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Tightening the net around cartels: transposition of Directive 2014/104/EU on antitrust damages actions in Spain

The Council of Ministers has approved Royal Decree-law 9/2017, of 26 May, which transposes into the Spanish legal system Directive 2014/104/EU on antitrust damages actions. The adoption of this legislation is aimed at promoting the application of competition law in national courts in the form of actions for damages filed by individuals. This "private" enforcement of competition law will undoubtedly enhance the public enforcement traditionally carried out by the European Commission and the Spanish competition authority (CNMC), in a context in which a proposal to strengthen the powers of the National Competition Authorities to investigate and sanction competition law infringements in Europe has just been launched.

Royal Decree-law 9/2017 makes important amendments to the Competition Act and the Civil Procedure Act with a view to making it easier to claim damages suffered due to an infringement of the competition provisions.

With the entry into force of the new regulations, there will foreseeably be a major increase in actions for damages derived from the infringement of competition law provisions in Spain.

I. Introduction

Saturday 27 May saw the publication in the Official State Gazette of the long-awaited transposition of Directive 2014/104/EU 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 "**Damages Directive**") in Spain. Given the delay in the transposition, which should have taken place no later than 26 December 2016, the legislation has been adopted in the form of a Royal Decree-law.

The substantive reforms have been included in the Spanish legal system by the introduction of a new Title in the Competition Act (*Ley 15/2007, de 3 de julio, de Defensa de la Competencia* or "**LDC**"). The procedural amendments, on the other hand, were carried out via the reform of the Civil Procedure Act (*Ley de Enjuiciamiento Civil* or "**LEC**") and will be applicable to actions brought as of the entry into force of Royal Decree-law 9/2017, i.e. 27 May 2017.

II. The substantive reforms: amendment of the Competition Act

With regard to the Competition Act, the third Article of Royal Decree-law 9/2017 includes a new Title VI in the LDC, entitled "*Indemnification for damages caused due to practices that restrict competition*", comprised of eleven new articles (Articles 71

to 81 LDC). The amendment of Article 64.3, letter c) LDC is particularly interesting as it stipulates that the effective compensation of the damages caused will constitute a mitigating factor that the competition authority will take into account when setting the corresponding fine. Meanwhile, the Fourth Additional Provision of the la Competition Act is amended in order to broaden the definition of "cartel" and to include new definitions for the actions for damages regulated in the new Title VI.

The main amendments to the LDC implemented by Royal Decree-law 9/2017 are the following:

1. Injured party's right to full compensation from the infringer (new Articles 71 and 72 LDC)

After establishing the liability for damages caused as a result of the infringement of 101 and 102 of the Treaty on the Functioning of the European Union ("**TFEU**") and/or Articles 1 and 2 LDC and clarifying that this liability also affects the companies or persons that control the infringer (Article 71 LDC), the injured party's right to full compensation for the harm suffered is recognised, understood as the right to be in the same situation it would have been in had the infringement not been committed (Article 72 LDC).

This compensation will comprise the right to be indemnified for actual loss and loss of profit, plus interest. Royal Decree-law 9/2017 does not specify the *dies a quo* for the calculation of such interest, which we envisage will prompt lengthy debate, in view of Recital 12 of the Damages Directive, which states that it "*should be due from the time when the harm occurred until the time when compensation is paid*".

In any event, in line with the terms of the Damages Directive, Article 72, section 3º, LDC makes it clear that the right to full compensation will under no circumstances entail overcompensation, whether by means of punitive, multiple or other types of damages (such as the "*treble damages*" envisaged in the United States, where the obligation to indemnify may be as high as three times the damage actually suffered in order to ensure the deterrent effect of the system).

