Competition Law and Litigation

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Statute of limitations on claims involving competitive damages

It is never too much to point out the importance of prescription. It constitutes a loss of the right of action by the creditor and/ or beneficiary of a right for not using it. It is a punishment for inaction. If the prescription may seem unfair, it constitutes an instrument of social peace and legal certainty. In fact, social peace stems from a legal certainty. Everyone who does not exercise their rights must know that he can lose it in the name of social peace - disputes should not be held up - and legal certainty - a debtor cannot be activated at a time when the memory and evidence of his defense are no longer available. Anyone who, for example, commits an infraction - voluntarily or involuntarily - can only be activated until a certain moment because he must know that, from that moment on, he can move on his life normally. This is social peace and legal security. It must be added the importance of the punishment of negligence since the holder of a right must exercise it; if not, there is the risk of losing the right to exercise.

José Fernando SIMÃO explains that "the basic grounds of prescription are actually two: legal certainty and negligence of the right holder". In his iconic work, Youssef Said CAHALI adds other justifications and clarifies that "the social interest in which the legal relations do not remain indefinitely uncertain justify the prescription; the presumption that those who disregard the exercise of their own right had no desire to preserve it; the utility of punishing negligence; and the destructive action of the time that destroys everything".[1]

Now, let's move on to the specific items of the herein article.

[1] CAHALI, Youssef Said. Prescrição e Decadência. São Paulo: RT, 2012, p. 23.

I. THE BEGINNING OF THE PRESCRIPTION TERM:

According to José Fernando SIMÃO, the prescription "starts on the commencement of the aspiration, therefore, since the right holder can claim the act or the omission"[2]. But he reminds that "part of the doctrine consider that the origin of the suit is not sufficient (action nata), but is necessary the knowledge of the fact"[3] . Accordingly, there are two key points to define the beginning of the prescription term: (i) the commencement of the aspiration and (ii) the knowledge of the fact.

Decisions have been contradictory in the case of actions for competitive damages (i.e. arising from infractions against the economic order). There are decisions that consider the term for the counting of the prescription period:

a) From the fact considered as an infraction, regardless of the knowledge of the victim

***Cobraço vs. ArcelorMittal* (Steel Cartel)[4]**

The decision of the lower court, dated from April 27, 2012, affirmed expressly that: "the initial term of the prescription is the moment of the occurrence of the right injury, a universal understanding of the action nata principle". The Court of Appeal upheld the judgment.

There are two decisions (Special Appeals – Resp, in its Portuguese abbreviation) that, although did not discuss cases of competitive damages, involve actions for damages.

Resp No. 1168336/RJ, Minister Nancy Andrighi, judged on March 22, 2011.

> "Article 189 of the Brazilian Civil Code established the actio nata principle, setting the date of the origin of the subjective right of action as dies a quo for the counting of the prescription term, regardless of the effective knowledge of the victim. In other words, the initial term of the prescription is the date in which the legit interest for action appear, and not on the date in which the victim has knowledge of the damage. This is an objective *criterion,* adopted by the legislator as a mean to establish a certain and determined rule for fixing and counting the periods of prescription."

REsp No. 1003955/RS, Minister Eliana Calmon, judged on August 12, 2009.

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[2] Op. cit., p. 207.
[3] Op. cit., p. 208.
[4] Case No. 98481587820068130024 – Court of Justice of Belo Horizonte/MG – Plaintiffs: Cobraço Comercial Brasileira de Aço Ltda. and Cobraço Serviços Ltda. Defendant: Companhia Siderúrgica Belgo Mineira (ArcelorMittal Brasil S.A).

> "5.2 ***A QUO* TERM OF PRESCRIPTION:** the initial term of prescription arises with the origin of the aspiration (***actio nata***), considered as the possibility of its legal exercise. The prescription term is counted from the **occurrence of the injury**, noting that is irrelevant its knowledge by the right holder".

b) From the damage´s knowledge by the holder of the claim

***Air Liquide vs. Granel Química* (Gases Cartel).** Judge Gil Cimino, judged on July 22, 2017[5].

> "The a quo term of the prescription period is the date in which the plaintiff took notice of the supposed existence of the violation to the competitive right by the defendant, which created a situation of impossibility of negotiation of better prices, facilitating abusive readjustments".

