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Gómez-Acebo & Pombo

Commencement of the limitation period for actions for damages resulting from infringements of competition law

Ángel Carrasco Perera
Professor of Civil Law, Universidad de Castilla-La Mancha
Academic Counsel, GA_P

This paper examines whether the conditions for the limitation period to start running are met when an action for damages for breach of competition law is brought without waiting for a prior administrative sanctioning decision.

1. What the claimant needs to know for the limitation period to start running

According to Art. 10(2) 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, the limitation period (with a duration of at least five years, without distinguishing between damages in contract and in tort!) for bringing actions for damages shall not begin to run until the infringement of competition law has ceased and the claimant knows, or can reasonably be expected to know: (a) of the "behaviour" and the "fact" constituting an infringement of competition law; (b) that "the infringement of competition law caused harm to it"; and (c) the "identity of the infringer". The transposition of this rule by art. 74 of the Spanish Competition Act (amendment published in the Official Journal of Spain of 27 May 2017) is not entirely consistent with the Spanish language version of the Directive, which in turn is a subtly deviated translation of the English language version. From the outset, it is not the same to have *full knowledge of the harm suffered* as to have *knowledge of the fact that harm has been suffered*. I will come back to this later, but first we should explore some general considerations

in relation to the limitation period for competition law actions. From now on I will refer to the rules as transposed into Spanish law.

2. Public and private enforcement in competition law

It is well known that the directive has sought to establish a duplicity of causes-of-action system, consisting on public and private remedies in competition law infringement proceedings, and that private remedies may rely on a prior determination of liability by a national or European competition authority or may be activated regardless of whether administrative proceedings have been initiated or concluded, without prejudice to the advantages for claimants of the existence of a prior administrative penalty (cf. art. 75). We thus speak of stand-alone claims and follow-on claims.

We must note that in the current legal system (not so in the 1989 amendment to the Competition Act ('LDC'): Judgment of the Supreme Court of 8 June 2014: sugar cartel), stand-alone claims are subject to their own autonomous limitation period, regardless of whether or not public infringement proceedings have been opened. This is clearly demonstrated by art. 74(3). If the limitation period for a stand-alone claim is interrupted when administrative sanctioning proceedings are initiated in respect of an infringement "related" to the action for damages ("*relativo a una infracción 'relacionada' con la acción de daños*", which is a mistranslation of "in respect of an infringement to which the action for damages relates", the latter denoting a more direct relationship between what is claimed in the civil claim and the subject matter of the administrative procedure), it is because that period already began to run. That is to say, the dies a quo of the civil limitation period can and must be triggered regardless of whether administrative sanctioning proceedings have been initiated or concluded. The same interruption of the limitation period occurs when an extrajudicial settlement procedure is initiated in respect of the parties to this alternative procedure. This legal prefiguration must be borne in mind because from the reading of some Spanish case law it seems to be accepted as an indisputable fact that the claimant may delay the commencement of the limitation period until the moment he knows of the administrative decision on the infringement (cf. Judgment of the Madrid Companies Court No. 12 of 9 May 2014: decennial insurance cartel) or, in other words, that, in matters of limitation, the claimants are always in the position of waiting to litigate a follow-on claim.

3. The task of assessing the harm

The enormous difficulty of assessing harm in this sector is universally accepted. In particular, because defendants and claimants will ordinarily be plural operators and, between them, parties may be randomly distributed who claim as direct buyers or suppliers of the cartel; others who are buyers of the direct buyers or are suppliers of the direct suppliers of the cartel; third parties who are providers or recipients of business services of the direct or indirect buyers; and finally, end consumers. Despite the fact that there is no significant claim in this sector

that is not accompanied by expert witness reports on complex econometric models, the not always verbalized feeling is that the correct calculation of the harm is a close to impossible undertaking; a finding of liability (not just a judgment), however, must take place (cf. art. 76(2)) and the judge cannot be content with giving a verdict of non liquet despite the absence of conclusive evidence.