2. Responsibility regime for infringers of competition law provisions (new Article 73 LDC)

When the infringement of the competition law is carried out jointly by several companies (such as in the case of a cartel), Article 73.1 LDC indicates that responsibility will be joint and several. Therefore, all infringers will be jointly and severally liable for the damages caused to the injured parties, which means that any injured party may claim all of the damages suffered from any of the companies participating in the cartel, without distinction, and regardless of whether it has a relationship with it as supplier or purchaser. While section 1 of this rule establishes the joint and several responsibility of infringers *ad extra* vis-à-vis the injured parties for the infringement, section 5 of the same provision regulates responsibility *ad intra* among the infringers, establishing that any infringer may take action against the rest of the infringers for an amount to be determined according to its "*relative responsibility*" for the damage caused as a result of the infringement. This precept establishes a new concept, that of "*relative responsibility*", which is bound to generate intense debate and will have to be developed by case law.

The general regime for joint and several responsibility vis-à-vis the injured parties does, however, have two exceptions, one for SMEs and another for beneficiaries of the exemption from payment of a fine under a leniency programme.

(a) Special regime for SMEs:

When the infringer is an SME as defined in Commission Recommendation 2003/361/EC, of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises, it will only be liable to its own direct and indirect purchasers, provided the following cumulative conditions are met: (i) on the one hand, its market share in the relevant market was below 5% at any time during the infringement of competition law, and (ii) the application of the normal rules of joint and several liability would irretrievably jeopardise its economic viability and cause its assets to lose all their value (Article 73.2 LDC). In establishing this special regime, Article 73.2 LDC only refers to the liability of the SME "*to its own direct and indirect purchasers*". We envisage that, in practice, a debate will arise regarding whether this special regime should also regulate the SME's liability to its direct and indirect suppliers, to which the rule does not expressly refer.

In any event, the SME will not be able to take advantage of the special regime if it played a leading role, that is, it led the infringement or coerced other undertakings to participate therein, or if it is a repeat offender, having been found guilty of a competition law infringement previously (Article 73.3 LDC).

(b) Special regime for beneficiaries of the exemption to pay the fine in the context of a leniency programme:

Section 4 of Article 73 LDC establishes that the beneficiary of an exemption from paying a fine as a result of having collaborated with the Administration as part of a leniency programme, will only be jointly and severally liable to its direct and indirect purchasers or suppliers. With regard to other injured parties, it will only be liable on a subsidiary basis, when they cannot obtain full compensation from the other companies involved in the same competition law infringement. This provision seeks to avoid the actions for damages regime reducing or removing the incentives to take advantage of leniency programmes designed by competition authorities which have been so successful in detecting and dismantling a highly significant number of secret cartels.

Note that the exception only applies to the beneficiaries of an exception from payment of the fine, not to undertakings who subsequently just obtain a reduction of the fine for cooperating with the Administration.

3. Limitation period for exercising actions for damages in relation to competition law (new Article 74 LDC)

In accordance with new Article 74.1 LDC, the limitation period for actions for damages in relation to competition law will be 5 years, a lengthy term in comparison with the excessively brief period of one year established in Article 1968 of the Spanish Civil Code for the extra-contractual liability actions falling under Article 1902 of the Civil Code, which is how this kind of actions is usually processed (except in those cases in which the claimant and defendant are contractually linked, in which case the claim was generally processed via *ex* Articles 1101 and/or 1303 et seq of the Civil Code and the limitation period of five years established in Article 1964 of the Civil Code). With the entry into force of Article 74.1 LDC, our understanding is that the five-year limitation period established therein will apply to any action for damages in relation to competition law infringement, regardless of whether or not the infringer and injured party are linked contractually.

As for the *dies a quo* as of which said term would start to count, Article 74 LDC states, in section 2, that in order for the term to start to run, two cumulative requirements must be met, an objective one and a subjective one. The objective requirement consists of the infringement of competition law having ceased. And the subjective requirements consists of the claimant knowing, or being reasonably expected to know, the following three facts (which are cumulative): (i) the behaviour and the fact that it constitutes an infringement of competition law, (ii) the fact that the infringement of competition law caused harm to it and (iii) the identity of the infringer.

