

## *Latin America*

# Balancing Public and Private Enforcement: Developments in Argentina, Brazil, and the EU

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# Balancing Public and Private Enforcement: Developments in Argentina, Brazil, and the EU

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The last two decades have seen extraordinary legislative efforts in the European Union (EU) and Latin America to strengthen both public and private enforcement of competition laws, especially through the implementation of leniency programs, and the development of public and special regimes for follow-on damage claims for private enforcement. Experiences in both regions show the complicated relationship between leniency programs and private enforcement – with new initiatives being developed to balance both. However, a neglected aspect so far, especially in the area of private enforcement, has been the extent to which leading competition law jurisdictions influence the design of competition laws in jurisdictions with less experience. The following article highlights some key developments regarding leniency and private enforcement policy in the EU, Argentina, and Brazil.

The relationship between public and private enforcement in the EU, Argentina, and Brazil has been one-sided for decades. Contrary to U.S. tradition, the enforcement of competition law in these jurisdictions has been in the sole hands of public authorities for a long time. However, from a European perspective, public enforcement against cartels only really took off when the European Commission introduced its leniency policy through its various Leniency Notices of 1996, 2002, and 2006, along with the corresponding national leniency programs. Such programs are widely considered to be the most effective tool for detecting and combatting infringements of competition law, especially by cartels. Typically, leniency applicants are

granted a reduction of up to 100 % of the final penalties in exchange for cooperation with authorities in sharing information regarding their participation, and that of others, in infringements of competition laws. Consequently, the number of cartel decisions adopted tripled in the years after.<sup>2</sup>

Around the same time, the Court of Justice of the European Union (CJEU) laid the foundation for private damage claims by clarifying that individuals can directly rely on EU competition law to obtain relief when harmed by cartel offenders.<sup>3</sup> Right from the outset, the case law implied that such damage claims do not only serve a compensatory function for harmed individuals, but also a deterrent function for the overall enforcement of competition law in general.<sup>4</sup> Successful leniency policies and subsequent claimer-friendly case law by the CJEU, as well as legislation on both the EU and national levels, such as the Damages Directive 104/EU/2014, led to an exponential increase in follow-on damage claims in the EU.<sup>5</sup> While far from perfect, it is not too much of a stretch to say that the EU and its Member States developed a functional two-tier enforcement system based on both public and private intervention.<sup>6</sup>

## The Global Influence of EU Competition Law – Does It Affect Private Enforcement?

Research in international and comparative competition law has increasingly focused on the way that jurisdictions follow global role models when designing their own competition laws. Many of these researchers view the EU's

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<sup>2</sup> See European Commission, Statistics on Cartel Cases, figure 1.8., last change: 10.12.2021, available here: [https://ec.europa.eu/competition-policy/cartels/statistics\\_en](https://ec.europa.eu/competition-policy/cartels/statistics_en).

<sup>3</sup> CJEU, judgment of 20.09.2001, C-453/99 (*Courage*) = ECLI:EU:C:2001:465.

<sup>4</sup> See e.g. Opinion of Advocate General Wahl, delivered on 06.02.2019, C-724/17 (*Skanska*), paras. 29-51 = ECLI:EU:C:2019:100.

<sup>5</sup> See for exact figures: Laborde, Cartel Damages Actions in Europe: How Courts have assessed Cartel Overcharges (2021 ed.), *Concurrences* No. 3-2021, pp. 232-242, available here: <https://www.concurrences.com/en/review/issues/no-3-2021/legal-practice/cartel-damages-actions-in-europe-how-courts-have-assessed-cartel-overcharges-en>.

<sup>6</sup> See for different points of criticism, especially the lack of effectiveness in EU private enforcement, Sousa, The System for EU Antitrust Enforcement is Misguided and Unfair – Let's change it, *Journal of European Competition Law & Practice* (11)8 2020, pp. 413–417.

competition law regime as the gold standard, having out-competed the other juggernaut, U.S. antitrust law, and now often used as a blueprint.

