

1-2017 • JUNE 9, 2017

## TRANSPOSITION OF THE EUROPEAN UNION DIRECTIVE ON ACTION FOR DAMAGES FOR INFRINGEMENTS OF COMPETITION LAW

On May 27, 2017, the Official State Gazette (“BOE”) published Royal Decree-Law 9/2017, of May 26, 2017, transposing into Spanish law various European Union directives in the financial, corporate/commercial and health fields, and on the assignment of workers (“RDL 9/2017”), one of which is 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 “Directive”).

Article Third of RDL 9/2017 makes an amendment, on the substantive side, to the Spanish Competition Law, 15/2007, of July 3, 2007 (“LDC”), with the addition of a new Title VI on compensation for the harm caused by restrictive practices in competition; and Article Fourth makes an amendment, on the procedural side, to the Spanish Civil Procedure Law, Law 1/2000, of January 7, 2000 (“LEC”), with the addition of a new article 283 bis designed to give access to evidence in proceedings in which compensation is claimed for damages caused by infringements of competition law provisions.

This regulation will apply to any action for damages for infringements of competition Law which is brought in Spain, regardless of whether the infringement had been held to exist by the European Commission or the Court of Justice of the European Union, or by a national competition authority or national court (Spanish or of any other EU member state).

Under Transitional Provision One: (i) the substantive amendments made to the LDC (such as extension of the limitation period or the rules on presumptions) will not be enforceable retroactively; and (ii) the new rules on access to the sources of evidence in the LEC will apply to the court proceedings that commence after its entry into force.

It must be kept in mind, however, that the Royal Decree-Law has to be validated by the Lower House of the Spanish Parliament and the Spanish parliament may deal with these provisions in a bill of law, which could mean that the articles in RDL 9/2017 could be amended further down the line.

The following paragraphs explain the most important elements introduced by RDL 9/2017.

### 1. AMENDMENTS TO THE LDC

Article Third of RDL 9/2017 includes three subarticles amending the LDC: the first amends article 64.3.c) regarding determination of the amounts of fines and mitigating factors; the second adds a new Title VI on compensation for the damages caused by restrictive practices in competition; and the third amends subarticle 2 and inserts a subarticle 3 in additional provision four on definitions, to assist with a better understanding of the new articles included in the LDC.

#### 1.1 Amendment of article 64.3 LDC

Article 64.3 LDC on methods for determining the amounts of fines for infringements of competition law sets out a number of mitigating factors. One such factor, included in Article 64.3 c), concerns the steps taken to make good the harm caused, and RDL 9/2017 has now added that effective compensation for the harm before the decision is rendered will be regarded a qualified mitigating factor.

## 1.2 New Title VI in the LDC

Title VI adds to the LDC a number of new articles numbered 71 through 81 determining the liability to provide compensation for the damages caused by persons infringing competition Law; the right of injured parties to full compensation and overcharges; the rules on joint and several liability; the limitation period for action; the effects of final decisions rendered in relation to infringements of competition law in damages proceedings; provisions regarding quantification of the harm and evidencing it; and the effects of out of court solutions on the proceedings.

### 1.2.1 Jurisdiction to entertain claims for damages

The new legislation determines that the injured party in an infringement of competition Law is entitled to claim full compensation. The new article 72.1 LDC provides that such claims against the infringers will be heard in the ordinary civil jurisdiction, although it fails to specify whether jurisdiction will lie with the courts of first instance or with the commercial courts.

### 1.2.2 Effect of final decisions regarding infringements of competition Law on subsequent action for damages

In connection with determining the existence of an infringement of competition Law, it is stipulated that the final decisions of a Spanish competition authority or of a Spanish court will be deemed irrefutable (Article 75.1 LDC). Those rendered by other member States will only benefit from a *iuris tantum* or rebuttable presumption (Article 75.2 LDC).

### 1.2.3 Liability for infringements, scope of liability broadened to persons controlling the infringing entity and joint and several liability

The provisions in the new Title VI of the LDC start out from the general principle of liability for infringements of the domestic Law in the LDC and for infringements of article 101 or article 102 of the Treaty on the Functioning of the European Union, under which the infringers of competition Law will be liable for the damages caused. They further provide that the activities of an infringing enterprise will also be attributed to the enterprises or persons controlling it, unless their economic behavior is not determined by any of them (Article 71 LDC).

In the interests of protection of the injured parties, the provisions also provide for joint and several liability in cases of joint infringements by more than one entity in which case any one of those entities may claim for the harm suffered (Article 73 LDC).

An exception to that joint and several liability is made for small and medium-sized enterprises, which are only liable to their own direct or indirect purchasers, where: their market share is below 5% at any time during the infringement; the application of joint and several liability would irretrievably jeopardize their economic viability and cause their assets to lose all their value; they did not order the infringement or coerce other companies to participate therein; and they have not previously been found to have infringed competition Law.

