The Private Competition Enforcement Review

Seventh Edition

Editor
Ilene Knable Gotts

Law Business Research

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EDITOR'S PREFACE

Private competition litigation can be an important complement to public enforcement in the achievement of compliance with the competition laws. For example, antitrust litigation has been a key component of the antitrust regime for decades in the United States. The US litigation system is highly developed – using extensive discovery, pleadings and motions, use of experts, and, in a small number of matters, trials, to resolve the rights of the parties. The process imposes high litigation costs (both in time and money) on all participants, but promises great rewards for prevailing plaintiffs. The usual rule that each party bears its own attorneys' fees is amended for private antitrust cases such that a prevailing plaintiff is entitled to its fees as well as treble damages. The costs and potential rewards to plaintiffs create an environment in which a large percentage of cases settle on the eve of trial. Arbitration and mediation are still rare, but not unheard of, in antitrust disputes. Congress and the US Supreme Court have attempted to curtail some of the more frivolous litigation and class actions by adopting tougher standards and ensuring that follow-on litigation exposure does not discourage wrongdoers from seeking amnesty. Although these initiatives may, on the margin, decrease the volume of private antitrust litigation in the United States, the environment remains ripe for high levels of litigation activity, particularly involving intellectual property rights and cartels.

Until the last decade or so, the United States was one of the few outliers in providing an antitrust regime that encouraged private enforcement of the antitrust laws. Brazil provided another, albeit more limited, example: Brazil has had private litigation arise involving non-compete clauses since the beginning of the 20th century, and monopoly or market closure claims since the 1950s. In the last decade, we have seen other regimes begin to provide for private competition litigation in their courts, typically, as discussed below, only after (i.e., as a 'follow on') to public enforcement. In some jurisdictions (e.g., Lithuania, Romania, Switzerland and Venezuela), however, private actions remain very rare and there is little, if any, precedent establishing the basis for compensatory damages or discovery, much less for arbitration or mediation. Also, other jurisdictions (e.g., Switzerland) still have very rigid requirements for 'standing', which limit the types of cases that can be initiated.

The tide is clearly turning, however, with important legislation pending in many jurisdictions throughout the world to provide a greater role for private enforcement and courts beginning to act in such cases. In Japan, for example, over a decade passed from adoption of private rights legislation until a private plaintiff prevailed in an injunction case for the first time; also it is only recently that a derivative shareholder action has been filed. In other jurisdictions, the transformation has been more rapid. Last year in Korea, for example, private actions have been brought against an alleged oil refinery cartel, sugar cartel, school uniform cartel and credit card VAN cartel. In addition, the court awarded damages to a local confectionery company against a cartel of wheat flour companies. In the past few years, some jurisdictions have had decisions that clarified the availability of the pass-on defence (e.g., France and Korea) as well as indirect-purchaser claims (e.g., Korea). Moreover, we appear to be at a critical turning point in the EU: on 17 April 2014, the European Parliament voted to adopt the proposed directive on rules governing private actions for damages for infringements of competition law. Once approved by the European Council – possibly as early as the summer or autumn of 2014 – EU Member States will be required to implement the directive into national law within two years of its promulgation. As mentioned above, even prior to the entry of the directive, many of the Member States throughout the European Union have increased their private antitrust enforcement rights or are considering changes to legislation to provide further rights to those injured by antitrust law infringement. Indeed, private enforcement developments in some jurisdictions have supplanted the EU's initiatives. The English and German courts, for instance, are emerging as major venues for private enforcement actions. Collective actions are now recognised in Sweden, Finland and Denmark. Italy also recently approved legislation allowing for collective damages actions and providing standing to sue to representative consumers and consumer associations, and France and England are currently also contemplating collective action or class action legislation. Differences will continue to exist from jurisdiction to jurisdiction regarding whether claimants must 'opt out' of collective redress proposals to have their claims survive a settlement (as in the UK), or instead must 'opt in' to share in the settlement benefits. Even in the absence of class action procedures, the trend in Europe is towards the creation and use of consumer collective redress mechanisms. For instance, the Netherlands permits claim vehicles to aggregate into one court case the claims of multiple parties. Similarly, in one recent case in Austria, several parties filed a claim by assigning it to a collective plaintiff. Some jurisdictions have not to date had any private damages awarded in antitrust cases, but changes to their competition legislation could favourably affect the bringing of private antitrust litigation seeking damages. Most jurisdictions impose a limitation period for bringing actions that commences only when the plaintiff knows of the wrongdoing and its participants; a few, however, apply shorter, more rigid time frames without a tolling period for the commencement of damages (e.g., Brazil, Canada and Switzerland, although Switzerland has legislation pending to toll the period) or injunctive litigation. Some jurisdictions base the statute of limitations upon the point at which a final determination of the competition authorities is rendered (e.g., India, Romania, South Africa and Austria) or from when the agency investigation commences (e.g., Hungary). In other jurisdictions such as Australia and Chile, it is not as clear when the statutory period will be tolled. In a few jurisdictions, it is only after the competition authority acts that a private action will be decided by the court.

