



Competition Law Newsletter

April 2018

**Greece implements EU Antitrust
Damages Directive 2014/104/EU**

A photograph of a row of law books on a shelf, partially obscured by a dark blue geometric shape in the bottom left corner of the cover.

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Greece implements EU Antitrust Damages Directive 2014/104/EU

Introduction

In March 2018, Law 4529/2018¹ (the “**Law**”) implemented into Greek Law Directive 2014/104/EU on private damages arising out of competition law infringements which aims to facilitate the right to claim compensation for any harm suffered as a result of an infringement of the EU and/or Greek competition law. The Law has retroactive effect since its substantive provisions apply from 27.12.2016, whilst its procedural provisions apply to civil damage actions filed from 26.12.2014.

The Law covers both anti-competitive agreements (horizontal and vertical) and practices of abuse of dominance. It applies to follow-on actions (i.e. actions for damages filed with the court, following the issue of an infringement decision by the competition authority) and standalone actions.

It is worth to note that the Law provides for the establishment of specialized chambers in the Athens Court of First Instance and the Athens Court of Appeal (the “**Court**” and/ or the “**Courts**”). These Courts shall comprise of judges specialized in competition or EU law, whilst their territorial competence shall cover the entire Greek territory.

Right to full compensation

Any person (natural or legal), irrespective of whether he is a direct or indirect customer of the infringer, who has suffered harm due to an infringement of the EU and/or Greek competition law is entitled to full compensation provided that the following conditions are met: (i) infringement of competition law; (ii) defendant’s fault (i.e. intent or negligence); (iii) damage; and (iv) causal link between the infringement and the damage suffered. In essence, the claimant should prove that the conditions on Greek tort liability (i.e. articles 914 et seq.) are fulfilled, since actions raised by the Law constitute specialized tort actions.

In particular, the claimant may claim actual damages, loss of profit and interest calculated from the time the harm occurred until the time of the payment of the compensation.

¹ Government Gazette A’56/2018.



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Quantification of damages

The quantification of damages constitutes a tough exercise for the claimant. Therefore, in cases it is practically impossible or excessively difficult for the plaintiff to precisely quantify such damages on the basis of the available evidence, the Law provides that the Court may award damages on the basis of likelihood, taking into consideration the kind and the extent of the infringement as well as the claimant's diligence in the collection and proper use of evidence. In addition, the Court may ask for the assistance of the national competition authority² as *amicus curiae*, if it deems this to be appropriate.

Finally, the Law provides for a rebuttable presumption of the harm in cases arising from cartel infringements.

Passing - on defence

The defendant, bearing the relevant burden of proof, may invoke as a defence against a claim for damages the fact that the claimant raised the downstream prices to its customers and thus "*passed on*" all or part of the overcharge arising from the competition law infringement.

A rebuttable presumption is introduced in favour of the pass-on of the overcharge to an indirect purchaser provided that the latter proves that: (i) the defendant has breached EU and/or Greek competition law; (ii) competition law infringement resulted in the overcharging of the direct purchaser by the defendant; and (iii) the indirect purchaser bought the related to the infringement goods/services.

Disclosure of evidence

Upon request of the claimant who invokes specific evidence which is under the control of the defendant or a third party and provided that the claimant has submitted reasonably available evidence, which is sufficient for the substantiation of its claim for damages, the Court may order the disclosure of evidence being in the control of the defendant or a third party. In addition, the Court may order the claimant or the third party to grant access to the defendant with regards to evidence held by such parties.

The Court shall order the disclosure of evidence in accordance with the principle of proportionality. In that context, it shall consider: (i) the extent to which the request for disclosure is supported by the available facts and evidence; (ii) the extent and the cost of the disclosure; and (iii) whether the requested evidence includes confidential information.

² The Law defines as national competition authority the Hellenic Competition Commission and the Hellenic Communications and Post Commission when it applies articles 1 and 2 of the Greek Competition Law and articles 101 and 102 of the EU Competition Law.



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According to the Law, any disclosure of evidence should comply with the legal professional privilege in accordance with the EU or Greek Law.

In case the litigant party fails or refuses to comply with the disclosure order or is unable to comply due to previous destruction of the evidence, the allegations of the requesting party are considered to be proven and a monetary fine ranging from €50.000,00 to €100.000,00 may be imposed.

In addition, the Law includes specific rules with regards to disclosure of evidence included in the file of the competition authority. In particular, the Court may order the disclosure of evidence kept in such file, taking into account whether the request for disclosure is specifically justified, whether there has already been filed a claim for damages and the need for compliance with the provisions of competition law.

Evidence consisting of leniency statements, settlement submissions or documents that include direct extracts of the above is inadmissible in actions for damages (black list). On the other hand, after the competition authority has closed its proceedings, the Court may order the disclosure of: (i) documents and information drafted by a natural or legal person in the context of the proceedings before the competition authority; (ii) documents and information drafted by the competition authority; and (iii) withdrawn settlement submissions (grey list). Finally, other pieces of evidence which are included in the file of the competition authority and do not fall within the black or the grey list may be disclosed at any time (white list).

Limitation period

The Law provides for a five (5) years limitation period which starts to run after the injured party knows or is reasonably expected to know the antitrust infringement, the damage and the infringer's identity. In the event that the infringement ceased subsequently, the limitation period starts running as of the time the infringement ceased.

In any case, claims against the infringer are time barred twenty (20) years following the cease of the infringement. The limitation period is suspended if a competition authority launches investigation on the infringement or if proceedings are brought before the competition authority regarding the infringement. The suspension ends one (1) year after the infringement decision has become final or the proceedings have been otherwise terminated.

With regards to horizontal anti-competitive agreements (cartels), the limitation period for claims that are raised by a party other than direct or indirect buyers or suppliers and are directed against infringers who participate in leniency programs, commences following the fruitless enforcement or following the final rejection of the injured party's action against the other participants of such horizontal agreement.



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Probative value of the decisions of the European Commission and the national competition authority

The Courts are bound by final decisions (i.e. not subject to appeal) of either the national competition authority or the European Commission with regards to competition law infringements. Final decisions issued by other Member-States constitute prima facie evidence with regards to the infringement.

Joint and several liability

Undertakings that jointly breached competition law are jointly and severally liable in actions for damages. The Law provides certain derogations for SMEs infringing competition law if their market share amounts to less than 5% and their viability would be threatened in case of joint and several liability well as for immunity recipients.

The present newsletter contains general information only and is not intended to provide specific professional advice or services.

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