Descriptions of this phenomenon range from the terms “The Brussels Effect”<sup>7</sup> to “Externalizing EU Competition policy”<sup>8</sup>. However, that research mostly focuses on public enforcement issues. Comparative and interdisciplinary research on the EU’s direct or indirect influence over private enforcement (and its interplay with public enforcement) is largely missing.<sup>9</sup> This is particularly regrettable considering that private enforcement is an increasingly important issue for international organizations such as the OECD or the International Competition Network (ICN).<sup>10</sup>

One might argue that the EU’s legal framework and its Damages Directive is still too young to be actively promoted elsewhere, as the EU does globally with public enforcement. Indeed, this article argues that active promotion is not necessary! It might be tempting for jurisdictions that wish to implement a stronger private enforcement policy to use EU law as a starting point. While further research has the potential to address this question more comprehensively on a global scale (as is the case with the influence of EU public enforcement), this article will focus on a few relevant aspects of competition policy in Argentina and Brazil.

## EU Competition Law’s Influence In Argentina’s And Brazil’s Leniency And Private Enforcement Policy

Various Latin American jurisdictions have introduced leniency programs since 2000, including Argentina, Brazil, Colombia, Mexico, and Peru.<sup>11</sup> The importance of these programs for the detection of infringements in competition law is regularly highlighted by authorities.<sup>12</sup> Some have been seen internationally as a success – e.g., the Brazilian Leniency program, which has been extensively sought after by cartel infringers in recent decades.<sup>13</sup> A recently published comprehensive study by the World Bank shed light on how leniency programs contributed to cartel detection in Latin American countries and the Caribbean.<sup>14</sup> In Brazil, around 40% of cartel prosecutions between 1980 and 2020 can be traced back to leniency applications, while Argentina relied on formal complaints or *ex officio* proceedings in the absence of an implemented leniency program.<sup>15</sup>

However, the deterrent effect of current anti-cartel policy, given the low rate of cartel detection, remains low. According to a simulation by the World Bank, administrative fines for companies involved in a cartel in Latin American countries and the Caribbean only account for 3 percent of the expected benefits these companies gained by colluding.<sup>16</sup> At this point, effective leniency programs accompanied by a strengthening of private enforcement could help to significantly reduce profits from cartel participation and thus deter cartelization in the

<sup>7</sup> See Bradford, *The Brussels Effect*, Oxford University Press, 2020; Bradford/Chilton/Linos/Weaver, *The Global Dominance of European Competition Law Over American Antitrust Law*, *Journal of Empirical Legal Studies* 2019, pp. 731-766.

<sup>8</sup> See e.g. Bender, *Externalizing EU competition policy*, Ipskamp Printing, 2020.

<sup>9</sup> See Crane, *Toward a Realistic Comparative Assessment of Private Antitrust Enforcement*, in: Gerard/Lianos/Fox (Eds.), *Reconciling efficiency and equity*, Cambridge University Press, 2019, p. 341 (341).

<sup>10</sup> See e.g. ICN, *Development of Private Enforcement of Competition Law in ICN Jurisdictions*, Cartel Working Group, 2019, available here: [https://www.internationalcompetitionnetwork.org/wp-content/uploads/2019/07/CWG\\_Privateenforcement-2019.pdf](https://www.internationalcompetitionnetwork.org/wp-content/uploads/2019/07/CWG_Privateenforcement-2019.pdf).

<sup>11</sup> See OECD, *Latin American and Caribbean Competition Forum, Background Note: Fining Methodologies for Competition Law Infringements*, DAF/COMP/LACF/2019(5), 27.09.2019, pp. 23-24.

<sup>12</sup> See e.g. Argentine Presidency: “La Argentina firmó una declaración con países de la región que destaca los beneficios de la libre competencia”, 03.12.2018, available here: [https://www.caserosada.gob.ar/informacion/eventos-destacados-presi/44327-la-argentina-firmo-una-declaracion-con-paises-de-la-region-que-destaca-los-beneficios-de-la-libre-competencia?utm\\_source=pocket\\_mylist](https://www.caserosada.gob.ar/informacion/eventos-destacados-presi/44327-la-argentina-firmo-una-declaracion-con-paises-de-la-region-que-destaca-los-beneficios-de-la-libre-competencia?utm_source=pocket_mylist).