***Hospital de Caridade de Erechim vs. White Martins* (Gases Cartel).** Judge Voltaire de Lima Moraes, judged on March 19, 2015.[6]

> "The initial petition elucidates that when the plaintiff became aware of the excess paid during the years of successive and uninterrupted contracting, as well as of the recognition of a cartel in the commercialization of the product for hospital use, he rescinded the contract (at the beginning of 2013). Thus, in principle, it is only from this time on that the plaintiff became aware of the breach of the law discussed herein, which was then the initial mark of the counting of the period of prescription."

The Brazilian Superior Court of Justice (STJ, in Portuguese) also manifested its opinion in a civil action for damages:

> "Thus, it is to be recognized that the emergence of the compensatory claim does not necessarily occur at the moment of the injury to the right, but rather when the holder of the violated subjective right is fully aware of the violation and of its entire extent, as well as of the responsible for the illicit, and there is no condition that prevents him from exercising the correlative right of action (claim)."[7]

However, there are several understandings that aim to define the moment of knowledge of the subjective right by its owner. These are: (i) from the publication of the initiation of the

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[5] Case No. 01303161520118260100 – Court of Justice of São Paulo (TJSP). Appellant: Air Liquide Brasil Ltda. Appellee: Granel Quimica Ltda.

[6] Case No. 04754655220148217000 – Court of Justice of Rio Grande do Sul (TJRS). Appellant: White Martins Gases Industria Ltda. Appellee: Hospital de Caridade de Erechim.

[7] REsp No. 1347715/RJ, Minister. Marco Aurélio Bellizze, judged on December 4, 2014.

investigation by the antitrust authority; or (ii) from the publication of the conviction by the Administrative Council for Economic Defense (CADE, in Portuguese) or by the criminal court.

This last understanding is explicitly displayed in Senate's Draft Law No. 283 of 2016, which deals with the *prevention and repression of infractions against the economic order, in order to improve the dissuasive nature of the fine imposed by the Administrative Council for Economic Defense (CADE) in convictions for breaches of the economic order, to stimulate the filing of private lawsuits for the cessation of infractions, as well as compensation for damages resulting therefrom.*

> Article 4. The Law No. 12529, of December 30, 2011, shall become effective with the following provisions:
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> "Article 46-A. When the action for damages is derived from the right provided in article 47, there shall be no prescription during the validity of the investigation or administrative proceeding within CADE.
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> 1st Paragraph. The claim to reparation for damages caused by infractions to the economic order foreseen in article 36 of this Law expires in 05 (five) years, beginning its count from the unequivocal knowledge of the illicit.
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> 2nd Paragraph. **The unequivocal knowledge of the illicit shall be deemed to have taken place upon the publication of the final judgment of the administrative proceeding by CADE or, alternatively, upon the outcome of the criminal case."** (O.G.) (our griffins)

Anticipating the Draft Law, it was recently decided, in the context of an action for compensation for damages arising from the cement cartel (*Itambé vs. Mendes Júnior Engenharia*), that the dies a quo of the prescription period is the date of CADE's decision. However, the decision considered the three-year period stipulated in the Brazilian Civil Code, not the five years proposed in the Bill:

> CIVIL LIABILITY – Action for damages – Illicit Act – Formation and participation in cartel to increase the cement price (...) PRESCRIPTION TERM. Application of the rule stipulated in the 3rd paragraph of article 206, V, of the Brazilian Civil Code, and not the rule stipulated in article 205 of the Code – PRECEDENTS – **INITIAL TERM OF THE PRESCRIPTION PERIOD – "Dies a quo" of the prescription term that corresponds to the date of CADE's decision,** to the occasion of the judgment of motions for clarification – **It is only possible to talk about a breach of the law, in the specific case, once the administrative practice has recognized an illicit conduct by the defendants,** on the occasion of the judgment of the motions for clarification against CADE's decision, given that it was only on that occasion that the appellee, holder of the violated subjective right,

> came to know the fact and the extent of its consequences, according to the action nata principle.[8] (O.G.)

