

Competition Law and Litigation

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Writ of Mandamus: Reduction in the Term of Injunctions

Interested parts cannot be harmed by judicial delay, based on the principle of good faith

Bill 2,121/2019 of the House of Representatives, has already been approved by both legislative chambers and is now awaiting review by the president to sanction or veto, to establish deadlines for the term of the injunction in (i) Direct Actions of Unconstitutionality, (ii) Claims of Infringement with Fundamental Precept, and (iii) Writ of Mandamus, in general.

At this moment, let us put aside the Direct Actions of Unconstitutionality and the Claims of Infringement with Fundamental Precept (without taking away any of their importance) and focus on the Writ of Mandamus. According to the 3rd paragraph of article 7 of Law 12,016/2009: *"The effects of an injunction, unless revoked or cancelled, will persist until the final decision."* The bill in this 4th article, modifies the wording of this paragraph into the following: *The effects of an injunction will persist for a period of 180 (one hundred and eighty) days, unless revoked or cancelled, and it will be judged immediately, under the penalty of loss of effectiveness, being given a single adjournment, also for a period of 180 (one hundred and eighty) days, provided that it is duly justified."*

In the words of Senator Antonio Anastasia, the purpose of the bill is "to remedy serious dysfunctionality in the performance of the jurisdictional function." This concern is extremely relevant given the notorious sluggishness of the judiciary (regardless of its causes).

However, in practice, the new deadline will at least cause a significant reduction in Writs of Mandamus, in not the end of them completely, which presumably, should be seen as legitimate at first.

Thus, there cannot be any guarantee that the merit will be decided in six or twelve months; especially when the topics are complex (and frequently, even when they are not that complex). The timing is annual and there are even cases with more than onedigit.

THIS DEMONSTRATES THE ATTEMPT TO SOLVE THE JUDICIAL SLUGGISHNESS (WHICH IS OFTEN JUSTIFIED BY THE EXCESS OF JUDICIAL PROCESSES IN BRAZIL) BY THE SIMPLE ELIMINATION OF AN ESSENTIAL GUARANTEE.

Who will launch an innovative tax thesis without the assurance that the taxing authority's requirements will be suspended while the Judiciary discusses the issue? Who will launch a question about the evidence for a conviction by the Administrative Council for Economic Defense's (CADE, in Portuguese) when the sanction can be carried out in six or twelve months? And so on... if the parties overcome the demands, they have already carried out the sanctions and reparations will demand from the Judiciary again, in an endless cycle.

The legitimate question is the following: What is the solution?

Certainly, canceling the guarantee is not it. For the reason that, the Brazilian Judiciary is slow and admits having many challenges, many of those presented by the Government itself and/or from its autarchies.

The solution is clearly in the creation of conditions for a speedier functioning judiciary.

There is no point in creating an impediment for the use of Writ of Mandamus - which can also be considered as a breach to the principle that the Judiciary must appreciate certain issues that are raised. It may be alleged that it is possible to file an ordinary action with a request for injunctive relief or a precautionary measure, but then the benefit of the Writ of Mandamus, which is greater agility will be withheld from those who feel harmed.

The interested parts cannot be harmed by the judicial sluggishness, based on the principle of good faith, beyond the delay itself (which is already serious damage). The same reasoning is applied to the Direct Actions of Unconstitutionality and Claims of Infringement with Fundamental Precept.

Lastly, the Presidency of the Republic must veto Bill 2,121/2019 and start to pursue the creation of conditions that warrant a speedier Judiciary performance.