The interface between leniency programmes (and cartel investigations) and private litigation is still evolving in many jurisdictions; and in some jurisdictions it remains unclear what weight to give competition agency decisions in follow-on litigation private cases and whether documents in the hands of the competition agency are discoverable (see, for example, Germany and Sweden). Some jurisdictions such as Hungary seek to provide a strong incentive for utilisation of their leniency programmes by providing full immunity from private damages claims for participants. In contrast, other jurisdictions, such as the Netherlands, do not bestow any benefit or immunity in a follow-on damages action. These issues are unlikely to be completely resolved in many jurisdictions in the near term.

There is one point on which there is almost universal agreement among jurisdictions: almost all jurisdictions have adopted an extraterritorial approach premised on 'effects' within their borders. Canadian courts may also decline jurisdiction for a foreign defendant based on the doctrine of *forum non conveniens* as well as comity considerations. A few jurisdictions, such as the UK, however, are prepared to allow claims in their jurisdictions when there is a relatively limited connection, such as when only one of a large number of defendants is located there. In contrast, in South Africa, the courts will also consider 'spill-over effects' from antitrust cartel conduct as providing a sufficient jurisdictional basis.

The litigation system in each jurisdiction to some extent reflects the respective perceptions of what private rights should protect. Most of the jurisdictions view private antitrust rights as an extension of tort law (e.g., Austria, Canada, France, Hungary, Israel, Japan, Korea, Norway, the Netherlands and the UK), with liability arising for participants who negligently or knowingly engage in conduct that injures another party. Turkey, while allocating liability on the basis of tort law, will in certain circumstances award treble damages as a punitive sanction. Some jurisdictions treat antitrust concerns as a defence for breaching a contract (e.g., Norway and the Netherlands); others (e.g., Australia) value the deterrent aspect of private actions to augment public enforcement, with some (e.g., Russia) focusing on the potential for 'unjust enrichment' by the defendant. In Brazil, there is a mechanism by which a court can assess a fine to be paid by the defendant to the Fund for the Defence of Collective Rights if the court determines the amount claimed as damages is too low as compared with the estimated size and gravity of the antitrust violation. Still others are concerned that private antitrust litigation might thwart public enforcement and may require what is in essence consent of the regulators before allowing the litigation or permitting the enforcement officials to participate in the case (e.g., in Brazil, as well in Germany, where the competition authorities may act as *amicus curiae*). Some jurisdictions believe that private litigation should only be available to victims of conduct that the antitrust authorities have already penalised (e.g., Chile, India, Turkey and Venezuela). Interestingly, no other jurisdiction has chosen to replicate the United States' system of routinely awarding treble damages for competition claims; instead, the overwhelming majority of jurisdictions take the position that damages awards should be compensatory rather than punitive (Canada does, however, recognise the potential for punitive damages for common law conspiracy and tort claims, as does Turkey). In Venezuela, however, the plaintiff can get unforeseen damages if the defendant has engaged is gross negligence or wilful conduct. Only Australia seems to be more receptive than the United States to suits being filed by a broad range of plaintiffs – including class-

action representatives and indirect purchasers – and to increased access for litigants to information and materials submitted to the antitrust authorities in a cartel investigation. Finally, in almost all jurisdictions, the prevailing party has some or all of its costs compensated by the losing party, discouraging frivolous litigation.

Cultural views also clearly affect litigation models. Outside the EU and North America, the availability of group or class actions varies extensively. A growing minority of jurisdictions embrace the use of class actions, particularly following a cartel ruling by the competition authority (e.g., Israel). Some jurisdictions (e.g., Turkey) permit group actions by associations and other legal entities for injunctive (rather than damages) relief. Jurisdictions such as Germany and Korea generally do not permit representative or class actions but instead have as a founding principle the use of courts for pursuing individual claims. In some jurisdictions (e.g., China, Korea and Switzerland) several claimants may lodge a collective suit against the same defendant if the claims are based on similar facts or a similar legal basis, or even permit courts to join similar lawsuits (e.g., Romania and Switzerland). In Japan, class actions have not been available except to organisations formed to represent consumer members; a new class action law will come into effect by 2016. In contrast, in Switzerland, consumers and consumer organisations do not currently have legal standing and cannot recuperate damages they have incurred as a result of an infringement of the Competition Act. In Poland, only entrepreneurs, not individuals, have standing to bring claims under the Unfair Competition Act, but the Group Claims Act is available if no administrative procedure has been undertaken concerning the same case.

