
URÍA MENÉNDEZ

Law transposing the EU Directive on damages claims arising from competition law infringements was passed

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On May 27, Royal Decree-Law 9/2017 was published in Spain's Official Gazette (*Boletín Oficial del Estado*, "BOE") of 26 May (the "Royal Decree-Law"), approving the text which transposes into Spanish law Directive 2014/104/EU on claims for damages arising from antitrust infringements. The rule is transposed six months late and has been processed through a fast-track procedure. The purpose of the new law, according to its Explanatory Memorandum, is to "guarantee that the damages suffered by subjects [...] as a consequence of such anticompetitive practices be effectively compensated".

The Royal Decree-Law modifies the Competition Law 15/2007 of 3 July (the "LDC", according to its Spanish acronym) (article 3) and the Civil Prosecution Law 1/2000 of January 7 (the "LEC", according to its acronym in Spanish) (article 4).

In general, the new regulation does not differ from the Directive, nor does it exceed its programmatic scope.

The most relevant aspects of the Royal Decree-Law are the following:

A) ENTRY INTO FORCE AND NON-RETROACTIVE APPLICATION OF THE NEW PROVISIONS

The legislative amendments introduced by the Royal Decree-Law came into force with the publication on the BOE on 27 May. Its transitory regime establishes the following:

- (i). On the one hand, the provisions of article 3 (i.e. those which modify the LDC, including, for example, the extension of the limitation period to take action or the rules on presumptions of the existence of a damage) do not apply retroactively. The scope of this provision will have to be examined by the courts.
- (ii). On the other hand, the provisions of article 4 (i.e. which modify the LEC) will only apply to damages claimed after its entry into force.

B) COMPENSATORY NATURE AND JOINT LIABILITY OF CO-OFFENDERS AND THEIR PARENT COMPANIES

The Royal Decree-Law establishes a general principle of full compensation for the damages suffered, in such a way that the injured party is entitled to receive from the offender compensation that includes: (i) consequential damages; (ii) lost profits; and (iii) accrued interest. Punitive damages are expressly excluded.

Furthermore, provision is made for the joint liability of co-offenders (companies, associations, unions or groups of undertakings). The co-offenders may exercise their right to claim from each other the part of the compensation which they have had to pay for the damages caused by the other co-offenders, according to their “relative liability”.

This principle of joint liability is exempted in cases involving small and medium-sized enterprises that meet with certain requirements, as well as entities that may have been benefited from full immunity from fines as a result of the implementation of a leniency programme in cartel cases.

Lastly, the Royal Decree-Law extends the liability to the parent company to offset damages caused by the restrictive practices of its subsidiary, unless it can be proven that the economic behaviour of the latter is independent. By doing so, a regime consistent with the practice of the EU courts and the LDC itself is established.

C) LIMITATION PERIOD TO TAKE ACTION

A new limitation period of five years is introduced into Spanish law to take action to claim damages suffered as a result of competition law infringements. This rule significantly extends the previous one year period for actions for damages in tort established in article 1968 of the Civil Code.

The day the five-year limitation period begins (*dies a quo*) will be taken into account as soon as the antitrust infringement has ceased and the injured party has knowledge or could reasonably have known **(i)** of the behaviour and the fact that it constitutes an infringement of competition law; **(ii)** the fact that the infringement of competition law has caused a damage; and **(iii)** the identity of the offender.

D) SCOPE OF THE COMPETITION LAW INFRINGEMENTS TO WHICH THE NEW REGIME APPLIES AND EFFECT OF THE COMPENSATION OF DAMAGES AS A MITIGATING FACTOR FOR THE PURPOSES OF CALCULATING ANTITRUST FINES

The infringements of competition law to which this regime applies are limited to articles 101 and 102 of the Treaty on the Functioning of the European Union and the equivalent provisions of the LDC (articles 1 and 2). Thus, the legislator has finally decided to exclude for these purposes the infringements of article 3 of the LDC, which refer to unfair competition acts that also amount to a restriction of competition, which was initially established in the prior draft bill, which was prepared by the Special Division of the Codification Commission (the “**Draft Bill**”).

The Royal Decree-Law also states that the effective compensation for damages before the competition authorities hand down a sanctioning decision will be considered a mitigating factor for the purposes of setting the amount of the antitrust fines (amendment of article 64.3.c) of the LDC).