It also limits the joint and several liability of the beneficiaries of exemptions from payment of fines under a leniency program, because in principle they will only be liable to their direct or indirect purchasers or suppliers, and will only be liable to the other injured parties where the latter cannot obtain full compensation from the other enterprises involved in the infringement.

Any infringer that has paid indemnification may later “*bring action for contribution against the other infringers to claim a sum that will be determined by reference to their liability for the loss caused*”, and limits also apply in cases of beneficiaries of the exemptions from payment of fines under a leniency program (Article 73.5 LDC).

#### 1.2.4 Right to full compensation. Overcharges and passing them on, evidence of the harm caused

Consistently with the Directive, the new provisions set out the right to full compensation for the injured parties in cases of restrictive practices in competition, including “*actual loss (damnum emergens) and loss of profit (lucrum cessans), plus the payment of interest*” and state that such compensation must not lead to overcompensation (Article 72 LDC).

Article 78 LDC provides that the right to compensation will relate only to the overcharge effectively paid by the injured party which has not been passed on and has caused harm to it, and has introduced into Spanish law what is known as the ‘*passing-on*’ defense, which may be raised by the infringer, with whom the burden of proving it will lie and who may require disclosure from the claimant or even from third parties, via the mechanisms introduced in the LEC for proceedings of this kind in Article Fourth of this new RDL 9/2017, which is described below.

It also specifies that the compensation will include the loss of profit suffered as a result of passing on the overcharges entirely or in part.

Article 79 LDC expressly envisages that the injured parties further down the supply chain -the so-called “indirect purchasers”- may claim indemnification for any overcharges passed on to them, and a *iuris tantum* or rebuttable presumption is established of the damage suffered by those indirect purchasers if they evidence that: (i) the defendant committed an infringement of competition Law; (ii) that infringement resulted in “*an overcharge for the direct purchaser of the defendant*”; and (iii) *the claimant purchased the goods or services “that were the object of the infringement of competition law, or purchased goods or services derived from or containing them”*.

The damages caused by an infringement must be evidenced, and the burden of proof lies with the claimant. There is a rebuttable presumption, however, that restrictive practices characterized as those of a cartel cause harm (Article 76.3 LDC).

The courts are expressly empowered to estimate the amount of damages if it is established that the claimant suffered damages but it is practically impossible or excessively difficult precisely to quantify the damage suffered on the basis of the evidence available. It is also specified that the Spanish competition authorities may provide information, upon request of the competent court, with respect to the methods used to determine the amount of compensation.

#### 1.2.5 Limitation period for bringing action and computation

A five-year limitation period is established for bringing this type of action (Article 74.1 LDC), and it is specified that the limitation period will start running from when the infringement has ceased and the claimant knows, or can reasonably be expected to know (i) of the behavior and the fact that it constitutes an infringement of competition law; (ii) of the harm caused; and (iii) the identity of the infringer.

This limitation period will be interrupted if a competition authority starts an investigation or sanctioning proceeding in relation to the infringement, an interruption that will end a year after the decision adopted by the competition authority has become final or after the proceeding is otherwise terminated. The period may also be interrupted if the parties engage in consensual dispute resolution. These are not the only grounds for interruption of the limitation period. Although the royal decree makes no mention of this, the general legislation contained in the Civil Code will also apply, which means that the period may be interrupted as a result of an out-of-court claim.

#### 1.2.6 Consensual solutions and effects

Article 81 LDC provides that the courts can interrupt the proceeding for up to two years if the parties are engaged in a consensual solution.

The effects of consensual settlements on the right to damages are also established, including that the right of an injured party, who reaches an agreement with any of the infringers, will be reduced by the settling infringer’s share of the harm caused to it. It also states that non-settling co-infringers cannot require a settling infringer to

contribute to the remaining amount of damages, and that, if the co-infringers are unable to pay the damages, the injured party may claim them from the settling co-infringer, unless it is expressly excluded under the terms of the consensual agreement (Article 77 LDC).

### 1.3 Amendment of additional provision four LDC

Section 3 of Article Third of RD 9/2017 adds new provisions to Additional Provision Four LDC to amend the definition of a cartel and insert a new paragraph 3 in the definitions related to action for damages for infringement of competition law.

In relation to the definition of a cartel, its legal definition is broadened, by removing the requirement for it to have a secret character and including within that definition any concerted practices aimed at coordinating their activities in relation to prices, market share, etc., without requiring such practices to have the status of agreements.

## 2. AMENDMENTS OF THE LEC

A new Article 283 bis has been added to the LEC, containing a number of subarticles regulating access to the sources of evidence, which will only be applicable in proceedings in connection with a claim for damages for infringements of competition law.

