

Greece implements Directive 2014/104/EU on civil damage actions for competition law infringements

On 14 March 2018, the Law on civil damage actions for competition law infringements implementing Directive 2014/104/EU (“the Law”) was enacted by the Greek Parliament. In essence, the actions raised in application of the Law will from now on be treated as “specialised” tort actions; this means that Greek law on tort liability (Articles 914 et seq. of the Greek Civil Code) and the provisions of the Greek Code of Civil Procedure will apply only in the absence of respective substantive and procedural rules under the Law.

We set out below the main rules of the Law, classified per subject matter: applicable principles and restrictions; procedural tools available to claimants in civil damage actions for competition law infringements; mechanisms that ensure the uniform application of the Law and of its principles; and, finally, allocation of civil liability for violation of competition rules among multiple parties.

A. The applicable principles and restrictions thereof: full restitution of damages; passing on defence; and statute of limitations

1. Right to full compensation of victims

Any person has a right to be compensated in full for any type of loss (actual loss, loss of profit and interest) suffered as a result of an infringement of Greek and EU competition rules, either by means of a stand-alone action, or in the context of a follow on action.

2. Pass-on defence

Infringers-defendants may raise the pass-on defence, while bearing the respective burden of proof. The Court may rule on the amount of the overcharge on the basis of likelihood considerations. A rebuttable presumption is introduced in favour of the pass-on of the overcharge to an indirect purchaser, in the event that the infringement resulted in the overcharging of a direct purchaser by the infringer and the indirect purchaser has purchased goods or services that had been the subject matter of the infringement.

3. Limitation Period

The standard five-year limitation period provided for civil law infringements also applies to competition law infringements adjudicated by Courts under the Law. The Law provides for criteria identical to the ones found in the Directive in connection with the commencement of the limitation period, i.e. such period begins on the date the infringement has ceased and the claimant has become

aware or reasonably ought to know: a) the critical conduct of the infringer and the fact that it constitutes an infringement of competition law; b) the damage caused to it by the infringement; and c) the identity of the infringer. The limitation period is suspended if any competition authority launches an investigation of the infringement or a proceeding before the authority until one (1) year after such authority's decision has become irrevocable, or after the termination of the proceedings before the authority.

By way of derogation, the Law further provides for more specific times of commencement of the limitation period in the following instances:

- (a) In cartel cases where the infringer has submitted itself to a leniency policy program, the limitation period begins after the unsuccessful initiation of enforcement proceedings or the final rejection of the claimant's lawsuit against the remaining members of the cartel.
- (b) Where the liability is due to a joint infringement, the limitation period commences as soon as one infringer compensates the other for an amount exceeding the proportion of liability of the former.

B. Procedural alleviations: presumptions and access to evidence

1. Effect of national decisions and decisions of the EC

Greek Civil Courts are bound by the final decisions of either the Greek Competition Authority or the European Commission ruling on infringements of Greek or EU Competition Law by way of an irrebuttable presumption.

Nevertheless, final decisions of Courts or authorities of other Member-States constitute prima facie evidence, but they have to be assessed along with any other evidence adduced by the parties.

2. Disclosure

The disclosure mechanism, governed by the principle of proportionality, is strengthened. Upon request by the claimant, who has presented a justification containing reasonably available facts and evidence sufficient to support the plausibility of its claim for damages, the Court hearing the claim may grant the latter access to evidence, which lies within the control of the defendant or any other third party, subject to certain conditions (without prejudice to the attorney-client privilege); and vice versa, access to evidence held by the claimant or a third party may also be granted to the defendant. Such evidence shall be circumscribed as precisely and as narrowly as possible by the requesting party, whereas the Court shall take all necessary measures to safeguard the confidentiality of information contained therein. Should the party ordered to disclose evidence fail to act accordingly or eventually destroy such evidence, then the Court shall draw inferences and the claims on which the petition for disclosure was founded will be deemed avowed; this party will also face a monetary penalty imposed by the hearing Court.