Jurisdictions that are receptive to arbitration and mediation as an alternative to litigation (e.g., Germany, Hungary, Japan, Korea, the Netherlands, Switzerland and Spain), also encourage alternative dispute mechanisms in private antitrust matters. Some courts prefer the use of experts and statements to discovery (e.g., in Chile; in France, where the appointment of independent experts is common; in Japan, which does not have mandatory production or discovery except in narrowly prescribed circumstances; and in Germany, which even allows the use of statements in lieu of documents). In Korea, economic experts are mainly used for assessment of damages rather than to establish violations. In Norway, the Civil Procedure Act allows for the appointment of expert judges and advisory opinions of the EFTA Court. Other jurisdictions believe that discovery is necessary to reach the correct outcome (e.g., Canada, which provides for broad discovery, and Israel, which believes that 'laying your cards on the table' and broad discovery are important). Views towards protecting certain documents and information on privilege grounds also cut consistently across antitrust and non-antitrust grounds (e.g., no attorney–client, attorney work product or joint work product privileges in Japan; limited recognition of privilege in Germany; extensive legal advice, litigation and common interest privilege in the UK and Norway), with the exception that some jurisdictions have left open the possibility of the privilege being preserved for otherwise privileged materials submitted to the antitrust authorities in cartel investigations. Interestingly, Portugal, which expressly recognises legal privilege for both external and in-house counsel, nonetheless provides for broad access to documents to the Portuguese Competition Authority. Some jurisdictions view settlement as a private matter (e.g., France, Japan and the Netherlands); others view it as subject to judicial intervention (e.g., Israel and Switzerland). The culture in some jurisdictions, such as Germany, so

strongly favours settlement that judges will require parties to attend hearings, and even propose settlement terms. In Canada, the law has imposed consequences for failure to accept a reasonable offer to settle and, in some jurisdictions, a pretrial settlement conference is mandatory.

As suggested above, private antitrust litigation is largely a work in progress in many parts of the world. Change occurs slowly in some jurisdictions, but clearly the direction is favourable to the recognition that private antitrust enforcement has a role to play. Many of the issues raised in this book, such as the pass-on defence and the standing of indirect purchasers, remain unresolved by the courts in many countries and our authors have provided their views regarding how these issues are likely to be clarified. Also unresolved in some jurisdictions is the availability of information obtained by the competition authorities during a cartel investigation, both from a leniency recipient and a party convicted of the offence. Other issues, such as privilege, are subject to change both through proposed legislative changes as well as court determinations. The one constant across all jurisdictions is the upward trend in cartel enforcement activity, which is likely to be a continuous source for private litigation in the future.

Ilene Knable Gotts
Wachtell, Lipton, Rosen & Katz
New York
August 2014

Chapter 23

SPAIN

Helmut Brokelmann[1]

I OVERVIEW OF RECENT PRIVATE ANTITRUST LITIGATION ACTIVITY

In 2013, the Spanish Supreme Court rendered two important judgments clarifying basic questions concerning actions for damages for breaches of EU and Spanish competition law.

Together with a previous judgment of 8 June 2012, the Supreme Court's judgment of 7 November 2013 in the *Sugar* cartel case[2] addresses key issues on damages actions, such as the binding effect of previous decisions of the competition authority, the burden of proof, the passing-on defence or the calculation of damages. The case goes back to an infringement decision adopted in 1999 by the Spanish competition authority, which found that from 1995 to 1996 two sugar manufacturers had fixed prices of sugar for industrial use and allocated markets and customers in Spain. The decision was subsequently confirmed on appeal by the Audiencia Nacional and the Supreme Court. Once the administrative decision became final, several companies that had purchased sugar for industrial use from the fined companies brought two follow-on actions claiming damages for the overcharge suffered, which were eventually heard by the Supreme Court.