This term will be suspended if the national authority takes action for the purpose of the infringement of competition law to which the action for damages relates. Meanwhile, the suspension will end at the earliest one year after the infringement decision has become final or after the proceedings are otherwise terminated (Article 74.3 LDC). The term will also be suspended if any consensual dispute resolution procedure is initiated, although this suspension will only apply in relation to the parties involved or represented in the consensual resolution of the dispute (Article 74.4 LDC).

4. Binding effect of final decisions handed down by national competition authorities (new Article 75 LDC)

New Article 75 LDC establishes, in section 1, that a final decision of a national competition authority or a review court finding an infringement of competition law is deemed to be "*irrefutably*" established for the purposes of an action for damages brought before their national courts. In other words, the final decision finding an infringement of competition law will be binding on the court hearing the action for damages derived from the infringement.

If this final decision were handed down by the administrative or judicial authorities of another European Union Member State, section 2 of Article 75 LDC stipulates that, in this case, the existence of the infringement "*will be presumed, unless proven otherwise*".

5. Quantification of harm (new Article 76 LDC)

New Article 76 LDC regulates the quantification of harm. While the basic premise is that the burden of proving the harm suffered as a result of the infringement of competition law falls on the claimant, this norm establishes certain rules and presumptions designed to overcome the difficulties that the party harmed by a competition law infringement may encounter when attempting to determine and quantify the harm suffered due to the infringement. Section 2 of Article 76 LDC establishes

that, in those cases in which it is demonstrated that the claimant suffered harm, but it is practically impossible or excessively difficult to quantify them exactly, the courts are empowered "*to estimate the amount of harm*". Obviously, this "estimation" will at all times respect the principle of full compensation, meaning that the court will ensure that the injured party receives appropriate and just indemnification for the harm suffered, no more, no less. To that end, section 4 of Article 76 LDC envisages the possibility for the court to ask the national competition authority for advice on how to determine the amount of damages. Meanwhile, section 3 of the article establishes the important presumption that cartel infringements result in harm. However, this is a rebuttable presumption, meaning that the infringer may attempt to refute it and demonstrate that no harm was caused to the claimant by the cartel.

6. Consensual dispute resolution (new Articles 64.3.c), 74.4, 77 and 81 LDC)

Articles 74.4, 77 and 81 LDC regulate the effects that the consensual dispute resolution will have on actions for damages.

On the one hand, and as we have indicated when addressing the limitation period, this period will be suspended and will not resume until the consensual dispute resolution procedure has concluded. This suspension will logically only apply in relation to the parties who are or have been involved in the consensual dispute resolution process. Moreover, Article 81 LDC envisages the possibility for the court to order a suspension of the action of damages for a maximum period of two years in order to facilitate the conclusion of the consensual dispute resolution process.

As for new Article 77 LDC, it regulates the effects of consensual resolutions on the right to compensation for harm. It establishes that the right to compensation for harm for an injured party who has reached a consensual agreement with an infringer or infringers, will be reduced by the proportional part corresponding to the settling infringers regarding the harm suffered as a result of the infringement (section 1 of Article 77 LDC). Moreover, non-settling infringers will not be able to take action against the settling infringer in order for it to contribute to the remaining compensation. However, unless the consensual agreement stipulates otherwise, the injured party will not be able to claim the remaining compensation from the settling infringer if the other non-settling co-infringers are unable to pay it.

With a view to offering an incentive to infringers who reach a consensual agreement with injured parties, it is established that the competition authority, when imposing the corresponding fine, must take the fact that the infringer effectively paid indemnification for the harm caused by its infringement into account as a mitigating factor before issuing its decision (new letter c) of Article 64.3 LDC).

7. Passing-on defence (new Articles 78 to 80 LDC)

With a view to avoiding any kind of over-compensation of the injured party, Article 78 LDC clarifies that the right to compensation recognised in favour of the injured party refers only to the "*overcharge actually suffered*" and that was not passed on. Moreover, it recognises the possibility for infringers/defendants to argue that the injured party/claimant passed on all or part of the overcharge resulting from the competition law infringement. The burden of proving that the overcharge was passed on will be borne by the infringer/defendant, and in order to do so it will be entitled to request disclosure of evidence in the possession of the claimant/injured party or third parties.

