñez Melgoza worked for more than twenty-two years in the antitrust agency of the Mexican government. He was Director General of Mergers of the former Federal Competition Commission (CFC) and Commissioner of the Federal Economic Competition Commission (COFECE). He is currently economic consultant and university professor.

Germán Enrique Bacca Medina is currently a Commisioner of the Communications Regulation Commission of Colombia. He is a lawyer from Universidad Externado de Colombia and holds a Specialist Diploma in Finance and Securities Law from the same University, an LLM degree in Communications and Computer Law from Queen Mary University of London and a Postgraduate Diploma in Economics for Competition Law from King's College University of London. Prior to his current position, he served as Deputy Superintendent for Antitrust at the Superintendence of Industry and Commerce and Deputy Superintendent for Data Protection at the same entity. He has also worked as Senior Competition Associate at the law firm Philippi Prietocarrizosa Ferrero DU & Uría in Bogotá.

Graciela Miralles is a Competition Specialist at the Trade and Competitiveness Global Practice of the World Bank Group. In this function, she has been involved in a wide variety of operational and analytical projects to promote competition policy reforms across countries in Latin America, East Asia Pacific, Europe and Central Asia, Middle East and North Africa. Graciela holds a PhD from the European University Institute (Florence, Italy), an LLM in European Community Law from the College of Europe (Bruges, Belgium); and an LLM in Comparative, European, and International Laws from the European University Institute. Dr. Miralles is a member of the Academic Society for Competition law (ASCOLA) and a qualified lawyer since 2003.

Guilherme de Aguiar Falco is a Competition lawyer and Economist with extensive experience in international antitrust cases, especially focusing on the Latin America region. Guilherme holds graduate degrees from Columbia University (LLM) and the Universidade Federal de Sao Carlos (MA in Applied Economics) as well as bachelor degrees in Law (Pontificia Universidade Catolica de Sao Paulo) and Economics (Universidade de Sao Paulo). Guilherme is currently working as a consultant for the World Bank Group.

Guilherme Teno Castilho Missali is a Senior Associate at Lino, Beraldi, Belluzzo and Caminati Advogados, focusing its activities on the Antitrust front. He is a member of the Brazilian Institute of Studies of Competition, Consumer and International Trade – IBRAC and a member of the CECORE of the Brazilian Bars Association – Sao Paulo Section (OAB-SP). He is currently attending Master Degree in Commercial Law at Faculty of Law of the USP. He is specialized in Compliance by Getúlio Vargas Foundation (FGV) and graduated from the Faculty of Law of the USP in 2011. He is the cofounder of the study group called “NECSO” at Faculty of Law of the USP that studies the interplay between sociology and competition.

James Mancini is an Analyst in the OECD’s Competition Division. James has previously worked as an Economist specializing in competition litigation and policy analysis at PricewaterhouseCoopers Canada as well as NERA Economic Consulting. He has also served as an Economist at the Canadian federal Department of Finance and at a provincial utilities regulator. James holds an MSc in Economics from the London School of Economics.

Javier Tapia is currently Judge of the Chilean Competition Tribunal (Tribunal de Defensa de la Libre Competencia de Chile or TDLC) and academic of the Postgraduate School at the Universidad de Chile, School of Law. He also teaches in other universities in Chile and abroad. Javier holds a Law degree from Universidad de Chile, School of Law; a PhD from University College of London, U.K.; an MSc. in Regulation from The London School of Economics and Political Sciences, U.K.; and a Diploma in Torts from Universidad de Chile. Javier is the corresponding author: jtapia02@gmail.com

Julián Peña is a partner at Allende & Brea since 2004. He graduated as a lawyer from the Universidad Católica Argentina in 1995. He was legal adviser to the Ministry of Economy (1996/2004), having advised different Ministers and Secretaries of Trade. He has also worked at the Argentine Antitrust Commission (1999/2001). He is Professor of Competition Law at Universidad de Buenos Aires and was Visiting Professor at the University of Florida (2009). Mr. Peña is founder and moderator of ForoCompetencia, an antitrust community with more than 550 members from more than twenty countries. Peña is also officer of the IBA’s Antitrust Committee; a member of the International Task Force of the ABA’s Section of Antitrust Law; and an international advisor of the American Antitrust Institute. He co-edited the book “Competition Law in Latin America. A Practical Guide” (with Marcelo Calliari, 2016) and is the author of “Control de Concentraciones Económicas” (2002) and of numerous articles, chapters and columns on antitrust and trade law. He has lectured on antitrust and trade issues at various universities and conferences.

Lucia Villarán Elias is a competition lawyer at the Competition Policy Cluster at the Trade and Competitiveness Global Practice of the World Bank Group. Lucia has extensive and applied experience on antitrust and regulatory sectoral frameworks worldwide, with focus on the Latin America region. Education: University of Michigan and Pontifícia Universidad Católica del Perú.

Marcelo Cesar Guimarães is currently a LLM candidate at Recife Law School of the Federal University of Pernambuco, specializing in International Competition Law. He holds a law degree from the same institution. In 2016 he was visiting researcher at the Centre d'études sur l'intégration et la mondialisation of the Université du Québec à Montréal.

Martha Martinez Licetti is the Lead Economist and Global Lead of the Competition Policy Cluster for the Trade and Competitiveness Global Practice at the World Bank Group, where she oversees a portfolio of more than fifty countries. She has more than fifteen years of experience in industrial organization, economic regulation and competition policy. She has held leading positions in the private and public sectors, including at the competition authority and the telecommunications regulator in her native Peru. She has lectured in industrial organization, network regulation, antitrust and economic analysis of law. Education: Northeastern University in Boston (Massachusetts), University of Austin (Texas) and Pontificia Universidad Catolica del Peru.

Marcela Mattiuzzo was Advisor and Chief of Staff at the Office of the Presidency at CADE (2015-2016). She is a Master's of Laws Candidate at the University of São Paulo, from were she holds a Law degree, and was a Visiting Researcher at Yale Law School (2016-2017). She is also a researcher at ITS Rio, with work focused on privacy and personal data regulation, and a partner at VMCA, a consultancy firm specialized in competition policy, compliance, and regulatory advocacy.