The Supreme Court's judgment of 4 September 2013[3] turns on the issue of time limitation for commencing follow-on actions. In 2009, the Markets and Competition Commission (CNMC) concluded that Iberdrola Distribución had abused its dominant position in the electricity market and hindered competition in the electricity supply market. Specifically, the abusive conduct consisted in denying supplier Centrica the

1 Helmut Brokelmann is a partner at Martínez Lage, Allendesalazar & Brokelmann.

2 Judgment of the Spanish Supreme Court of 7 November 2013, Wes. RJ/2014/487.

3 Judgment of the Spanish Supreme Court of 4 September 2013, Wes. RJ/2013/7419.

information needed to compete in the retail market. Centrica brought a follow-on action for damages against Iberdrola Distribución before the Commercial Court of Bilbao,[4] which rejected Centrica's claim on the basis that its action was time-barred. This judgment was affirmed on appeal by the Audiencia Provincial, which held that the starting date of the one-year limitation period commenced when Iberdrola communicated to Centrica that the requested information was now available. The Supreme Court, however, held that the limitation period only starts when the claimant becomes completely aware of the damage suffered. In this case, the damage suffered could not be calculated until Centrica had complete knowledge of the information, which had taken place at a later stage when it actually received the information in a computerised form. Thus, the Supreme Court concluded that the action was not time-barred.

Another noteworthy development relates to stand-alone actions in which the competition rules have been directly enforced by the civil and commercial courts. In a series of petrol station cases, the civil courts have ruled on the validity of exclusive supply agreements and awarded damages where the contracts contained anti-competitive clauses (resale price maintenance or excessive non-compete commitments). In *Fontanet v. Repsol*, the Supreme Court confirmed in a judgment of 8 May 2013[5] that the contract in question was partially void given its excessive duration and damages for lost profits had to be granted.[6] Although in these cases there was no previous infringement decision from a competition authority, damages were awarded following a European Commission commitment decision on Repsol's supply agreements.[7]

A further example of a stand-alone damages action is the 9 May 2014 judgment of the Commercial Court of Madrid in the *MUSAAT v. ASEFA/CASER/SCOR* case related to an insurance cartel fined by the Spanish Competition Authority in 2009.[8] The judgment awarded damages to a competitor of the alleged cartel for suffering a boycott by three reinsurance companies for offering the insurance in question at prices below the minimum agreed by the members of the cartel. The Court qualified the boycott as an infringement distinct from the cartel and awarded €3 million in damages.

4 Commercial Court of Bilbao, judgment of 16 July 2012, *Centrica Energía v. Iberdrola Distribución*.

5 Judgment of the Spanish Supreme Court of 8 May 2013, *Estación De Servicio Fontanet S.L. v. Repsol Comercial De Productos Petrolíferos S.A*, Wes. RJ/2013/4946.

6 See also the judgments of the Audiencia Provincial of Madrid of 11 March 2013 (*Repsol Comercial de productos petrolíferos v. Don Dimas y TAYGRAO*); of 19 April 2013 (*Estación de servicio Azpeitia-azkoitia v. Repsol Comercial de productos petrolíferos*); of 15 July 2013 (*Estación de servicio Fuente la Reina v. BP Oil España*).

7 Commission Decision of 12 April 2006 relating to a proceeding pursuant to Article 81 of the EC Treaty (Case COMP/B-1/38.348 – *Repsol CPP*).

8 Fines totalling €120 million were imposed on six insurance and reinsurance companies. The Audiencia Nacional quashed this decision and the appeals are pending before the Supreme Court, where the European Commission has submitted an *amicus curiae* brief requesting that these judgments be overturned and the decision of the Competition Authority confirmed.

Another example of a stand-alone action is the 12 March 2013 judgment of the Madrid Commercial Court,[9] in which a claim brought by an association of pharmaceutical wholesalers (EAEPC) against Janssen-Cilag for abusive refusal to supply and introduction of a dual pricing system was dismissed.

II GENERAL INTRODUCTION TO THE LEGISLATIVE FRAMEWORK FOR PRIVATE ANTITRUST ENFORCEMENT

As elsewhere in the EU, in Spain the emphasis is clearly on the public enforcement of the competition rules by the administrative competition authority (Comisisón Nacional de los Mercados y la Competencia, CNMC) and its counterparts at the regional level. Nonetheless, since 2004 private enforcement has been possible before the commercial courts, which are competent to hear cases involving both national and EU competition law.[10] Although there have been occasional stand-alone actions before these courts, these are rather exceptional, since most actions are follow-on damages actions after an infringement of the competition rules has been declared by the CNMC or the European Commission.

Antitrust claims can be brought under Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU) if trade between EU Member States is affected by the agreement or practice in question and/or under Articles 1 and 2 of the Spanish Competition Act (SPA).[11]

Damages claims are usually based on tort law, although in claims from direct purchasers it should also be possible to bring a contractual action or an action of unjust enrichment. The limitation periods for each of these claims are different under Spanish law.