In the same understating of the Draft Law, there was a decision in the case ***FEHOSP vs. White Martins and others*** **(Gases Cartel)[9]**:

> "I reject the preliminary argument of prescription of the claim of the right of the plaintiff. It was demonstrated in the records (pages 1035/1041) the existence of a decision pronounced in the Criminal Action No. 00045179520094036181. This case had as its object the conviction of the defendants for a crime against the economic order.
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> Since the decision is from March 19, 2012, and its res judicata occurred on March 27, 2012, there is the understanding of Article 200 of the Civil Code: "When the action arises from a fact that should be determined in the criminal court, it shall not be subject to the prescription period before the respective final judgment". "(Decision of March 3, 2015)

Therefore, there are two defining points on the beginning of the prescription term, but (i) there is no doubt about the date of the publication of CADE's final decision (legal presumption), (ii) we tend to consider that the criminal action is its res judicata. One defect of this paragraph is the idea that the two decisions - administrative and criminal - will be condemnatory, without accepting the possibility of controversy. There is also the possibility of a Class Action, whose "outcome" (or final decision) should also be included among the hypotheses of the definition of the beginning of the prescription period. A curious point to consider here is the total unnecessary of the caput; in fact, what is the point in the pause of the prescription period if it has not yet begun?

Therefore, if the caput is maintained, the 2nd paragraph should be excluded, on the contrary, if the 2nd paragraph is maintained, the caput should be excluded. Obviously, it is necessary a renumbering.

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[8] Case No. 21038890920188260000 – Court of Justice of São Paulo (TJSP). Judge Caio Marcelo Mendes de Oliveira, judged on October 11, 2018.

[9] Case No. 10653176520138260100 – Court of Justice of São Paulo (TJSP). – Plaintiff: FEHOSP – Federação das Santas Casas e Hospitais Beneficientes do Estado de São Paulo; Defendants: White Martins Gases Industriais Ltda.; Air Liquide Brasil Ltda.; Linde Gases Ltda.; Air Products Brasil Ltda.; IBG – Indústria Brasileira de Gases Ltda.

II. END OF THE PRESCRIPTION PERIOD

The Brazilian Antitrust Law (Law No. 12529/2011) establishes, in article 47, the right of those who are damaged to file claims in order to *"receive the compensation for losses and damages"*[10]; but it does not inform the prescription term for this claim, reason why the Civil Code is necessary for the interpretation.

According to the 3rd paragraph of article 206 of the Civil Code, the prescription of the actions for damages occurs in a 3-year term. However, there are some cases in which the Judiciary have given a prescription term superior to the one stipulated in the Civil Code.

This is the case of a decision from the Court of Justice of Rio Grande do Sul[11], in a claim filed by Santa Casa de Caridade de Dom Pedro against Linde Gases for its performance in the Gases Cartel[12], in which a 10-year prescription term was applied, since it was understood that it was not only an action for damages.

The Draft Law aims to define a 5-year term for the prescription of claims to compensation of damages caused by infractions to the economic order foreseen in article 36 of the Antitrust Law.

In any case, when the action is originated from a fact that is also a crime, the prescription does not occur before the final decision, as provided in article 200 of the Civil Code[13]. That marks the importance of establishing who defines what is crime or not: the judgment of the action for damages or the criminal Judgment. As long as this doubt is not solved by the jurisprudence, we will have potential conflicts between the two Judgments.

III. INTERRUPTION AND SUSPENSION OF THE PRESCRIPTION PERIOD

The major reason for the difficulty of the article mentioned to solve the problem is the suspension of the prescription period during an administrative inquiry. A company can be accused and the representation may result in an investigation that goes through the years. It should be noted that the administrative inquiry does not necessarily require notification of the accused; the prescription period will remain suspended, without the accused even knowing the possible claim,

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[10] Article 47. The aggrieved parties, on their own accord or by someone legally entitled and referred to in Article 82 of Law No. 8078, of September 11th, 1990, may take legal action in defense of their individual interests or shared common interests, so that the practices constituting violations to the economic order cease, and compensation for the losses and damages suffered be received, regardless of the investigation or administrative proceeding, which will not be suspended due to Tribunal action.

[11] Case No. 0053119720168217000 – TJRS. Judge Vicente Barroco de Vasconcellos.

[12] Administrative Proceeding No. 08012.009888/2003-70

[13] Article 200. When the action is originated from a fact that should be decided on a criminal judgment, the prescription will not occur before the respective final decision.

noting a clear violation of the legal certainty. However, in the light of the above amendment, this breach will not occur.