Pablo Márquez is a partner at Márquez, Barrera, Castañeda & Ramirez. Before joining the firm, Pablo served as Chairman of the Commission for the Regulation of Communications and Superintendent for Antitrust in Colombia. He holds a PhD in Competition Law for the University of Oxford, an LLM in Law from Harvard, an MSc in Economics, a BPhil and a BA in Law from Universidad Javeriana.

Pablo Reja Sánchez is a former UNPD Consultant at the CADE, University Professor and PhD student in International Law from the UnB, Master in International Relations at the State University of Paraiba/UnB and BA from the University of Granada. Erasmus exchange at University of Paris II Panthéon-Assas (2010/2011).

Pierre Horna is responsible for the design, formulation and implementation of technical assistance and capacity building programs on competition and consumer protection laws and policies for selected developing countries in the ASEAN, Balkan, CIS and Latin American regions. He is the legal affairs official at the Competition and Consumer Policies Branch at UNCTAD Mr. Horna has doctorate studies in International Competition Law at the University of Geneva, Switzerland. Master of

Laws in International Business Law from Leiden University, The Netherlands with thesis on the developmental dimension of expanding WTO covered agreements into Competition Policy (2002) and studies on E-commerce and consumer protection at the Buckingham University, England (2001). Visiting research fellow at Oxford's Centre for Competition Law and Policy and Senior Associate at Pembroke College, University of Oxford.

Rosana Aragón Plaza is a Policy Analyst at the OECD's Competition Division. She is based at the OECD Mexico Center. Before joining the OECD in 2016, Rosana was a competition counsel at a major Brussels law firm. She holds an LLM from Harvard Law School and an LLM in EU law and economic analysis from the College of Europe; she obtained degrees in law and international relations from Universidad Pontificia Comillas de Madrid (ICADE).

Tanja Goodwin is an Economist in the Trade and Competitiveness Global Practice of the World Bank Group. She focuses on analytics and technical assistance in pro-competition sectoral regulation and on the implementation of competition policy. Before joining the World Bank Group, Tanja worked at private and public research institutes in Germany and in Latin America. Education: New York University and University of Tuebingen.

Vanessa Facuse is former Head of the Litigation Division at the Chilean Competition Agency (Fiscalía Nacional Económica or FNE). She teaches competition law in the MBA program at Universidad Diego Portales. Vanessa holds a law degree from Universidad de Chile, School of Law, a Master in IT Law and Telecommunications from Universidad de Chile, and a Diploma in Administrative Law from the same university.

Vinicius Marques de Carvalho was President of the CADE from 2012 till 2016. He is also Professor of Law at the USP and holds a PhD in Law from both the USP and the University Paris I (Panthéon-Sorbonne). After leaving the authority, Vinicius was a Yale Greenberg World Fellow and is now the managing partner at VMCA, a consultancy firm specialized in competition policy, compliance, and regulatory advocacy.

Summary of Contents

Table of Contents

CHAPTER 15

Shareholders' Damage Claims Against Company Directors for Antitrust Violations? The Japanese Experience and Possible Lessons to Brazil and Latin America

Amanda Athayde

§15.01 INTRODUCTION

Hard core cartels are antitrust violations subject to strict scrutiny by the public authorities as well as by the private parties. On the one side, administrative, civil and/or criminal actions typically perform public enforcement, depending on the jurisdiction's legislation. On the other side, the private enforcement can be performed in several ways, including the private damages lawsuits against the cartelists by the consumers harmed by the anticompetitive conduct.

Recently, possibly triggered by the public disclosure of antitrust lawsuits and by the governments' enforcement actions, the shareholder derivative suits against corporate officers and directors[1] took off around the globe.[2] This type of derivative

1. For the purpose of this article, officers and directors are regarded as the ones appointed in the company's bylaws as responsible for carrying out the company's day-to-day business operations. They are elected by the General Shareholders' Meeting, according to Art. 122 (II) of the Brazilian Corporation Law: "*The general meeting has the exclusive authority: II – to elect or discharge corporation officers and auditors at any time, subject to the provisions of item II of Section 142*" and Art. 132 (III): "*An annual general meeting of shareholders shall be held every year during the first four months after the closing of the fiscal year in order: III – to elect the officers and the members of the statutory audit committee.*" They have to act as agents and trustees for the corporation, and have the duty to act with care, loyalty, good will and diligence in all acts done on behalf of the corporation. The officers and directors may, or not, be shareholders, as provided in Art. 146:

lawsuit is brought by a shareholder of a corporation on its behalf to enforce or defend a legal right or claim which the corporation has failed to. In the antitrust context, the failure of the corporation to file the lawsuit may occur for instance if the potential defendant is someone close to the company – just as it is typically the case of the current or previous corporate officers and directors. Those individuals may face this type of lawsuit by a breach of its fiduciary duties of loyalty and diligence,[3] and if the shareholder derivative suit is successful, the triumphs go to the corporation.

Thereby, this article proposes some possible corporate causes for action of the shareholders against the corporate officers and directors in the case of antitrust violations. First, when the corporate officers and directors personally practiced the antitrust wrongdoing. Second, when the corporate officers and directors are conniving with other officers and/or directors who practiced the antitrust wrongdoing and fail to take action – for example, failing to apply for leniency or settlement. Third, when the corporate officers and directors are negligent to prevent the wrongdoing. For this purpose, section II presents the Japanese experience in shareholders derivative actions in the antitrust context. Hereupon, section III points out some ways through which those lawsuits could be implemented in Brazil, according to the Brazilian Corporation Act. Finally, section IV proposes conclusions and launches some debates.

§15.02 THE JAPANESE EXPERIENCE ON SHAREHOLDER DERIVATIVE ACTIONS AGAINST OFFICERS AND DIRECTORS IN THE ANTITRUST CONTEXT

The Japanese Companies Act[4] provides in its Article 423(1)[5] that the negligent corporate officers or directors are liable to the company for damages resulting thereof. Article 847(3)[6] gives individual shareholders the right to file a derivative action[7] in case

"*Individuals may be elected as members of the administrative bodies; the members of the administrative council must be shareholders, while the directors residing in Brazil may, or may not, be shareholders*." Their appointment is regulated in Art. 149, as follows: "*Council members and directors shall take up their appointments by signing an instrument of appointment in the book of minutes of administrative council meetings or of board of directors' meetings, as the case may be*."