If the correct amount of damages is a virtually unachievable objective within administrative proceedings - which has in principle no limited resources at its disposal to establish the facts - it is a fantasy to think that evidential certainty can be obtained through private litigation, where all parties have an incentive to *invest only limited amounts in the quest for truth*. But it so happens that administrative determinations of cartel liability rarely make a pronouncement on whether the behaviour caused private harm to individuals and *never* dare to make an estimation of the *value* of such harm, which are left aside for determination, where appropriate, at private litigation. This is so even in the case of joint and several liability administrative findings, which in fact leaves interested parties with no real means of enforcing reimbursement between co-debtors, rendering useless the provision of art. 73(5) ("on the basis of the relative liability for such harm"). And it also in fact makes impossible scholastic speculation, which is at the root of (the otherwise unjustified rule) art. 77: as if the claimant settling with one of the cartel operators could know in advance such operator's "share in the harm" and the "remaining" share of compensation that is not recovered by settling with the same.

4. The "extent" of the harm

The above digressions were geared to the following. There is a tendency in Spanish law and the civil judiciary to repeat as a universal motto that civil liability actions, in general, do not begin to run until the fact of the infringement, the identity of the infringer and the "extent" of the compensation due (or of the quantified harm) are known[1]. An explanation of what is meant by "knowledge of the extent" has never been offered in great detail[2], but the series of court

[1] Cf. Judgment of the Supreme Court of 2 April 2012: "As the recent Judgment of the Supreme Court of 25 April 2013 recalls, the beginning of the limitation period for tort liability actions is determined by the harmed party's knowledge of the existence of the act that determines liability ("as of the injured party knew about it"). The initial day to bring the action is the day on which it may be brought, according to the principle of *actio nondum nata non praescribitur* (the action which has not yet arisen cannot lapse) (Judgments of the Supreme Court, among the most recent, of 24 May 2010; 12 December 2011, and 9 January 2013, so that the limitation period does not begin to run against the party who intends to bring the action until it has the appropriate factual and legal elements to establish a situation of full suitability to litigate (i.e. until *the harmed party has actual knowledge of the extent or degree of [bodily] harm* suffered)". It was a problem of personal injury after-effects.

[2] Cf. the sought indeterminateness of the Judgments of the Supreme Court of 5 June 2008 or 25 March 2009: "for not yet knowing the *basis* for acting on it". And of the Judgment of the Supreme Court of 12 December 2011: "appropriate factual and legal elements to establish a situation of *full suitability* to litigate". Or "knowledge of the harm *actually caused*" (Judgment of the Supreme Court of 4 October 2012). Or "as of

decisions in which this expression is usually contained leads one to believe that the requirement occurs within the cases affected by the doctrine of "continuous harm", harm consolidated by diffuse consolidation, especially in the case of personal injury, harm caused by unfair competition, environmental harm and harm caused by infringements of intellectual property law. The need for "consolidation" of the harm is then ordinarily mentioned. An infringement of arts. 101 and 102 of the Treaty on the Functioning of the European Union may sometimes constitute continuous infringement; but note that this, which may be more common in cases of abuse of a dominant position, can hardly occur where the infringement is a cartel. It is true that a cartel may last a long time, but the *harm caused to other operators* (direct and indirect buyers, etc.) is usually *punctual*. The buyer in our case suffers harm when he buys the cartelized product or service; and if he buys it many times, each time he makes a purchase, the harm consists of the punctual harm of the overcharge. Neither the infringement nor the harm can be diffuse *with respect to each of the harmed potentials* nor to each of the *acts of purchase*. And the fact that the action for damages is not yet time-barred for those who bought later does not mean that it is not time-barred for those who bought the cartelized product earlier. In this respect, there is no kind of universal joinder between the injured parties or between their possible collective representations (cf. Judgment of the CJEU, *Peroxide*, 2015); there is no rule of closure whereby the dies a quo for any claimant is postponed until the cessation of the infringement as a whole.