<sup>13</sup> See e.g. the assessment by da Silva Lima/Salgado/Sampaio Fuiza: *Leniency and Cooperation Programs in Brazil: An Empirical Analysis from 1994 to 2014*, *Rev. Econ. Contemp.* 23(02) 2019, p. 1 (8), available here: <https://www.scielo.br/j/rec/a/gBwHF9QQb9KMdB4VrV7RGsB/?lang=en>.

<sup>14</sup> World Bank, *Fixing Markets, Not Prices: Policy Options to Tackle Economic Cartels in Latin America and the Caribbean*, 2021, available here: <https://openknowledge.worldbank.org/handle/10986/35985>.

<sup>15</sup> World Bank, *Fixing Markets, Not Prices: Policy Options to Tackle Economic Cartels in Latin America and the Caribbean*, 2021, p. 41–42.

<sup>16</sup> World Bank, *Fixing Markets, Not Prices: Policy Options to Tackle Economic Cartels in Latin America and the Caribbean*, 2021, p. 43.

future. Nevertheless, the challenges for establishing a private enforcement culture in Latin America and especially in Argentina and Brazil largely remain unsolved – as had been the case in the EU not that long ago. There are also significant cultural challenges in developing the acceptance of private enforcement in Latin America: mainly the broadly informal policies that disincentivize private litigation in general, as well as the unfamiliarity with competition law that persists among judges.<sup>17</sup>

In Argentina, the early competition laws (such as Law No. 11.210 from 1923) have had a great deal of influence by U.S. antitrust thinking, even though they have never really been applied. The influence of EU competition law has only been recognized in later modifications starting in the.<sup>18</sup> The first introduction of a leniency program, as well as the first explicit framework for damage claims through the new amendment to Law No. 27,442 in 2018 both mirror that development. In both cases Argentina devoted attention to the experiences gained by the European Commission, but also looked at Latin American countries such as Brazil.<sup>19</sup> Reading the legislative documents and debates surrounding Law No. 27,442, it is remarkable how often a comparative perspective was sought, especially about the European experience. As a result, the Argentine leniency program and its interplay with private enforcement largely followed the lines of its European counterpart.<sup>20</sup> It would be wrong, however, to treat Law No. 27,442 as a mere legal transplant of EU competition law in the field of leniency and private enforcement policy. Especially with regard to the latter, the Argentine legislators took a different path

concerning a number of important aspects. One example is the possibility of punitive damages: Derived from consumer law, the legislator introduced the possibility of punitive damages in Article 64 of Law No 27,442 to provide higher deterrence of cartel infringements – a legal instrument the EU explicitly did not include during its legislative process for the Damages Directive<sup>21</sup> and which is largely unknown among jurisdictions with a civil law tradition. Another interesting aspect that differs from the European legislation is in the way a successful leniency applicant may be liable in private damages proceedings. Article 65 of Law No. 27,442 provides that, if implemented, any leniency applicant (whether first confessor or a runner-up) may be exempted from paying private damages at the discretion of the *Tribunal de Defensa de la Competencia (para. 1)*, unless the victim is a direct or indirect customer or supplier, or any other victim of the leniency applicant's cartel that cannot obtain relief from other cartel members (para 2.).<sup>22</sup> This exemption can be traced back to Article 11(4) of the Damages Directive – however, this partial exemption from liability is mandatory in the EU and its Member States and only applies to leniency applicants with full immunity from public fines, as opposed to the Argentinian statute that also covers runners-up.

In Brazil, the Competition Authority (CADE) has had ample opportunity to gather experience with its leniency tools, having one of the longest-running leniency programs in place in Latin America, established over 20 years ago. Its enforcement and leniency policy is now nationally and internationally respected.<sup>23</sup> What is interesting - and different from developments

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<sup>17</sup> Peña, Cultural Challenges to Private Antitrust Enforcement in Latin America, in: Albert A. Foer, A Consumer Voice in the Antitrust Arena, Liber Amicorum, pp. 355-367.

<sup>18</sup> See in detail Greco/Stordeur/Viezens, Origen e Historia de la Ley de Defensa de la Competencia

Argentina: hacia los 100 años de legislación, in: Anuario de Derecho de la Competencia 2021, La Ley Paraguay, pp. 96-120.