2. For instance, recently a shareholder sued Google's holding company board in California State court accusing company leadership of violating European antitrust laws and breaching fiduciary duties to investors with its restrictive Android licensing terms (Case *Robert Jessup v. Larry Page* et al., case number CIV538782, in the Superior Court of the State of California, County of San Mateo).
3. FRAZÃO dedicates an important part of its book to develop on the duties of loyalty and due care of the corporate officers. FRAZÃO, Ana. *Função social da empresa: repercussões sobre a responsabilidade civil de controladores e administradores de S/As*. 2011. pp. 332–404.
4. Japan. Companies Act. Act. N. 86 of July 26, 2005.
5. Article 423(1) of the Companies Act in Japan: "*(1) If a director, accounting advisor, company auditor, executive officer or accounting auditor (hereinafter in this Section referred to as 'Officers, Etc.') neglects his/her duties, he/she shall be liable to such Stock Company for damages arising as a result thereof.*"
6. Article 847(3) of the Companies Act in Japan: "*When the Stock Company does not file an Action for Pursuing Liability, etc. within sixty days from the day of the demand under the provisions of*

the stock company does not file the appropriate action for pursuing liability against those officers and directors for their intentional or negligent acts.

According to RAMSEYER and NAKAZATO, derivative suits were uncommon in Japan, but due to changes in the filling fees that apply to those suits, they have become increasingly common.[8] In the antitrust context, KAWAI, SHIMADA and HEIKE[9] point out that the Japanese society and the legal and business community came to recognize the derivative shareholder actions as one of the measures to question the responsibility of corporations in the antitrust field. WALLE[10] describes that traditionally the shareholders have targeted officers and directors on the basis that they failed to prevent an antitrust violation from occurring. In 2010, however, for the first time, shareholders claimed that the officers and directors of a company were also negligent for not filing a timely leniency application.[11]

According to WALLE,[12] around fifteen derivative suits alleging antitrust violations have been brought in Japan, some of them being rejected by the court and others resulting in settlements.[13] The author explains that some of the typical defenses for

---

paragraph (1), the shareholder who has made such demand may file an Action for Pursuing Liability, etc. on behalf of the Stock Company."

7. A shareholder must continuously hold a corporation's shares for a period of six months in order to file a derivative shareholder action.
8. RAMSEYER, J. Mark; NAKAZATO, Minoru. *Japanese Law: An Economic Approach*. University of Chicago Press, 1999. p. 264.
9. KAWAI, Kozo; SHIMADA, Madoka; HEIKE, Masahiro. Chapter 16. Japan. *The Private Competition Enforcement Review.* 5th Ed. Law Business Research, 2012. p. 251. Available at: <http://www.jurists.co.jp/en/publication/tractate/docs/PCER_Fifth.pdf>.
10. SIMON VANDE WALLE. *Private Antitrust Litigation in the European Union and Japan: A Comparative Perspective*. Maklu, 2013. pp. 123–126.
11. The derivative shareholder action was filed against Sumitomo Denko, in the cartel on optical fiber cable case. *Apud* KAWAI, Kozo; SHIMADA, Madoka; HEIKE, Masahiro. Chapter 16. Japan. *The Private Competition Enforcement Review.* 5th Ed. Law Business Research, 2012. p. 251. Available at: <http://www.jurists.co.jp/en/publication/tractate/docs/PCER_Fifth.pdf>.
12. WALLE. *Ibid*. p. 124, footnote 10.
13. There were cases where the Japanese officers and directors decided to settle, paying non-negligible amounts (ranging from JPY 80 to JPY 230 million), such as in the bid-rigging cases on steel highway bridge construction orders, on the construction of a new subway line in Nagoya. WALLE. *Ibid.* According to WEST:

> Following a 1993 reduction of filing fees, the number of shareholder derivative suits filed in Japan has increased dramatically, creating a database from which to study litigation incentives. This chapter shows that most plaintiffs in Japan lose, few suits settle, settlement amounts are low, and, as in the United States, shareholders do not receive direct stock price benefits from suits. Most derivative suits in Japan, as in the United States, can be explained not by direct benefits to plaintiffs, but by attorney incentives. But derivative suits, like most things in life, have more than one source of causation. The residuum of suits not explained by attorney incentives is best explained by a combination of: (a) non-monetary factors such as altruism, spite, and social concerns, (b) corporate troublemakers (sokaiya), (c) insurance, and (d) close corporation fights. I also find that many derivative actions "piggyback" on government enforcement actions in Japan, which, especially given the lack of information available to shareholders and low white-collar crime enforcement rates, raises interesting questions regarding the relationship of public and private enforcement. These findings suggest that the difficult and messy issues of derivative suits are not unique to the relatively "litigious" or "attorney-centered" United States, and instead simply are endemic to the derivative suit mechanism.

those officers and directors in Japan are the following. First, that they were not aware of the conduct. Second, that they were not aware that the conduct in question constituted a violation/the unlawfulness conduct, and therefore its acts lacked of the requisite intent or negligence. Third, that they did not violate the Antimonopoly Act themselves. Fourth, that the harm suffered because of fines or surcharges was overweighed by the profits derived from the antitrust violation.

Besides those possible defenses, two important decisions on shareholder derivative actions regarding antitrust violations that took place in 2014 in Japan and resulted in settlements changed landscape of those derivative lawsuits.

In December 1, 2010, after condemnation by the JFTC of the optical fiber cable case, a derivative shareholder action was filed against the directors of Sumitomo Electric for alleged negligence.[14] The shareholder claimed that the directors had acted negligently because they: (a) had overlooked the cartels, (b) had not established truly effective compliance systems to prevent cartels beforehand, (c) had not established effective compliance systems relating to leniency applications, and (d) had not applied for leniency. The shareholders sought payment of around JPY 6.7 billion (around USD 630 million), which corresponded to the penalty imposed on the company by the JFTC.[15]

A subsequent suit was brought in 2012 by shareholders against company's officials of Sumitomo Electric in the automotive wire harnesses case. In that case, the shareholders alleged negligence of the officers and directors even though the company was successfully the leniency applicant in this case.[16] During the process, the court issued an order to produce some of the evidence the JFTC obtained during the investigation,[17] which enhanced the shareholders claim.