But of course, if the Bill of Law is approved without the amendment in question, we will have a situation where any delay in informing the accused of the existence of the investigation will result in the loss of evidence (witnesses are no longer found, documents can be eliminated in the time, materials are no longer able to pass skills, etc.).

Proposed by Senator Aécio Neves, Bill of Law No. 283/2016 attempts to define the issue, although without success, by adding to the Antitrust Law the article 46-A: "*When the action for damages is derived from the right provided in article 47, there shall be no prescription during the validity of the investigation or administrative proceeding within CADE.* "

According to the Reporting Senator Armando Monteiro, in the Draft Law's last opinion[14]:

> This legal issue has a relevant economic impact, since the initiation of an investigation and/or administrative proceeding within CADE does not suspend or interrupt the counting of the prescription period for the actions for compensation of competitive damages stipulated in article 47 of the Antitrust Law, contrary to what happens, for example, in the European Union. Therefore, if the administrative decision takes more than three years to be rendered and the party is already aware of the violation, for example, by disclosing of the Leniency Agreement in the media, the claim of the right to file for civil damages may be prejudiced. Add to the prescription short-term the fear of high lost costs in the case that the illicit is not proved, and the result may be the discouragement for potential sufferers to comply with these demands and seek compensation for damages. Thus, once again, the amendment provided by the Draft Law represents an incentive to actions for damages, increasing the cost of anticompetitive behavior and thus discouraging them.

This is an important position, but unfair to any accused, since the evidence becomes extremely difficult, if not impossible, after a certain period of time. As noted above, a breach of legal certainty is clear.

When the Draft Law passed the Commission of Constitution and Justice of the Senate, it obtained the Amendment No. 3 which, in paragraph 1, established a five-year term for prescription, "*starting from the unequivocal knowledge of the illicit.*" Since this unequivocal knowledge of the

[14] Legislative Report by the approval of the bill and the amendments No. 1 to 3 – CCJ, of May 24, 2018. Available at: https://legis.senado.leg.br/sdleg-getter/documento?dm=7736043&ts=1529437623606&disposition=inline&ts=1529437623606 [Access on September 27, 2018]

illicit would be a complicated investigation, paragraph 2 established two alternative presumptions:

> The unequivocal knowledge of the illicit act is considered to occur when the final decision of the administrative proceeding is published by CADE or, alternatively, at the end of the criminal action.

This amendment, however, renders the caput of Article 46-A useless, since there is no reason to suspend a period of time which has not yet begun. Therefore, it is suggested the elimination of the caput and the renumbering of the paragraphs.

Regarding legal certainty, the main concern of this article, the accused of an infraction already knows, at the beginning of the proceeding, that, in the event of being convicted, he may be sued in actions for competitive damages. The Draft Law did not, however, consider the hypothesis that a proceeding ends with agreements by all the defendants; it is important to consider the final homologation of the agreements by CADE.

Currently, the courts also consider that the outcome of the criminal action also suspends the prescription period. It is worth remembering the decision of the Appeal of the case *FEHOSP vs. White Martins e outros* (Gases Cartel)

> "It is true that, according to page 274 of the present appeal, the Criminal Action No. 00045179520094036181 was filed by the Public Prosecutor against the representatives of the appellee companies, in order to determine the possible formation of the cartel in the market of the distribution of industrial gases. The criminal action was proposed by the year of 2009 and judged in 2012.
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> Because of this, and in accordance with article 200 of the Civil Code, **the prescription term for the case was suspended."** (O.G.) (Case No. 21966942020148260000 - TJSP, Judge Sergio Alfieri, judged on August 8, 2015)

Although the Bill of Law has not yet been converted into law, parties interested in joining an action for competitive damages and who wishes to wait for the final decision of the antitrust authority may use the judicial protest institute to interrupt prescription, pursuant to article 202, II, of the Civil Code. However, there is a great risk in the use of time since the article 202 of the Civil Code makes it clear that the interruption of the prescription "*can only occur once*".

This brings us to an impasse since the judicial interruption of the prescription is independent of the administrative proceeding. In fact, the recent judgment on the subject (*Itambé vs. Mendes*

Júnior Engenharia) established that the filing of the claim did not depend on the previous exhaustion of the administrative proceeding.