
The Government adopts a Royal Decree-Law transposing the Damages Directive

Legal flash | Antitrust Private Enforcement

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The Council of Ministers adopts a Royal Decree-Law implementing the Directive on actions for damages for infringements of competition law

On the 27th of May, the BOE (the Official State Gazette) published [Royal Decree-Law 9/2017](#) of 26 May, which transposes into Spanish law Directive 2014/104/EU on actions for damages for infringements of competition law (the Directive).

The Royal Decree-Law entered into force on the day of its publication. It incorporates the substantive provisions of the Directive into the Spanish Competition Act (LDC) and the procedural provisions into the Spanish Code of Civil Procedure (LEC).

Summary

- > Innovations in the Competition Act
- > Innovations in the Code of Civil Procedure



Innovations in the Competition Act

The LDC will now have a new section on compensation for damages resulting from anticompetitive practices, which introduces the following aspects:

- > **Right to full compensation** for the damages suffered as a result of anticompetitive practices. This will comprise the right to compensation for the actual loss and the loss of profits, as well as the payment of interests.
- > **Responsibility of parent companies** for the behavior of subsidiaries. The actions of a company are imputable to the legal and/or natural persons that control it, provided the economic behavior of the subsidiary is determined by such controlling persons.
- > **Joint and several liability** among the infringers, with specific rules applying to SME. Regulation of the individual responsibility of the offenders.
- > Establishment of: (i) a **limitation period of five years** to bring an action for damages; (ii) criteria to determine when the limitation period starts running; and (iii) circumstances governing the valid interruption of the limitation period.
- > Probative value of decisions adopted by **national competition authorities**, both Spanish and from other Member states. There is a rebuttable presumption that cartels cause harm.
- > **Effects of consensual settlements** for example, on the calculation of the administrative fines, with the aim of encouraging such a resolution.
- > **Quantification of the damages and burden of proof**, both as regards the damage as well as in relation to the pass-on defence.
- > Regulation of actions for damages brought by claimants on **different levels of the supply chain**. The Decree-Law also regulates the elements that courts can take into consideration in order to prevent actions by claimants on different levels of the chain from leading to either multiple responsibility or to the absence of responsibility of the infringer.



Innovations in the Code of Civil Procedure

The Royal Decree-Law introduces in the LEC a new Section, 1 bis, on disclosure in the context of actions for damages for infringements of competition law. This Section is included in the Chapter devoted to evidence in declarative procedures.

The most relevant aspects regulated in this Section are:

Disclosure of evidence

- > Possibility to apply for the **disclosure of relevant evidence** (i.e. specific evidence or categories of evidence) from the defendant or from a third person. The defendant is also entitled to apply for disclosure.
- > Regulation of the **application requirements**: proportionality and reasoned motivation to justify the viability of the action for damages.
- > The application can be submitted: (i) **before the procedure**; (ii) **with the submission of the claim**; or (iii) **during the procedure**.
- > The application will be sent to the other party, and both parties will be summoned to an oral hearing which will take place within **ten days of the application**.
- > Possibility for the court to use necessary means **to ensure the execution of the disclosure order**, including the entry to and registration of premises.
- > Consequences of **frustrating the disclosure** (e.g. imposition of daily fines), modulated by the principle of proportionality.
- > Disclosure of evidence included in the **file of a competition authority** and limits to the use of this evidence.



Confidentiality

- Possibility of **ordering the disclosure of confidential information**, adopting the necessary measures for its protection.
- Prohibition against accessing certain categories of confidential or commercially sensitive documents or materials (e.g. leniency statements).
- Consequences in case of **infringements of confidentiality obligations** (e.g. a declaration that the infringer is civilly liable for the damages caused, and an order to pay them).

Caution and costs

- The person applying for disclosure of evidence will cover the costs and will also be held liable for the damages caused in the event that the evidence is used in an illegitimate or unauthorised manner. The person with the burden of providing disclosure can apply to the court for sufficient cautionary measures to ensure that the applicant can cover both infringement eventualities.

The Royal Decree-Law is based on the [Law Proposal from the Special Section of the General Codification Commission](#) for the transposition of the Directive. However, it opts for a less ambitious modification of the Spanish legal system since, contrary to the Proposal, (i) it does not extend the new regulation to the damages caused by infractions of Article 3 of the LDC (disloyal competition acts) and (ii) it restricts the disclosure of evidence to actions for damages for infringements of competition law.

According to Article 86 of the Spanish Constitution, the Decree-Law must be debated in the Parliament and approved (or rejected) in its totality, within 30 days after its promulgation.

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