Finally, in 2014, the Osaka District Court combined both lawsuits and mediated a settlement. According to its terms, twenty-two ex-officials agreed to recover JPY 520 million (around USD 5 million) to the company for their negligence. This was the

WEST, Mark D. Why Shareholders Sue: The Evidence from Japan. *Michigan Law and Economics Research Article* No. 00-010, 2000.

14. JFTC. Optical Fiber Cable Case. *Cease and Desist Orders and Surcharge Payment Orders against Manufacturers of Optical Fiber Cable Products.* Available at: <http://www.jftc.go.jp/en/pressreleases/yearly-2010/may/individual-000021.html>.
15. In this context, the Osaka District Court even ordered the JFTC to submit documents in relation to the shareholder derivative suit. SHIMADA, Madoka; TANAKA, Nobuhiro. The Osaka District Court orders the Japan Fair Trade Commission to submit documents in relation to a shareholder derivative suit (Sumitomo Electric), June 15, 2012, *e-Competitions Bulletin Japan Antitrust*, Art. N° 72453. Available at: <http://www.concurrences.com/Bulletin/Special-Issues/Japan/A-Japanese-district-court-orders-72453?lang=en>.
16. JFTC. Wire harness and related products Case. *Cease and Desist Orders and Surcharge Payment Orders to participants in bid-rigging conspiracies for automotive wire harness and related products.* Available at: < http://www.jftc.go.jp/en/pressreleases/yearly-2012/jan/individual-000462.html>.
17. SHIMADA, Madoka. NAKANO, Sumito. Japanese Leniency Program: issues to be considered. *CPI Antitrust Chronicle*, September 2015. p. 5.

highest ever settlement amount for a shareholder derivative suit in Japan, justified by their failure to prevent and/or report the cartel activities in those two cases.[18]

Given all that, derivative suits in Japan, which target corporate directors and officers of companies for antitrust violations, started being successful, even if by means of settlements. This scenario brings light to some possible analogies and repercussions of this understanding in other jurisdictions, such as in Brazil[19] and other countries in Latin America.

§15.03 ARE SHAREHOLDER DERIVATIVE SUITS AGAINST OFFICERS AND DIRECTORS FOR ANTITRUST VIOLATIONS A POSSIBLE REALITY IN BRAZIL?

In Brazil, the Corporation Law,[20] in its Article 158 (I), provides that the officer shall be personally liable to the company for losses resulting from his acts with fault or fraud within the scope of his authority.[21] Article 158 paragraph 1st establishes that the corporate officer shall also exceptionally be liable for the unlawful acts of other officers when acting in connivance with them, when neglecting to investigate such acts or when, despite knowledge of them, fails to take action to prevent such acts.[22]

Article 159 paragraph 3rd also provides to individual shareholders the right to file a derivative action, i.e., an action on behalf of the company in case the stock company does not file the appropriate action for pursuing liability within three months.[23] This lawsuit may be brought even if the general meeting of the company decides not to institute proceedings, since any shareholder representing at least 5% of the capital may

18. Nikkei Asian Review. *Sumitomo Electric to Get Record Payout from Ex-officials*, May 8, 2014. Available at: <http://asia.nikkei.com/Business/Companies/Sumitomo-Electric-to-get-record-payout-from-ex-officials>.
19. Brazil currently investigates those two cartel cases which were the basis for the shareholders derivative actions in Japan. The optical fiber cable investigation: Brazil. CADE. Administrative Proceeding (PA) No. 08012.003970/2010-10 and 08700.008576/2012-81. The wire harnesses investigation: Brazil. CADE. Administrative Proceeding (PA) No. 08700.009029/2015-66).
20. Brazil. Corporation Law. Law 6.404/1976.
21. Article 186 (I) of the Corporation Law in Brazil: "*An officer shall not be personally liable for the commitments he undertakes on behalf of the corporation and by virtue of action taken in the ordinary course of business; he shall, however, be liable for any loss caused when he acts: I - within the scope of his authority, **with fault or fraud**; II - contrary to the provisions of the law or of the bylaws.*"
22. Article 158 paragraph 1st: "*An officer shall not be liable for unlawful acts of the other officers, **except when acting in connivance with them, when neglecting to investigate such acts or when, despite knowledge of them, he fails to take action to prevent such acts**. A dissenting officer shall be exempt from liability when he makes his dissent to be recorded in the minutes of a meeting of the administrative body, or, if this is.*"
23. Article 159 paragraph 3rd of the Corporation Law in Brazil: "*Article 159. By a resolution passed in a general meeting, the corporation may bring an action for civil liability against any officer for the losses caused to the corporation's property. Paragraph 3. Any shareholder may bring the action if proceedings are not instituted within three months from the date of the resolution of the general meeting.*"

file the derivative lawsuit, according to paragraph 4th of Article 159.[24] If the damages are finally recovered, it shall be transferred to the corporation and not to the shareholder who initiated the suit, but the expenses incurred with the lawsuit would be reimbursed, as provided in Article 159 paragraph 5th.[25]

The article proposes that in Brazil corporate officers and directors may face shareholders derivative suits claiming corporate liability for antitrust violations at least in three situations.

First situation: officers and directors who personally practiced the antitrust wrongdoing.