E) NEW LEGAL CONCEPT OF CARTEL PRACTICES BETWEEN COMPETING COMPANIES

Another significant novelty of the Royal Decree-Law is the modification of the legal concept of cartel as defined in the Additional Provision Four of the LDC. This modification is in line with the practice of the European Union. On the one hand, it does away with the secrecy requirement. On the other hand, the new definition broadens the legal concept to include behaviours consisting of concerted practices between competitors (and not necessarily agreements), and which aim to coordinate their competitive behaviour in terms of prices, quantities, distribution of customers and markets and, in general, other anti-competitive measures against competitors.

F) EFFECTS OF PREVIOUS COMPETITION AUTHORITY DECISIONS

Unlike the Draft Bill, the rule ultimately approved that Spanish courts are not bound by the declarations of infringement made by competition authorities or courts of other Member States. It only grants them presumed effects *iuris tantum* of the existence of an infringement. In turn, the final decisions of infringement of the Spanish competition authorities or of the European Union are binding on Spanish courts. Notwithstanding this, this binding effect will only affect the existence of the infringement and the identity of the offenders, but not the rest of the sanctioning resolution (such as references to the effects of the infringing conduct on the market).

G) SPECIFIC RULES ON PRESUMPTIONS AND BURDEN OF PROOF

The Real Decree-Law retains the traditional criteria that the claimant has the burden of proof and needs to evidence (i) that it has suffered a specific damage; (ii) that such damage derives from the unlawful behaviour; and (iii) its quantification. Notwithstanding this, a rebuttable presumption of the cause of the damage is established for infringements classified as a cartel. If the damage cannot be accurately proven, the judge is authorized to reasonably estimate it.

Additionally, in cartel cases, if the claimant is an indirect client of the infringing company, a rebuttable presumption is established, as it is assumed that its supplier (the direct client) has transferred to its own clients the overpricing derived from the infringing conduct. In turn, if it is a direct client, no such presumption is established and it is the defendant—in order to be exempted from payment of compensation—who must prove that the plaintiff has transferred downstream, to its own clients, the overpricing that it allegedly paid to the infringing company as a consequence of the cartel practices.

H) ACCESS TO THE SOURCES OF EVIDENCE IS FACILITATED ALTHOUGH A DISCLOSURE REGIME CHARACTERISTIC OF ANGLO-SAXON SYSTEMS IS EXCLUDED. THE CONFIDENTIALITY OF BUSINESS SECRETS IS PROTECTED

The new legislation incorporates to the LEC a new and specific regulation on access to the sources of evidence applicable only to the procedures of claims for damages derived from antitrust infringements. The Draft Bill was much broader and proposed a general reform for all types of claims for damages, but the legislator has ultimately decided to limit it to the scope of damages derived from anticompetitive behaviours.

This new mechanism of access to the sources of evidence has a procedural structure similar to an injunction measure. It enables the claimant to request the judge to order the counterparty or third parties to provide access to some sources of evidence necessary to substantiate the claim. However, in any case, the principles of proportionality, necessity and suitability must be preserved. Additionally, sanctions are foreseen in case of inadequate use of the sources of evidence obtained by this means.

Unlike Anglo-Saxon systems, the new regime of access to sources of evidence does not allow indiscriminate access to all evidence related to the related antitrust infringement. The legislator has made it clear that it is not a system of “disclosure” similar to that of the US, nor will it allow the so-called fishing expeditions, specifically excluding “indiscriminate searches of information” from the Royal Decree-Law. Moreover, the possibility of the judge ordering access: (i) to requests for leniency in cartel cases; and (ii) to the settlement firm proposals in cartel cases, is expressly excluded. In addition, it is expected that the applicant for access to the sources of evidence will have to provide sufficient security to cover the expenses caused to the defendant or third parties for revealing the requested documents, as well as the damages that they may suffer as a result of the misuse of the information obtained.

Finally, the Royal Decree-Law also embraces the need to protect the confidentiality of business secrets of entities called to reveal documentary evidence. To this end, it provides specific mechanisms, many of them based on the practice of the European Commission or on Anglo-Saxon systems, to safeguard the confidentiality of this type of information; for example, limiting access to a predefined circle of parties subject to confidentiality obligations, access only within the court premises, etc.

ABOUT URÍA MENÉNDEZ

Uría Menéndez has a team which specialises in advising on procedures for claims for damages arising from antitrust infringements, which is formed by competition law experts and litigators with a proven track-record and with extensive experience in defending the interests of their clients in this type of litigation.

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