In line with the above, new Article 79 LDC regulates the possibility for indirect purchasers to also claim indemnification for the harm suffered as a result of the direct purchasers having passed on the overcharge caused by the competition law infringement to them. In this regard, it is clarified that said indirect purchaser will bear the burden of proving the "*existence and amount of the passing-on*", and in order to do so will be entitled to request the disclosure it deems necessary and appropriate.

With a view to facilitating claims by said indirect purchasers, a refutable presumption is established that the indirect purchaser has demonstrated that the overcharge was passed on to it if the following three cumulative conditions are met: (i) the defendant has committed a competition law infringement, (ii) the result of said infringement was an overcharge for the defendant's direct purchaser and (iii) the indirect purchaser acquired the goods or services involved in the infringement, or acquired goods or services derived from or containing the same. Therefore, if the indirect purchaser duly demonstrates that these three conditions are met, it will be assumed that an overcharge has been passed on to it and, as such, the indirect purchaser will be deemed to have suffered harm.

Conscious of the risk of over-compensation of the injured parties and multiple liability of the infringers, Article 80 LDC establishes the need for the courts that hear the action for damages to take into account the existence of other damages proceedings that have already concluded or are in progress at the same time and that were brought by purchasers situated at different levels of the supply chain.

III. Procedural reforms: amendment of the Civil Procedure Act

Meanwhile, Article 4 of Royal Decree-law 9/2017 amends the LEC introducing a new Section 1 bis in Chapter V (entitled "*Evidence: general provisions*") of Title I ("*Standard provisions for declaratory actions*") in Volume II ("*Declaratory actions*"). This new Section 1 bis is entitled "*Access to sources of evidence in actions for damages derived from competition law infringements*" and comprises Article 283 bis a) to Article 283 bis k).

In the Spanish legal system, the presiding principle is that the claimant bears the burden of proving the facts on which its action is based (Article 217 LEC). In the case of actions for damages, this means that the claimant must prove: the existence of an offence (the competition law infringement), the existence of harm (whether actual loss or loss of profit) and the causal relationship between the offence committed and the harm claimed. However, the victim of a competition law infringement can encounter serious difficulties when it comes to proving the existence of the same and the harm it caused, as the evidence it needs to do so may not be in its possession, but in that of the infringer and/or third parties.

With a view to attempting to resolve this "*information asymmetry*" (as it is termed in Recital 15 of the Damages Directive), specific regulations have been introduced for the disclosure of documentary evidence in actions for damages in relation to competition matters.

The disclosure of evidence can be requested not only by the injured party resulting from a competition law infringement seeking to bring an action for damages, but also by the defendant in the action (the alleged infringer) who may also have an interest in the disclosure of evidence by the claimant or third parties in order to prepare its defence, mainly if its intention is to invoke the passing-on defence to which we referred earlier.

The request for the disclosure of evidence must be justified, and the claimant must present "*a reasoned justification containing reasonably available facts and evidence sufficient to support the plausibility of its claim for damages derived from a competition law infringement*", (Article 283 bis a).1) LEC), or regarding its defence, in the case of the defendant. The request will identify "*specified items of evidence*" or "*relevant categories of evidence, circumscribed as precisely and as narrowly as possible*" (section 2 of Article 283 bis a) LEC).

As for the moment at which the application should be made, it could be submitted before the corresponding action for damages is brought, in order to prepare it, in the claim itself or while proceedings are pending (Article 283 bis e) LEC). However, if access to the sources of evidence is requested before the action is brought, the applicant will have to file its damages action within 20 days of the expiry of the evidence period. The competent court to hear the application will be the one hearing the action for damages or the one with jurisdiction to hear the main claim if it has not yet been filed (Article 283 bis d) LEC). In the event that the application is *ante demanda*, section 2 of Article 283 bis d) LEC expressly states that no pleas to jurisdiction may be filed, albeit the court may of its own motion decline jurisdiction if it considers that it is not competent.