Certain pieces of evidence included in the file of the competition authority having judged on the infringement may also be disclosed; however, the Court may not at any time order the disclosure of leniency statements or settlement submissions (or documents containing unabridged and unedited excerpts thereof), whereas such evidence obtained by a party solely through access to the file of the

competition authority will be deemed inadmissible in actions for damages. On the contrary, information submitted in the course of proceedings before the competition authority or documentation the competition authority has drawn up and sent to the parties to the proceedings, as well as settlement submissions that have been withdrawn, can be disclosed following a Court order after the competition authority has closed its proceedings.

3. Court assessment of the quantum of damages

The competent Court enjoys the discretion to assess the quantum of damages without full judicial conviction (on the basis of likelihood considerations), if it is established that a claimant suffered damages, but, on the basis of the available evidence, it is practically impossible or excessively burdensome to quantify with precision the damages suffered; for the same purpose, the Court can call into assistance the competent competition authority as *amicus curiae*. It is presumed that infringements consisting in cartels cause damages, nevertheless the infringer is entitled to rebut that presumption.

C. Fostering the uniform application of the Law and of its principles

1. Obviating contradictory rulings and overcompensation

New specialised departments are to be established within the Court of First Instance and the Court of Appeals, comprised by judges specialised in competition law, before which the cases of the present Law shall be brought. The aim of this procedural restructuring is a) to obviate the risk of issuing contradictory decisions, especially in cases of actions brought by indirect purchasers in different points of time; and b) avoid overcompensation of claimants.

2. Guidelines to national Courts re: claimants from different levels in the supply chain

In order to avoid actions for damages by claimants from different levels in the supply chain resulting either in a multiple liability or in an absence of liability of the infringer, Greek Courts take due account in their assessments of: (a) actions for damages that are related to the same infringement of competition law, but are advanced by claimants operating in other levels in the supply chain; (b) judgments resulting from actions for damages as referred under (a); (c) any other relevant information.

D. Issues of allocation of liability

1. Joint and several liability

Undertakings which have infringed competition law through joint behaviour are jointly and severally liable in actions for damages. The Law introduces specific derogations for SMEs having infringed

competition rules, on the basis of market share thresholds and the financial inability of the SMEs to compensate their victims.

2. Consensual dispute resolution

In the context of a consensual dispute resolution in the matter of civil damages, one of the joint infringers may be discharged from its liability not only vis-a-vis the victim, but also vis-à-vis the other non-settling infringers. In case the non-settling co-infringers fail to satisfy the remaining amount of the injured party's claim, the settling co-infringer, unless otherwise explicitly agreed in the context of its settlement shall satisfy the injured claimant while retaining the right of recourse against the non-settling parties.

E. Entry into force

Article 16 of the Law (art. 22 of the Directive) provides that the substantive provisions of the Law are effective as of the date of its entry into force, whereas article 24 of the Law (titled "Effective Date") defines such date as the 27th of December 2016, subject to any specific provisions contained therein. By contrast, procedural provisions apply also to civil damage actions filed from 26 December 2014 onwards.

For further information, please contact:

Dr. Emmanuel Mastromanolis

Partner

T (+30) 210 69 67 104

E e.mastromanolis@zeya.com

Dr. Stefanos Charaktiniotis

Partner

T (+30) 210 69 67 082

E s.charaktiniotis@zeya.com

Established in 1893, Zepos & Yannopoulos is one of the leading and largest Law firms in Greece providing comprehensive legal and tax services to companies conducting business in Greece.

280, Kifissias Ave.
152 32 Halandri
Athens, Greece

newsletters@zeya.com
Tel.: (+30) 210 69 67 000
Fax: (+30) 210 69 94 640
www.zeya.com

All rights reserved. No part of this publication may be reproduced or transmitted in any form or by any means, or stored in any retrieval system of any nature without prior permission. Application for permission for other use of copyright material including permission to reproduce extracts in other published works shall be made to the publishers. Full acknowledgment of author, publisher and source must be given. Nothing in this newsletter shall be construed as legal advice. The newsletter is necessarily generalised. Professional advice should therefore be sought before any action is undertaken based on this newsletter.