<sup>19</sup> del Pino/del Rio: New Antitrust Regime in Argentina, Journal of European Competition Law & Practice (10) 5 2019, p. 310 (314).

<sup>20</sup> Folguera Crespo/Solano Díaz, La nueva Ley de Defensa de la Competencia Argentina: algunas consideraciones desde la perspectiva europea, in: Trevisán/del Pino/Charmatropulos, Comentarios a la Ley de Defensa de la Competencia, Thomson Reuters, 2018, p. 676.

<sup>21</sup> Commission staff working paper accompanying the White paper on damages actions for breach of the EC antitrust rules, {COM(2008) 165 final}, 02.04.2008, para. 203, available here: <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52008SC0404&from=EN>.

<sup>22</sup> See also Mezzanotte, Comments on Argentina's new Leniency Program, The Journal of International Business & Law (18)2 2019, p. 163 (171-172).

<sup>23</sup> OECD Peer Reviews of Competition Law and Policy, Brazil, 2019, p.18, available here: <https://www.oecd.org/daf/competition/oecd-peer-reviews-of-competition-law-and-policy-brazil-ENG-web.pdf>.

in Argentina – is Brazil’s traditionally strong cooperation with U.S. authorities and the latter’s influence on the design of Brazil’s leniency program.<sup>24</sup> The same goes for the current private enforcement regime set forth in Law No. 12,529/2011, noticeably inspired more heavily in U.S., rather than European private enforcement style<sup>25</sup> – not surprising since it came into effect before the Damages Directive did. As a result of successful cartel detection and the special framework set out in Law No. 12,529/2011, private enforcement has been on the rise in recent years as well – without too much European influence.<sup>26</sup> However, that does not mean that EU competition law had no influence in Brazilian competition policy, as recent literature has shown<sup>27</sup>. It has simply been less relevant for Brazil’s leniency and private enforcement policy. This appreciation fits well with recent findings in the literature that see Brazil as having evolved into a jurisdiction that promotes and develops its own rules, rather than just aligning with other jurisdictions.<sup>28</sup>

### **Outlook: What’s Next for Leniency and Private Enforcement Policy in The EU, Argentina, and Brazil?**

The brief overview above has shown that EU competition law is recognized in Argentina and Brazil, albeit with different levels of reception. Nevertheless, the work of designing competition policy never stops. Therefore, it is worth looking at current trends in leniency and private enforcement policy in the EU, Argentina and Brazil.

Recent data has shown that there is a declining trend of leniency applications worldwide over the last few years. The “OECD Competition Trends 2021” show a sharp decline in leniency applications between 2015 and 2019 for nearly every region.<sup>29</sup> The debate over the reasons for that decline is in full force.

In the EU, the debate focuses largely on the emergence of a functioning private enforcement regime. Statistics show that private damage claims by alleged victims of a cartel have grown exponentially in the EU over the last decade (see above). The effect of this development is obvious: Whenever a cartel member considers applying for leniency, it must also consider the consequences of disclosing its participation in the cartel. The higher the risk of being dragged into protracted damages litigation, where the amount of damages can exceed a possible (reduced) fine by a competition authority, the lower the incentive to disclose their cartel participation is in the first place. Under the Damages Directive, only an undertaking that has received full immunity from a fine will benefit from a privilege of limited liability for the harm caused.<sup>30</sup>

It is still unclear to what extent the adoption and implementation of the Damages Directive has contributed to this development – as many damage claims stem from the pre-Damages Directive era.<sup>31</sup> On the national level the picture is similar. In Germany, statistics show a sharp decline in leniency applications – a trend that

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<sup>24</sup> See Wang, Tug, Hug or Both? A Comparative Analysis of EU and US Competition Policy Permeation to Brazil and China, *European Foreign Affairs Review* 22, no. special issue 2017, p. 95 (103-104).

<sup>25</sup> See Jasper, Cartel Damages Litigation in Brazil: A Brief Introduction, 6.4.2015, Competition Policy International, available here: <https://www.competitionpolicyinternational.com/cartel-damages-litigation-in-brazil-a-brief-introduction/>.

