Implementation of the Antitrust Damages Directive in Spain.

The government has issued an urgent Royal Decree-Law 9/2017 of 26 May (**RDL**) implementing Directive 2014/104/UE, of the European Parliament and the Council, of 26 November 2014 (**Directive**) into Spanish law. A Royal Decree-law is an instrument used by the government to legislate on matters that require urgency, subject to subsequent validation by Parliament.[1] The urgency in this case is due to the fact that the Directive should have been implemented end of 2016; and that the subject-matter of the Directive has potential to trigger the State's liability *vis-à-vis* individuals for late implementation; the urgency is also justified by the fact that the European Commission had already opened an infringement procedure against Spain in January. Hence, although it is not desirable that this legislation is approved without parliamentary debate, it is not surprising that an urgent Royal Decree-law has been used.

The RDL 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 RDL includes the following changes to existing law:

- In line with the Directive, the RDL 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 hitherto existing 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 RDL 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 may 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.

[1] We already reported two years ago on an embryonic draft bill, which in fact was not converted into a formal bill and was never submitted to Parliament, which may be explained by the absence of any parliamentary majority in Spain in 2016 (http://callolcoca.com/wp-content/uploads/2015/06/Competition-Alert-Damages-Implemen-Propv5.pdf).

- Decisions by the competition authorities, or courts of Spain constitute irrefutable evidence of the existence of an infringement before any Spanish court hearing an antitrust damages case. Conversely, decisions by the competition authorities, or courts, of any Member State other than Spain create a presumption that a competition law infringement exists.
- On the other hand, the RDL 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 RDL does not include (as opposed to the initial draft project on which we reported two years ago[2]) within the scope of antitrust damages, harm stemming from breaches of Article 3 Competition Act, a provision specific to Spanish law, which prohibits unfair competition conduct affecting the general interest. It does include within its scope infringements of the national law provisions equivalent to Articles 101 and 102 TFEU.

When it comes to procedural issues, the RDL implements the rules on access to evidence including in the Directive in the Civil Procedure Act. Thus, a new revamped set of rules on evidence concerning all civil litigation (as proposed in the initial draft project) has not been introduced.[3]

The new rules on access to 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 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 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 RDL 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.

Finally, regarding the moment of entering into force of the new rules, the RDL establishes that the new rules introduced in the Competition Act will not apply retroactively. In our (initial) view, the provision should be interpreted as an indication that the new rules apply to cases where anticompetitive related harm arises after publication on the RDL in the Official Gazette (27 May 2017). This means that the general rules of torts contained in the Civil Code will continue to be applied to matters started after the pre-existing regime. Concerning the rules on access to evidence, newly introduced in the Civil Procedure Act, they are of application to proceedings initiated after 27 of May.

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[2] http://callolcoca.com/wp-content/uploads/2015/06/Competition-Alert-Damages-Implemen-Propv5.pdf.

[3] See prior footnote.