Assume there was a bid-rigging cartel in the construction sector in Brazil and that the Commercial Director of the company A – who is a corporate officer in the bylaws – agreed to fix prices and allocate markets with companies B, C and D. The Commercial Director personally joined the meetings and fostered the anticompetitive agreements, leading its employees to implement the wrongdoing. An investigation is initiated in the administrative sphere, by the Brazilian Competition Authority, the Administrative Council for Economic Defense ("CADE", in its Portuguese acronym). An investigation is also investigated in the criminal sphere, by the State and/or Federal Public Prosecutors ("MP," in its Portuguese acronym). Upon final judgment of the case by CADE's Tribunal,[26] assume that companies A, B, C and D are convicted, as well as all the individuals involved on behalf of the companies. Those individuals that practiced

24. Article 159 paragraph 4th of the Corporation Law in Brazil: "*Should the general meeting decide not to institute proceedings, they may be instituted by shareholders representing at least five per cent of the capital.*"
25. Article 159 paragraph 5th of the Corporation Law in Brazil: "*Paragraph 5. Any damages recovered by proceedings instituted by a shareholder shall be transferred to the corporation, but the corporation shall reimburse him for all expenses incurred, including monetary adjustment and interest on his expenditure, up to the limit of such damages.*"
26. In the administrative sphere in Brazil, Art. 37 of the Brazilian Competition Law (Law 12.529/2011) states that antitrust infringements subjects the ones responsible to the following fines, among other penalties: (i) in the case of a company, a fine of 0.1%–0% of the gross sales of the company, group or conglomerate, in the last fiscal year before the establishment of the administrative proceeding, in the field of the business activity in which the violation occurred, which will never be less than the advantage obtained, when possible the estimation thereof; (ii) in the case of the administrator, directly or indirectly responsible for the violation, when negligence or willful misconduct is proven, a fine of 1%–20% of that applied to the company or to legal entity; (iii) in the case of other individuals or public or private legal entities, as well as any association of persons or de facto or the jure legal entities, even if temporary, or unincorporated, which do not perform business activity, not being possible to use the gross sales criteria, a fine between BRL 50,000 and BRL 2 billion. Without prejudice to the penalties set forth in Art. 37 of this Law, when so required according to the seriousness of the facts or public interest, one or more of the penalties stated in Art. 38 may be imposed: publication in news articles of the extracts from the conviction; ineligibility for official financing and for participation in biddings; recommendation to the respective public agencies for compulsory license, denial of installment payment of federal taxes, company divestiture, transfer of corporate control, sale of assets or partial interruption of activity, the wrongdoer be provided from carrying on trade for a period of five years, among other penalties.

the cartel may also face criminal sanctions, possibly sentenced to jail time.[27] It is possible to understand that Company A, therefore, suffered losses resulting from the acts of its Commercial Director.

The above-mentioned Commercial Director of company A, who practiced the antitrust wrongdoing with the intent to bid rig, may be held corporate liable for his acts, notwithstanding the administrative and criminal sanctions. That is true since he personally practiced the antitrust wrongdoing with fraud or, at least, with fault, as provided in Article 158 (I) of the Brazilian Corporation Law. When the Commercial Director of company A deliberately practiced an illicit conduct, it exposed the company to damages, frontally violating the fiduciary duties established in Article 155[28] (Duty of Loyalty) of the Brazilian Corporation Law.

Pursuant to VASCONCELOS,[29] the duty of loyalty has a positive and a negative perspective. The positive perspective relates to the adoption of practices aiming to achieve company's scope through active behaviors. The negative perspective, by its turn, relates to the abstention of behaviors that would be contrary or harmful to the company's social purpose. The author's conclusion is that the negative perspective plays a greater role. This article proposes that the example of the conduct of the Commercial Director of company A represents an infringement of this negative perspective of the duty of loyalty. He did not absent to behave contrary to the company's social purpose, but instead actively performed anticompetitive acts that harmed and caused damages to it (even though it might have been targeting profits to the company).

27. In the criminal sphere in Brazil, Art. 4 of the Brazilian Economic Crimes Law (Law 8.137/1990) states that the individuals face a penalty in Brazil of two to five years of imprisonment and fines for cartel conduct.
28. Article 155 of the Corporation Law in Brazil: Duty of Loyalty:

> An officer shall serve the corporation with loyalty, shall treat its affairs with confidence and shall not: I - use any commercial opportunity which may come to his knowledge, by virtue of his position, for his own benefit or that of a third party, whether or not harmful to the corporation; II - fail to exercise or protect corporation rights or, in seeking to obtain advantages for himself or for a third party, fail to make use of a commercial opportunity which he knows to be of interest to the corporation; III - acquire for resale at a profit property or rights which he knows the corporation needs or which the corporation intends to acquire. Paragraph 1. An officer of a publicly held corporation shall also treat in confidence any information not yet revealed to the public, which he obtained by virtue of his position and which may significantly affect the quotation of securities, and shall not make use of such information to obtain any advantages for himself or for third parties by purchasing or selling securities. Paragraph 2. An officer shall ensure that the provisions of paragraph 1, above, are not infringed by a subordinate or third party enjoying his confidence. Paragraph 3. Any person detrimentally affected in a purchase or sale of securities contracted contrary to the provisions of paragraphs I and 2, above, may demand indemnity from the person responsible for the infringement for losses and damages, unless the person was aware of the information at the time the contract was made. Paragraph 4 Any officer who may receive any confidential information not yet revealed to the public shall not make use of such information to obtain any advantages for himself or for third parties by purchasing or selling securities.

29. VASCONCELOS, Pedro Pais de. *A participação social nas sociedades empresárias*. Coimbra: Almedina, 2006. p. 205.

This corporate liability becomes even more evident when the Commercial Director of company A, encouraged to confess – for example after a corporate whistleblower's tip – conceals its acts, destroys evidences and do not collaborate with the company's internal investigation efforts. This situation may specially be real if he is the Commercial Director of company A is in the Brazilian subsidiary and the internal investigation is conducted by the head office overseas.

The Commercial Director of company A, in this scenario, is in a strong conflict of interest with the company, potentially violating also Article 156[30] (Conflict of Interests) of the Brazilian Corporation Law. The Commercial Director's interest is to conceal the wrongdoing, while the company's A interest is "clean the house," uncover all the wrongdoings and get back to the track of the legal practices. This conflict of interests, eventually resulting in a lack of collaboration and even in the implementation of some opposition acts to impair the data gathering, may lead to the company's A failure to successfully apply for a marker and to execute a Leniency Agreement or a settlement that could have been in the course of negotiations. The duties required in a situation of conflict of interest are rolled-out from the duty of loyalty itself.[31] Hence, when the Commercial Director is overlooking the company's interests and emphasizing its own personal interests, he is in a situation of conflict of interest, which also constitutes a fraudulent breach of the duty of loyalty.

