Legislative Proposal for the implementation of the EU antitrust damages Directive in Spain

The Ministry of Justice has published its proposal (**Proposal**) on the implementation in Spain of Directive 2014/104/UE, of the European Parliament and the Council, of 26 November 2014 (**Directive**). Before initiating the parliamentary approval process, the Proposal should be formally submitted by the government. According to sources of the Ministry of Justice, the Proposal will be subject to public consultation, during which stakeholders can submit their views. The deadline for Member States to implement the Directive in their respective domestic legal systems expires on 27 December 2016. At this stage, it is not entirely clear whether or not that deadline will be met in Spain since, subsequent to the December 2015 parliamentary elections, no stable coalition to form a new government is in sight. This may lead to new elections in June, which (in view of the currently divisive environment both at party level and public opinion), may well result in a new *de facto* stalemate, without a majority government having full legislative initiative.

The Proposal amends *(i)* Law 15/2007, of 3 July, on the Defence of Competition (**Competition Act**) regarding substantive issues; and *(ii)* Law 1/2000, of 7 January, on Civil Procedure (**Civil Procedure Act**) concerning procedural issues such as access to evidence.

Regarding changes to the Competition Act, the Proposal includes the content of the Directive and, notably, the Proposal goes beyond the wording of the Directive in some instances.

- In line with the Directive, the Proposal establishes the general rule of statutory joint and several liability of cartel members for damages caused as a result of anticompetitive conduct. This is in stark contrast to current law, where joint and several liability must as a general rule be foreseen by statute and where cartel members are therefore not presumed to be joint and severally liable, provided that the damage attributable to each cartel member can be individualized (if the amount of damage cannot be individually attributed, then the case law has considered that it is possible to construe the existence of joint and several liability, although the issue has not been discussed in the few cartel damages claims precedents available in Spain, where liability has been considered to be several *e.g.*, Supreme Court Judgments of 8 June 2012, case 2163/2009 and of 7 November 2013, case 2472/2011 in the landmark *Sugar cartel*).
- An interesting (and relevant) presumption introduced is the parental liability of parent companies for damage caused by their subsidiaries (except when the economic conduct of a company is not determined by its parent company). This presumption generally applicable to administrative antitrust liability will also be applied *ex lege* in damages cases.
- Following the Directive, the Proposal sets the statute of limitations for antitrust damages claims at five years, establishing an exception to the general limitation for extra contractual claims, which is of one year under the Civil Code (also applicable currently to antitrust damages claims). The short duration of the limitation period in Spain has been subject to some criticism, with some opinions questioning that such short limitation period would be compatible with the principle of effectiveness of damages claims. Under current law, the limitation period may be considered to start to run on the date on which a Decision of the Competition Authority is published (or individually notified if applicable) determining the existence of the cartel, the participants, the duration and the relevant particulars about the cartel's effects, when those key elements of fact were not known prior to the administrative Decision. Conversely, if the details of the cartel or competition infringement required to mount a damages claim are known prior to publication of an antitrust decision, a party harmed by the anticompetitive conduct should be aware that the limitation period for claiming damages may start to run well before an antitrust (administrative) decision has been issued, or indeed even before a Competition Authority has started to investigate the allegedly illegal conduct (this is our reading of the Judgment of the Supreme Court 4 September 2013, *Centrica v. Iberdrola*, case 528/2013). Such case law regarding the *dies a quo* will likely continue to apply under the legislation implementing the Directive, as it appears largely in line with Article 10 of the Directive.
- Another development worth noting is that, according to the Proposal, *final* decisions by the competition authorities, or courts, of any Member State (and not only domestic authorities or courts,

as set out in the Directive) constitute irrefutable evidence of the existence of an infringement before any Spanish court hearing an antitrust damages case (on this point the Proposal goes beyond the Directive which requires as minimum legal standard that final decisions of authorities and courts of other Member States are accepted as *prima facie* evidence of an antitrust infringement).

- On the other hand, the Proposal sets out that the effective compensation of the damage by an infringer should be considered a *qualified* mitigating circumstance by the Competition Authority when deciding the amount of fines in pending cases (without it being completely clear at this stage how the term *qualified* is to be construed).
- Finally, the Proposal includes within the scope of antitrust damages, those damages stemming from breaches of Article 3 Competition Act, a provision specific to Spanish law, which prohibits unfair competition conduct affecting the general interest.

When it comes to procedural issues, the Proposal is ambitious. A revamped set of rules on access to evidence is proposed for insertion in the Civil Procedure Act. This new set of rules would not only apply to antitrust damages cases, but to all civil litigation: the Proposal includes provisions common to all types of civil court proceedings, as well as specific rules concerning antitrust damages, on the one hand, and intellectual property cases, on the other hand.

The new rules specific to access to means of evidence in antitrust damages cases can be roughly summarized as follows: any claimant may submit a reasoned petition asking the court to grant access to means of evidence (including documents, digital recordings, quantitative information, witnesses, expert reports, amongst others) in the hands of the defendant or third parties. The petition can be submitted before the proceedings are initiated or during proceedings. The claimant should justify (a) that the means of evidence to which access is requested are relevant to the case; and, (b) that it has no means to access the evidence in question other than by court intervention. If the petition is filed before proceedings are initiated, the claimant should also provide justification that it has a feasible damages claim against the defendant. It should be noted that the court may also grant the defendant access to means of evidence held by the claimant (or third parties) if so required.

Courts should decide on petitions guided by the principle of proportionality, taking into account the legitimate interests of all the parties involved, in particular: *(i)* that the petition is justified by facts and other evidence; *(ii)* the scope and costs that the access to the evidence entail (particularly for third parties), avoiding indiscriminate searches of irrelevant information; and *(iii)* whether or not the information requested is confidential.

Consequently, the Proposal includes rules on disclosure of documents from counterparties and other third parties (even before proceedings are initiated); rules to be taken into account by the courts to assess the proportionality of disclosure petitions; rules on confidentiality of documents; hearing of the parties from whom documents are requested; possible coercive measures; possibility of requesting additional measures; or the protection of protected documents (*i.e*. leniency statements and settlement submissions), amongst others.

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