If we think about it a moment, the conclusion that has just been proposed is self-evident. If the commencement of the limitation period were to depend on whether the claimant knew or could have known *before the proceedings* the amount of the compensable harm, as a result the risk of quantification and proof of harm would be borne by the defendant, rather than, as is logical, by the claimant. In addition, it would be considered that no limitation period would have commenced, even if there had been a claim, if the final and conclusive judgment were to grant an amount of compensation different from that requested, because this would reveal that the claimant did not in fact know when he sued what this amount was, that there was no *actio nata* (birth of the right to sue). This cannot be admitted, as art. 76(2) indirectly proves, as it starts from the obvious, implicit postulate that the risk of quantifying the harm is a risk of proof and proof is a risk of the claimant, but not a constituent element of the action in its course of limitation or a de facto or de iure circumstance that supports the claim. What the claimant has to know in order for the limitation period to commence are the contingencies of harm, whether punctual or continuous, but the quantification is his risk in the proceedings, without prejudice to the "help" that the judge wishes to give him thanks to art. 76(2). At least as far as the harm caused by the operation of cartels in the market is concerned (it is not so clear in other types of harm), the difference between the contingency of the harm and the amount of the harm is notorious.

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the total harmful result is known *quantitatively*" (Judgment of the Supreme Court of 12 February 2003). On other occasions, what needs to be known is only the "existence of the determining fact of liability" (Judgment of the Supreme Court of 25 April 2013).

5. The "attraction" of Spanish law

If the proposal here criticized indeed expresses the belief held in respect of harm-related case law, Spain would become an optimal forum for litigating against operators involved in international cartels, without the need for even one of the infringers to be domiciled or to have carried out marketing acts in Spain, it being sufficient that a person domiciled in Spain would wish to litigate as a claimant. Because the *Peroxide* judgment of the Court of Justice of the European Union clearly states that the place of commission of the wrongful act within the meaning of art. 7(2) of the Brussels I Regulation (EU) is the place of the singular materialization of the harm for each tortfeasor, which is equivalent to postulating as a jurisdictional connecting factor the domicile of the claimant (or of each of them). But Spanish civil law would also become the most convenient applicable law for claimants, who would end up choosing it in the event of litigation involving more than one defendant in accordance with art. 6(3) of Regulation (EU) Rome II. The "chain" of the law on limitation periods in Europe would be broken at its weakest "link", Spanish law, which would fatally attract to our whirlpool the rules of other jurisdictions. Because Spanish civil law is also one of the few[3] that in respect of limitation periods lacks a general rule (there are special rules on product liability and nuclear liability) on an absolute time limit to the limitation period, that is to say, a final time limit closing suability that is terminatively applied regardless of whether or not the claimant is aware of the circumstances that trigger the production of the dies a quo of the limitation period. In other words, if things in Spain were as they are here denied, and applying the Spanish civil law of limitation periods, the time limit for actions for damages would probably never begin to run and would never expire due to the passage of time.

6. The most likely praxis

If we were now asked to make a prospective assessment of the most likely future state of affairs under the present legislation, we would say (a) that we will not see a stand-alone claim outside the cases of abuse of a dominant position in which the harmed party is highly singularized; (b) that, when follow-on claims are filed, the adjudger will never question whether the limitation period for the action was born and eventually was consumed before the commencement of the administrative proceedings, and (c) that, once the administrative decision is signed off - which will almost certainly not contain any estimate of losses -, the limitation period will begin to run (or run again, if paragraph (a) is not allowed) regardless of whether those affected by the cartel or abuse of dominant position are in a position to actually assess the "quantitative extent" of the harm before they embark on court proceedings.

[3] Longstop limitation period: ten years in Germany, twenty in The Netherlands, for instance.