This duty of loyalty is likewise infringed since the officers and directors have complementary duties of transparency (full disclosure) and information.[32] Those duties are not fulfilled when the Commercial Director of company A conceals its anticompetitive acts and prevents the company to be granted immunity or to mitigate the damages by settling the case with the competition authority.

Therefore, in this first situation, the shareholders of company A may bring derivative lawsuits against the Commercial Director aiming his liability and the recovery of the losses caused to the company in accordance with Article 158 (1) of the Brazilian Corporation Law, due to the acts practiced with fault or fraud.

---

30. Article 156 of the Corporation Law in Brazil: Conflict of Interests:

    An officer shall not take part in any corporate transaction in which he has an interest which conflicts with an interest of the corporation, nor in the decisions made by the other officers on the matter. He shall disclose his disqualification to the other officers and shall cause the nature and extent of his interest to be recorded in the minutes of the administrative council, or board of directors' meeting. Paragraph 1. Notwithstanding compliance with the provisions of this article, an officer may only contract with the corporation under reasonable and fair conditions, identical to those which prevail in the market or under which the corporation would contract with third parties. Paragraph 2. Any business contracted otherwise than in accordance with the provisions of paragraph 1, above, is voidable and the officer concerned shall be obliged to transfer to the corporation all benefits which he may have obtained in such business.
31. FRAZÃO, Ana. *Função social da empresa: repercussões sobre a responsabilidade civil de controladores e administradores de S/As*. 2011. p. 336.
32. CARVALHOSA, Modesto. *Comentários à Lei das Sociedades Anônimas*. São Paulo: Saraiva, 2003. III. p. 331.

Second situation: officers and directors conniving with other officers and/or directors who practiced the antitrust wrongdoing and who fail to take action

Assume once again that there was a bid-rigging cartel in the construction sector in Brazil and that the Commercial Director of the company A agreed to fix prices and allocate markets with companies B, C and D. The Commercial Director personally joined the meetings and fostered the anticompetitive agreements, leading its employees to implement the wrongdoing. In a certain point, the Financial Director and the Vice President, who were not directly involved in the wrongdoing – but who are corporate officers in the bylaws – learned that the Commercial Director was practicing the anticompetitive conduct of bid rigging. However, they did not take any action. They did not either cease the Commercial Director's conduct immediately by means, for example, of a request of a general meeting with the board to inform, a temporary removal or even though the dismissal of the Commercial Director.

Those corporate officers hence implicitly allowed an antitrust violation to develop and continue, which exposed the corporation to enormous legal liability. They violated the duty of loyalty established in Article 155 of the Brazilian Corporation Law, since they privileged the Commercial Director' and not the corporation's interests. In this context, those Financial Director and Vice President of the company A may exceptionally be liable for the unlawful acts of other officers because they acted in connivance with them, as provided in Article 158 paragraph 1st of the Brazilian Corporation Law.

This situation also represents a failure of the corporate officers with the duty of loyalty, which, according to CLARK,[33] is a leftover concept, which can contain factual situations that no one could predict or categorize. This officer's corporate liability would be especially interesting if the Financial Director and the Vice President, learning the antitrust violation, fail to consider the application of the company for the Leniency[34] or the Settlement[35] Programs of the CADE. It is possible to understand that if those corporate officers had taken action immediately upon notice of the wrongdoing, company A could have reached CADE earlier and could have been granted full

33. CLARK, Robert Charles. *Corporate Law.* New York: Aspen Law & Business, 1986. p. 41.
34. According to Art. 86, para. 4, of the Brazilian Competition Law (Law No. 12.529/2011) combined with Art. 208 of the Internal Rules of CADE, once CADE's Tribunal declare that the Leniency Agreement has been fulfilled, the leniency recipients will benefit from: (i) administrative immunity under Law No. 12.529/2011, in cases in which the Leniency Agreement's proposal is submitted to CADE's General Superintendence when this authority was not aware of the reported violation; or (ii) a reduction by one to two-thirds of the applicable fine under Law No. 12.529/2011, in cases in which the Leniency Agreement's proposal is submitted to the SG/CADE after this authority becomes aware of the reported violation. For further information on the Brazilian Guidelines on Leniency Program: <http://www.cade.gov.br/upload/Guidelines%20CADE's%20Antitrust%20Leniency%20Program.pdf>.
35. According to Art. 85 of the Brazilian Competition Law (Law No. 12.529/2011) combined with article, For further information on the Brazilian Guidelines on Cease and Desist Agreement for cartel Cases: <http://www.cade.gov.br/upload/Guidelines_TCC.pdf>.

immunity in the Leniency Program or at least a significant file reduction depending on its arrival time to apply for a settlement.[36]

Therefore, in this second situation, the shareholders of company A may bring derivative lawsuits aiming liability and the recovery of the losses caused to the company in accordance with Article 158 paragraph 1st of the Brazilian Corporation Law. This lawsuit would be brought not only against the Commercial Director who personally performed the wrongdoing (first situation), but also against the Financial Director and the Vice President who were conniving with the Commercial Director and who did not take any action upon notice of the anticompetitive practice (second situation).

Third situation: officers and directors negligent to prevent the wrongdoing

Assume once more that there was a bid-rigging cartel in the construction sector in Brazil and that the Commercial Manager of the company A agreed to fix prices and allocate markets with companies B, C and D. The Commercial Manager personally joined the meetings and fostered the anticompetitive agreements. The Commercial Director, the Vice President and the President – who are corporate officers in the bylaws –, during the bidding process, received follow up information about the phases and results by this Commercial Manager. Even though they did not participate personally on the illegal acts nor did they specifically know about the wrongdoing, they recognized the possibility that this employee was performing anticompetitive conduct and neglected the fact. This would also be the case when, for example, of the Ombudsman Director of company A receives an anonymous complaint from an employee exposing the misconduct of the Commercial Manager and decides to turn a blind eye on the fact, without further investigation on the issue. Those corporate officers acted with negligence in finding out the misconduct and failed to prevent the antitrust violation, which expose the company to severe sanctions in the antitrust field.

In this situation, the Commercial Director, Vice President, President, or even the Ombudsman Director of the company A may exceptionally be liable for the unlawful acts of other officers because they were negligent, as provided in Article 158 paragraph 1st of the Brazilian Corporation Law.