The provisions on access to sources of evidence makes it available to the defendant as well as the claimant, basically so that the defendant can access the documents necessary to raise the *'passing-on'* defense.

### 2.1 Scope of the measures

Defendants and claimants are afforded the right to request the disclosure of evidence relevant to the case which is held by the parties or a third party, a request that must be made in a reasoned application supporting the plausibility of their claims for damages. The judge will only allow the disclosure of specified items of evidence or of categories of evidence circumscribed as precisely and as narrowly as possible, after assessing whether the disclosure is proportionate and considering the legitimate interests of all parties and third parties concerned (Article 283 bis a) LEC).

The court may order the disclosure of evidence containing confidential information, and adopt any measures considered necessary to protect such information (Article 283 bis b) LEC).

Among others, they may request data such as the identity and addresses of both the infringers and of the direct and indirect purchasers, the behavior and practices constituting the infringement, or the prices charged for the products or services concerned from the first transfer until they are handed over to the end consumer or end user.

### 2.2 Jurisdiction

The court with jurisdiction to order the disclosure will be that entertaining the case at first instance or, if the case has yet to begin, the court with jurisdiction for the principal claim (Article 283 bis d) LEC).

### 2.3 The request and when to make it

The disclosure of documents may be requested in the claim, during the proceedings, or before the proceedings start, although in the latter case the claim must be brought within twenty days after the disclosure took place, otherwise the law imposes payment of the damages on the applicant, and, at the request of the injured party, measures may also be ordered to withdraw any compliance orders that may have been made, and it may be held that the data obtained cannot be used in another proceeding where abuse by the applicant is found (Article 283 bis e) LEC).

The expenses associated with implementing the measures will be at the cost of the applicant. The applicant may be requested to post a bond to secure both the expenses and any harm that may be caused through misuse of the sources of evidence (Article 283 bis c) LEC).

## 2.4 Procedure

After an application has been filed, it will be notified to the person against whom the measure has been requested and against the person against whom the claim or defense is submitted or intended to be submitted, and the judge will adopt a decision on the disclosure after holding a hearing, in which the parties or, as the case may be, the third party against whom the measure has been requested, may plead their rights and submit evidence (Article 283 bis f) LEC).

Against the decision on applications filed with the claim or during the proceedings, a request for reconsideration (*recurso de reposición*) may be lodged with staying effects, and, if this request is dismissed, the injured party may assert his rights at second instance.

Against the decision on applications filed before the claim, an appeal to an immediately superior court may be lodged.

In the event of an appeal to an immediately superior court, the appellant may apply for a stay of execution of the decision.

It is provided that costs will be awarded according to the general rules in the LEC.

## 2.5 Implementation of the measure

The disclosure will take place as determined in the court's decision and the applicants may be assisted in the process by an expert on this subject.

Raids on premises, or the seizure of any documents and objects therein, may be ordered if necessary.

The LEC also sets out the consequences of obstructing the ordered measures, by providing that the court may impose measures such as accepting the facts referred to in the sources of evidence, deeming that the obstructing party has accepted the claims submitted against it, or dismissing any that it may submit, in addition to levying fines, or ordering that party to pay the costs of the ancillary proceeding for access to evidence and those of the main proceeding, regardless of their outcome (article 283 bis h) LEC).

## 2.6 Disclosure of evidence contained in a competition authority's file

Specific rules have been included in the LEC regarding the disclosure of evidence contained in a competition authority's file, strict confidentiality requirements are laid down together with restrictions as to the information that may be requested and when it may be disclosed (article 283 bis j) LEC).

Special protection is given in these rules to the statements made in leniency programs, and to settlement submissions, which cannot under any circumstances be ordered to be disclosed by the courts.

Elsewhere, the disclosure of information prepared either by the parties or by the competition authorities during the proceedings before them, in addition to withdrawn settlement submissions, may only be ordered by the court after the competition authority has closed its proceedings by adopting a decision or otherwise.

Any other information in a competition authority's file may be disclosed at any time.

The evidence obtained through access to these files may only be used in action for damages brought by the person that requested access or its successors.

These cases also include measures in the event of an infringement of the confidentiality obligations or infringements of the restrictions on use of the sources of evidence provided in the LEC.

Follow us:



**[www.garrigues.com](http://www.garrigues.com)**

This publication contains general information and does not constitute professional opinion or legal advice.  
© J & A Garrigues, S.L.P., all rights reserved. exploitation, reproduction, distribution, public communication and transformation, total and partial, of this work, without written permission from J & A Garrigues S.L.P.

Hermosilla, 3 - 28001 Madrid (Spain) **T** +34 91 514 52 00 - **F** +34 91 399 24 08