When ordering said disclosure, the court will consider the "*the legitimate interests of all parties and third parties concerned*" (Article 283 bis a) LEC, section 3) and will ensure that the persons who have an interest in the disclosure of documents can be heard before the disclosure is ordered (Article 283 bis f) LEC). In this regard, Article 283 bis b) LEC expressly states that the interest of a company in avoiding actions for damages being brought against it due to a competition law infringement "*shall not constitute an interest that warrants protection*".

Moreover, it is established that the court will avoid the disclosure implying a "*non-specific search for information*" (Article 283 bis a) 3 b) LEC) or, in colloquial terms, a *fishing expedition*, and will maintain the confidentiality of the information to be disclosed, "*especially concerning any third parties*" (Article 283 bis a) 3 c) LEC). With a view precisely to avoiding any abuse, Article 283 bis c) LEC envisages the possibility of a court requiring that the applicant deposit a bond before disclosure can take place.

In relation to confidential information, Article 283 bis b) LEC establishes that the courts will adopt the measures they consider necessary to protect confidentiality. In this regard, section 5 of Article 283 bis b) LEC establishes the following measures: the possibility of redacting sensitive passages in documents, conducting hearings in camera, restricting the persons allowed to see the evidence, instructing experts to produce summaries of the information in an aggregated or otherwise non-confidential form, drafting a non-confidential version of the court decision or restricting access to certain sources of evidence to the representatives and legal defence of the parties and experts subject to confidentiality obligations. Moreover, section 3 of Article 283 bis b) LEC guarantees the full effect of the applicable confidentiality rules governing client and lawyer communications, as well as the rules on the duty of secrecy.

Article 283 bis k) LEC regulates the consequences of a breach of the obligations regarding confidentiality and the use of sources of evidence, which are clearly designed to act as a deterrent. Apart from the criminal liability that may be incurred, this provision envisages the possibility of the full or partial dismissal of the action or pleas made or opposed in the main proceedings by the party that fails to fulfil its confidentiality obligations, declaring said party civilly liable for the harm caused and ordering it to pay damages, in addition to ordering it to pay the costs of the procedure for access to the sources of evidence and the costs of the main proceedings. Moreover, it establishes that if the court considers that the breach "*is not serious*", instead of adopting one or more of the above measures, it can impose a fine on the party in question of between 6,000 and 1,000,000 euros. Moreover, its representatives and legal counsel could also be deemed "infringers" and ordered to pay separate fines.

Before ordering access to the evidence requested, the court will hear the parties in an oral hearing. An appeal for reversal may be filed against the decision adopted, with suspensive effect, and if dismissed, the injured party would be able to exercise its rights at second instance, or directly file an appeal if the application was made *ante demanda*. The appellant may in this case request the suspension of the effect of the challenged decision, and the appeal court will reach a decision on the suspension as soon as it receives the case file, until which time the challenged appeal will be suspended (Article 283 bis f) LEC, entitled "*Procedure*").

If access to certain sources of evidence is ordered, it will be executed in accordance with the terms of Articles 283 bis g) to 283 bis h) LEC, which establish how the measures ordered by the court will be executed and the consequence of obstruction of the same, which can entail criminal liability and fines of between 600 and 60,000 euros per day of delay in complying with the measures, in addition to recognition of the facts to which the sources of evidence supposedly referred and/or tacit acquiescence to the pleas made or to be made by the applicant.

The disclosure of evidence which, generally speaking, is regulated in el Article 283 bis a) LEC, is subject to a series of restrictions when the intention is to access a competition authority file.

In this regard, the starting point is that in actions for damages, the disclosure of the evidence appearing in the competition authority file can be ordered "*at any time*" (Article 283 bis i) 9 LEC), with the court instructing the authorities to disclose the same if neither party or a third party is "*reasonably*" able to provide such evidence (Article 283 bis i) 10 LEC). However, there is a series of documents contained in the administrative files that is exempted from the duty of disclosure, in absolute terms in some cases, or temporarily, while the proceedings are in progress, in others, with a view to protecting the leniency programmes (Articles 283 bis i) and 283 bis j) LEC).