This negligence would represent a violation of the duty of diligence, required in 153[37] (Duty of Diligence) of the Brazilian Corporation Act. In relation to the duty of diligence, the standard required from the officers are higher than the one of a *bonus pater familias*, and is intrinsically related to the social interest of the company, inclusively in what concerns the social role of the company.[38] It is clear that the

36. The settlement is Brazil is called TCC, which is the Portuguese acronym for "Termo de Compromisso de Cessação", i.e., Cease and Desist Agreement.
37. Article 153 of the Corporation Law in Brazil: Duty of Diligence. "*In the exercise of his duties, a corporation officer shall employ the care and diligence which an industrious and honest man customarily employs in the administration of his own affairs*."
38. DÍAZ ECHEGARAY, José Juis. *Deberes y Responsabilidad de los Administradores de Sociedades de Capital.* Elcano (Navarra): Editorial Aranzadi: 2006. p. 118. *Apud* FRAZÃO, Ana. *Função social da empresa: repercussões sobre a responsabilidade civil de controladores e administradores de S/As*. 2011. p. 352.

purpose of the companies is to obtain profits – and that a cartel may enhance, at least temporarily raise those profits. However, the social role of the company also determines that the officers have to balance this purpose with other interests involved in the execution of the company's activities, not causing unjustifiable or disproportionate damages. The duty of diligence, hence, is related primarily to the general duty of respect and prevention of danger, according to MENEZES CORDEIRO.[39] By fixing prices and allocating markets with its competitors, the Commercial Manager of company A offended the social role of the company and violated the duty of diligence.

Additionally, a lack of diligence would be apparent when the corporate officers of company A, after a condemnation by CADE of a bid-rigging cartel in the construction sector, fails to implement a corporate compliance program, which ends up in another cartel in the energy sector, for instance. The implementation of a surveillance, supervision and investigation system would be required by the duty of diligence of the officers, according to COUTO SILVA – which would have failed in the mentioned situation. The author also argues that the offices have to take an active attitude towards the company, monitoring the activities and the information in a way to assure that the shareholders rights are not being violated by the lower instances of the company.[40] In this path, the duty of diligence also prohibits the adoption of a "calculated infringement,"[41] which could be the defense argument that the cartel was "calculated" to bring more profits than damages. A failure to implement an adequate compliance program within company A, even after the first fine imposed by CADE and in a sector which favors collusive behaviors, resulted in losses for company A, which were a result of the officers acts with negligence.

According to POSNER, the danger of mismanagement (negligence) is less serious than that the danger that the managers will not deal fairly with the shareholders (disloyalty).[42] In a scale of gravity, a violation of the duty of loyalty would be more detrimental than a violation of the duty of diligence. Considering the situations presented of this article, this article proposes the following scale of gravity. The first and the second situations represent the lack of loyalty of the officers and directors and are the worst cases – (1) personally practicing the antitrust wrongdoing and (2) conniving and failing to take action when taking notice of the violation. The third situation represents the lack of diligence and is less painful – (3) by the negligence to prevent the anticompetitive illicit.

39. CORDEIRO, Antonio Menezes. A *lealdade no direito das sociedades*. 2007.
40. SILVA, Alexandre Couto. *Responsabilidade dos administradores de S/A. Business judgement rule.* Rio de Janeiro: Elsevier, 2007, 252.
41. FRAZÃO, Ana. *Função social da empresa: repercussões sobre a responsabilidade civil de controladores e administradores de S/As*. 2011. p. 358.
42. POSNER, Richard A. *Economic Analysis of Law.* New York: Aspen Law & Business, 1988. p. 452.

This lack of diligence is subject to the analysis of the "business judgment rule"[43] standard (established in Article 159[44] §6º of the Brazilian Corporation Law), which does not apply to the lack of the duty of loyalty. According to the "business judgment rule," there is a presumption that the officers take their decisions in an informed basis with good faith and in an honest belief that its acts are taken in the best interest of the company. In addition, there is the understanding that the corporate officers and directors decisions are unsusceptible of judicial review, expect if the motivation was fraud, conflict of interests, illegality and gross negligence.[45] The purpose of this "business judgment rule," therefore, is to overcome the difficulties to evaluate *ex post* the diligence in the acts of the officers. It provides a shift on the analysis from the right or wrong parameter to the reasonableness of the decision-making process, which protects decisions made based on due information and counseling. This mitigation on the duty of diligence analysis provides, hence, greater prominence to the duty of loyalty.[46]

In the view of this article, the implementation of a strong compliance program within the company may be a major asset for the loyal and diligent officers and directors to rebut claims on a derivative shareholder action arising from antitrust violations. The stronger is the adoption of a compliance program, the stronger is the argument that they were not negligent to prevent such wrongdoings. Additionally, the fact that the officers and directors had special counseling[47] when faced with a situation of an antitrust violation may appoint to the fulfillment of the duty of diligence required in the Brazilian legislation.

To the present day, there are no known precedents in Brazil of shareholders derivative actions against corporate officers and/or directors in the antitrust context, which may be inspired by the experience around the globe.

§15.04 CONCLUSION

The shareholders derivative action against officers and directors due to antitrust violations is a novel feature available for the accountability of the corporate individuals liable for the infringement. In Japan there have already been some successful cases

43. The BJR creates a presumption that corporate officers and directors "acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company [and its shareholders]. In re Walt Disney Co. Derivative Litig., 907 A.2d 693, 747 (Del. Ch. 2005).
44. Article 159(6) of the Corporation Law in Brazil: "*By a resolution passed in a general meeting, the corporation may bring an action for civil liability against any officer for the losses caused to the corporation's property.* (…) *Paragraph 6. A judge may excuse the officer from liability, when convinced that he acted in good faith and in the interests of the corporation.*"
45. CLARK, Robert Charles. *Corporate Law.* New York: Aspen Law & Business, 1986. pp. 123–124.
46. The lack of the duty of loyalty is subject to a full analysis of the merits of the officer's acts. According to NUNES. NUNES, Pedro Caetano. *Responsabilidade civil dos administradores perante os accionistas.* Coimbra: Almedina, 2001. p. 24.
47. RIBEIRO, Renato Ventura. *Dever de diligência dos administradores de sociedades.* São Paulo: Quartier Latin, 2006. p. 227.

resulting in settlements. Those derivative shareholders lawsuit benefited the company through the reimbursement of the fines already paid by officers and directors.