<sup>26</sup> See ICC Compendium of Antitrust Damages Actions 2021, Brazil, Court proceedings, p. 6, available here: <https://iccwbo.org/content/uploads/sites/3/2021/03/icc-antitrust-compendium-proceedings-brazil.pdf>.

<sup>27</sup> Favoretto Rocha, The Extraterritoriality of European Competition Law Under a Brazilian Perspective, in: N Cunha Rodrigues (ed.), *Extraterritoriality of EU Economic Law*, 2021, pp. 149-172.

<sup>28</sup> See Wang, Domestic regulatory reform and transgovernmental networks: Brazil and China in the global competition regime, *Regulation & Governance* (15) 2020, No. 3, p. 492 (500).

<sup>29</sup> OECD Competition Trends 2021, Volume I, p. 12, available here: <https://www.oecd.org/daf/competition/oecd-competition-trends-2021-vol1.pdf>.

<sup>30</sup> See Recital 38, Article 11(4) of the Damages Directive.

<sup>31</sup> See also the cautious assessment by the European Commission: Commission Staff Working Document on the implementation of Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, 14.12.2020, SWD(2020) 338 final, pp. 3-4.

started after 2015.<sup>32</sup> The President of the German Federal Cartel Office (FCO), Andreas Mundt, explicitly attributed this development to the increase in damage claims.<sup>33</sup>

As the importance of leniency programs is still recognized by everyone in the EU, how do the EU and its Member States respond to this decline? Recently, the EU Commission Executive Vice President and Commissioner for Competition, Margrethe Vestager, gave a speech at the Italian Antitrust Association Annual Conference where she emphasized the importance of the EU Leniency Notice.<sup>34</sup> To assess possible weaknesses of the current leniency system, the Commission launched discussions with both the business world as well with other competition authorities on the global stage. At the same time, the Commission boosts other tools such as its whistleblowing tool, market screening or *ex officio* dawn raids. Just in the last few months, the Commission conducted dawn raids in the garment, wood pulp, and animal health sectors. There have also been calls to extend leniency protection applicants in follow-on damage claims – for example, the President of the FCO recently called for discussions to develop ideas on how to provide leniency applicants with immunity from follow-on damage claims that go beyond the current partial exemption mentioned above in Article 11(4) of the Damages Directive.<sup>35</sup>

In Argentina, the leniency program as well as the overall framework of the law (e.g. the creation of the new independent competition watchdog, Autoridad Nacional de la

Competencia, ANC) have never been implemented since their creation in 2018. On the contrary, the Senate introduced and approved a new amendment that seeks to eliminate the leniency program on the grounds that it is unconstitutional to reward those who infringed competition law in the first place<sup>36</sup> – a decision that drew a lot of criticism.<sup>37</sup> While it is unlikely that this amendment will be passed after a change in Government following the 2021 elections, it is obvious that eliminating the leniency program would make it more difficult for the competition authority to detect cartels, as cartel members would not have to fear that a leniency application might be filed by a fellow conspirator. It is to be hoped that the leniency program as designed will actually be implemented in the near future, and in turn lead to higher cartel detection. This would also be accompanied by a higher incentive for victims to claim private damages, even though there are many more factors that influence a culture of private enforcement.

In Brazil, various projects to strengthen private enforcement are ongoing. The most outstanding is the pending legislative process for Law No. 11,275/2018 that *inter alia* seeks to introduce double damages liability for cartel participants, with a privilege included for leniency applicants that would make them liable for single damages only, assuming they can provide CADE with additional information that helps in calculating the harm caused by the infringement, without being jointly and severally liable for harm caused by other cartel members.<sup>38</sup> In addition, CADE is actively guiding businesses on its

<sup>32</sup> See e.g. Bundeskartellamt (Federal Cartel Office) Tätigkeitsbericht 2019/2020, p. 58, available here:

[https://www.bundeskartellamt.de/SharedDocs/Publikation/DE/Taetigkeitsberichte/Bundeskartellamt%20-%20T%C3%A4tigkeitsbericht%202019\\_2020.pdf?\\_\\_blob=publicationFile&v=5](https://www.bundeskartellamt.de/SharedDocs/Publikation/DE/Taetigkeitsberichte/Bundeskartellamt%20-%20T%C3%A4tigkeitsbericht%202019_2020.pdf?__blob=publicationFile&v=5).