(a) The "blacklist": categories of evidence that are exempted from the disclosure of evidence

Section 6 of Article 283 bis i) LEC establishes a "blacklist" of documents that cannot be disclosed: (i) statements in the context of a leniency programme, that is, those statements in which the applicant incriminates itself and provides a detailed description of its participation in the cartel, and (ii) settlement submissions, which also represent an acknowledgement of infringement by the applicant. The need to include these categories of evidence in the "blacklist" is derived from the fact that, as the European Commission indicates in Recital 26 of the Damages Directive, leniency programmes and settlement procedures are important tools for the "*detection and efficient prosecution of, and the imposition of penalties for, the most serious infringements of competition law*" and, unless protected, the companies could be deterred from cooperating with the competition authorities if self-incriminating statements produced for the sole purpose of cooperating with the competition authorities were to be disclosed.

The protection of these categories of evidence is absolute. Not only will the courts not be able to order their disclosure at any time, were any of the parties to submit such evidence to the action for damages because they had access to it as interested parties in the administrative procedure, the court will have to declare it inadmissible (Article 283 bis j) LEC).

(b) The "grey list": categories of evidence that will only be disclosed when the proceedings are deemed to have concluded

Section 5 of Article 283 bis i) LEC establishes a "grey list" which includes those documents, or categories of evidence, in relation to which the court will order disclosure "*only after a competition authority, by adopting a decision or otherwise, has closed its proceedings*". While it does not specify whether or not said decision must be final (the Damages Directive does not specify either), we believe that it is not necessary that it be final, it will be sufficient that the administrative proceedings have concluded.

This "grey list" includes the following categories of evidence: (i) information that was prepared by a natural or legal person specifically for the proceedings of a competition authority; (ii) information that the competition authority has drawn up and sent to the parties in the course of its proceedings; and (iii) settlement submissions that have been withdrawn. As you can see, the categories of evidence included in the "grey list" include information that has been prepared specifically for the administrative proceedings, such as the parties' replies to information requests from the national competition authority or the statement of objections sent by the authority to the parties.

Until such time as the competition authority has closed the proceedings by adopting a decision or otherwise, if evidence belonging to these categories is submitted to the proceedings by one of the parties, the court will have to declare it inadmissible (Article 283 bis j) LEC).

IV. Recognition of the principles of effectiveness and equivalence in relation to actions for damages derived from competition law infringements

The Second Additional Provision of Royal Decree-law 9/2017 recognises the principles of effectiveness and equivalence enshrined in European case law, expressly stating that these principles will govern the exercise of actions for damages derived from competition law infringements.

The principle of effectiveness means that Member States shall ensure that all national rules and procedures relating to the exercise of claims for damages do not render practically impossible or excessively difficult the exercise of the right to full compensation for harm caused by an infringement of competition law.

In accordance with the principle of equivalence, national rules and procedures relating to actions for damages resulting from infringements of Article 101 or 102 TFEU shall not be less favourable to the alleged injured parties than those governing similar actions for damages resulting from infringements of national law.

V. Territorial scope and transitional regime of the amendments to the LDC and LEC by Royal Decree-law 9/2017

In accordance with the First Additional Provision of Royal Decree-law 9/2017, the provisions contained in Articles three and four of said provision will apply to actions for damages brought in Spain regardless of whether the competition law infringement was declared by the European Commission or the Court of Justice of the European Union or by a competition authority or court in Spain or any other Member State of the European Union.

Moreover, the First Transitional Provision clarifies that the terms of Article three of Royal Decree-law 9/2017 (which amends the Competition Act) will not apply retroactively and that the amendments to the LEC by virtue of Article four of Royal Decree-law 9/2017 will only apply to proceedings initiated after the entry into force of Royal Decree-law 9/2017 (that is, 27 May 2017).

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