This article proposes a *first situation in Brazil in which officers and directors may face shareholders derivative suits claiming corporate liability for antitrust violations: when they personally practiced the antitrust wrongdoing*. That would be a breach of the fiduciary duty of loyalty required by the officers, established in Article 155 of the Brazilian Corporation Act. This would be aggravated when the corporate officer fails to cooperate with the company's internal investigation, conceals documents and impairs data gathering to prove the collusive agreement, resulting, for example, in the failure for the company to execute a Leniency Agreement or a settlement with the Competition Authority. The officers and directors liability would be in accordance with Article 158 (1) of the Brazilian Corporation Act, since the acts are performed with fault or fraud.

This article proposes a *second situation in Brazil in which officers and directors may face shareholders derivative suits claiming corporate liability for antitrust violations: when they are conniving with other officers and/or directors who practiced the antitrust wrongdoing and fail to take action.* That would also be a breach of the fiduciary duty of loyalty required by the officers, established in Article 155 of the Brazilian Corporation Act. The failure to take action would be a evident when the officers who learned the anticompetitive conduct by another colleague did not take the appropriate actions. This would be aggravated if the officers, upon notice of the antitrust violation, fail to timely act and reach the Competition Authority to apply for a marker of Leniency or Settlement. If they had done so, they would had granted the company with full immunity or at least a significant reduction of the applicable fines, resulting in losses to the corporation. The officers and directors liability would be in accordance with Article 158 paragraph 1st of the Brazilian Corporation Act, since the acts are characterized as connivance and/or fail to take action.

This article proposes a *third situation in Brazil in which officers and directors may face shareholders derivative suits claiming corporate liability for antitrust violations: when they are negligent to prevent the wrongdoing.* That would be a breach of the fiduciary duty of diligence required by the officers, established in Article 153 of the Brazilian Corporation Act. The officers may have failed to take an active attitude towards the company, monitoring the activities and the information in a way to assure that the shareholders rights are not being violated by the lower instances of the company. However, this lack of diligence is subject to the analysis of the "business judgment rule," which protects decisions made bases on due information and counseling. The officers and directors liability would be in accordance with Article 158 paragraph 1st of the Brazilian Corporation Act, since the acts are characterized as negligence.

In summary, the three situations proposed can be expressed in this table 15.1.

Table 15.1 Situations in Brazil in Which Officers and Directors May Face Shareholders Derivative Suits Claiming Corporate Liability for Antitrust Violations

(i) when they personally practiced the antitrust wrongdoing	Failure on the Duty of Loyalty (Article 155)	Liability according to Article 158 (I)	
(ii) when they are conniving with other officers and/or directors who practiced the antitrust wrongdoing and fail to take action	Failure on the Duty of Loyalty (Article 155)	Liability according to Article 158 paragraph 1st	
(iii) when they are negligent to prevent the wrongdoing	Failure on the Duty of Diligence (Article 155)	Liability according to Article 158 paragraph 1st	*Subject to the "business judgment rule" standard*

Some debates may emerge when quantifying those damages claimed by the shareholders. Typically, the lawsuit could target the actual damages and the ceased profit resulting from the anticompetitive practice, as established in Articles 927,[48] 186[49] and 187[50] of the Civil Code. By demanding actual damages, the shareholders may target, for example, the reimbursement of the antitrust penalties already paid by the company to CADE. In addition, by demanding ceased profits, the shareholders may target the compensation for the profits lost during the period an eventual suspension to participate in the biddings, if that was one of the penalties imposed. This case would be especially sharp if the shareholders, pursuant to above-mentioned Article 187, allege that the officer or director violated the economic order and exceeded the limits imposed by the social function of the company,[51] embodied with the understanding that the company not only is imposed by limitations and abstentions, but also has duties and obligations due to its social independence.[52]

48. Article 927 of the Brazilian Civil Code. "*Art. 927. If a party, through an unlawful act (articles 186 and 187), causes a damage to another party, he is obliged to pay compensation. Sole paragraph. There will be a duty to compensate, irrespective of negligence, when specifically stated by the law, or when the activity performed by the party who caused the damage implies, by its nature, a certain risk to third parties*."
49. Article 186 of the Brazilian Civil Code. "*He who by voluntary action or omission, negligence or recklessness, violate law and harm others, even if only moral, commits an unlawful act.*"
50. Article 187 of the Brazilian Civil Code. "*It also commits an unlawful act the holder of a right that, in practice it clearly exceeds the limits imposed by their economic or social order, good faith or in morals. To use a power, right harm someone brings legal effect as a duty to indemnify.*"
51. COMPARATO, Fábio Konder. Estado, empresa e função social. *Revista dos Tribunais*, v. 732, pp. 38–46, 1996.
52. FRAZÃO, Ana. Função social da empresa na Constituição de 1998. *Revista Direito, Estado e Sociedade*, n. 29, 2014.

The shareholders may as well claim moral damage. According to Article 52 of the Brazilian Civil Code, the rights of personality are applicable, insofar as appropriate, to the legal entities the protection of the person. The Brazilian Superior Court of Justice ("STJ" in its Portuguese acronym) also prescribes, in the Summary Statement 227, that the legal entity may suffer moral damage. FRAZÃO argues that it is unequivocal that an act of disloyal management violates the company's credibility.[53] Considering the fact that an antitrust condemnation in Brazil made by CADE's Tribunal is public and attracts great media attention, the notice that the company was convicted and sentenced to pay severe fines represents a significant damage to the company's reputation. It would be feasible for the companies' shareholders in Brazil to target the officers and directors for the moral damages caused due to the antitrust violation.

In conclusion, corporate officers and directors in Brazil should be personally concerned with the antitrust violations in its company. Not only because of the administrative and criminal prosecution, but also due to their possible corporate liability as provided in the Brazilian Corporation Act (Law 6404/1976).

53. FRAZÃO, Ana. *Função social da empresa: repercussões sobre a responsabilidade civil de controladores e administradores de S/As*. 2011. p. 342.