<sup>33</sup> See Federal Cartel Office, Review of 2020, press release of 29.12.2020, available here:

[https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2020/29\\_12\\_2020\\_Jahresr%C3%BCckblick.html;jsessionid=E6BCE2AC6C89AC767A50B21452BA8A85.2\\_cid390?nn=3591568](https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2020/29_12_2020_Jahresr%C3%BCckblick.html;jsessionid=E6BCE2AC6C89AC767A50B21452BA8A85.2_cid390?nn=3591568).

<sup>34</sup> Speech by EVP M. Vestager at the Italian Antitrust Association Annual Conference - “A new era of cartel enforcement”, 22.10.2021, available here: [https://ec.europa.eu/commission/commissioners/2019-2024/vestager/announcements/speech-evp-m-vestager-italian-antitrust-association-annual-conference-new-era-cartel-enforcement\\_en](https://ec.europa.eu/commission/commissioners/2019-2024/vestager/announcements/speech-evp-m-vestager-italian-antitrust-association-annual-conference-new-era-cartel-enforcement_en).

<sup>35</sup> Global Competition Review, Mundt touts immunity from damages for leniency applicants, 10.09.2021: available here:

<https://globalcompetitionreview.com/mundt-touts-immunity-damages-leniency-applicants>.

<sup>36</sup> See also the last CPI Latin America Column by Peña, Competition Law in Latin America Is Facing New Challenges, 09.01.2022, available here:

<https://www.competitionpolicyinternational.com/competition-law-in-latin-america-is-facing-new-challenges/>.

<sup>37</sup> Colegio de Abogados de la Ciudad de Buenos Aires, Ley de Defensa de la Competencia Una Reforma Innecesaria y Que No Protege La Competencia, 10.02.2021, available here: <http://colabogados.org.ar/posicion/declaracion.php?id=299>.

<sup>38</sup> See also Honda/de Melo e Lemos/Assis de Almeida/Viglino, ICC Compendium of Antitrust Damages 2021, Brazil, p. 123.

leniency policy, having recently published new “Guidelines for Evidence in Antitrust Leniency Agreement Proposals with CADE” along with further guidelines on its private enforcement policy and on disclosure of evidence (Resolution No. 21/2018).

## Summary

The global debate on how to align leniency and private enforcement policy is in full swing. The central question here can be considered as: to what extent should leniency applicants be held liable in follow-on damage proceedings? It is likely that EU competition policy will be adjusted in coming years to fight the decline of leniency applications. In the meantime, the European Commission will not only make more use of other tools to detect cartels such as *ex officio* dawn raids, but also engage in global discussions with other competition authorities. Some other deficits related the EU’s private enforcement regime are yet to be addressed, such as the need for an effective tool for collective redress, especially for the benefit of the consumer. For that, the EU might not only draw inspiration from the U.S., but also from the Brazilian experience and its quite successful

model for class actions.<sup>39</sup> It remains to be seen whether adjustments to EU competition policy will set a new trend in the international competition law community, and how private enforcement will be treated within international organizations in the future. As other competition jurisdictions mature and gain experience, it would not be surprising to see the EU competition regime also be influenced by international trends. However, recent developments in Argentina and Brazil have shown that the global influence of EU competition law on the intersection of public and private enforcement might not be as strong as academic research suggests, and that more nuance in this discussion is needed – irrespective of whether independent solutions go in the right or wrong direction. Should the envisaged leniency and private enforcement policies in Argentina and Brazil be implemented as planned, it will be intriguing to see whether a culture of private enforcement develops in the next few years, and whether it actually can lead to a deterrent effect on cartels. Clearly, these are interesting times not only for research in comparative competition law, but also for the daily work of practitioners in both enforcement and private practice.

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<sup>39</sup> See e.g. Porto, *As ações ajuizadas com pedido de indenização por dano de cartel: uma análise empírica do estado da arte no Brasil*, 2017.