Tort claims are governed by Article 1902 et seq. of the Spanish Civil Code (CC): 'any person who by action or omission causes damage to another by fault or negligence is obliged to repair the damage caused.' Article 1968(2) establishes a limitation period of one year. This period starts to run as of the date in which the injured party had full knowledge of the harm suffered. It is not yet judicially settled how this applies in follow-on claims, but the prevailing view seems to be that the period starts to run when the administrative decision is published (or notified to the injured party). Nonetheless, it could also be argued that the deadline does not start to run until the administrative decision is final, particularly in view of the risk of having to bear the judicial costs if the claim is eventually dismissed. The above-mentioned *Centrica* judgment of the Supreme Court relates to a claim brought under the former Competition Act of 1989, which required the administrative decision to be final before damages claims could be brought. The 2007 SPA has derogated this requirement, although in practice injured parties often wait until the decision is final before bringing damages claims.

9 Madrid Commercial Court, judgment of 12 March 2013, *EAEPC v. Janssen-Cilag*, Wes. JUR 2009\147979.

10 Article 86-ter (2)(f) of the Judiciary Act.

11 Spanish Competition Act 15/2007 of 3 July 2007.

Although in the above-mentioned *Sugar* cartel case the Supreme Court refused to qualify the damages action brought by direct purchasers of the cartel as of a contractual nature, focusing instead on tort law, pursuant to Article 1101 of the Civil Code it is possible to claim damages when a contract is performed in bad faith (in the case of a cartel, because the seller knew that the price was affected by an infringement of the competition rules). The limitation period to claim damages in such cases is 15 years (Article 1964 CC).

Finally, it should in principle also be possible to claim that the contract with the direct purchaser is null and void due to a fraudulent misrepresentation on the part of the seller as regards the contract price. In such cases, it should be possible to claim restitution (Article 1303 CC) of the price paid to the infringing party (the latter's claim for restitution being barred due to the principle of *nemo auditur propiam turpitudinem allegans*, Article 1306 CC). The limitation period for such claims is four years (Article 1301 CC).

III EXTRATERRITORIALITY

There are no special rules regarding extraterritoriality. Spanish competition rules apply if the practice or conduct in question has actual or potential effects on competition in the national territory, irrespective of the nationality of the infringing company. According to EU Council Regulation 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, defendants domiciled in an EU Member State must in principle be sued in the courts of that Member State, although the Regulation provides for exceptions to that rule. Similar rules apply for non-EU countries under the Lugano Convention.

IV STANDING

In accordance with the case law of the Court of Justice of the European Union (CJEU) in the *Courage v. Crehan* and *Manfredi* judgments,[12] any person or undertaking that has suffered loss or damage as a result of an infringement of Spanish or EU competition law (both final consumers as well as the direct and indirect purchasers of the companies that have incurred in anti-competitive practices or the parties to an anti-competitive agreement) may bring a claim for damages. Any such claim may be brought on a 'stand-alone' basis where there is no prior infringement decision of a competition authority, or on a 'follow-on' basis. In addition, if one party contributing to any damage has compensated the victim in full, it has standing to start proceedings against the other contributing parties to recover the part of the damages paid on their behalf.

Consumer associations representing the interests of final consumers also have standing to defend the rights and interests of their members and consumers in general (see Section VII, *infra*).

12 Case C-453/99 *Courage v. Crehan* EU:C:2001:465; Joined Cases C-295/04 to C-298/04 *Manfredi and Others* EU:C:2006:461.

V THE PROCESS OF DISCOVERY

US-style discovery is not available under the Spanish Civil Procedural Law (CPL), which only provides for pretrial discovery (*diligencias preliminaries*, Article 256 et seq. CPL) to a very limited extent for the purposes of identifying the defendant or complying with other admissibility requirements of the future claim. Only in cases of violation of intellectual property rights does the CPL provide for a more far-reaching discovery mechanism which also allows requesting evidence proving the violation. Broader discovery rules are also provided for in the Unfair Competition Act.

In a ruling of 7 October 2011, the Audiencia Provincial of Madrid held that pretrial evidence may only be requested exceptionally if it is 'objectively indispensable' to prepare the trial. If the information could, however, be obtained during the usual phase of evidence gathering after filing the claim, such information may not be requested beforehand. Although the CPL provides for certain mechanisms that can be used by the future claimant to obtain information from the defendant, or secure the future production of evidence, these instruments have a very limited scope aimed at avoiding existing evidence no longer being available at a later stage.

Under the general evidence gathering rules of the CPL, parties to the proceedings may request any evidence in the preliminary hearing following the submission of the plaintiff's claim and the defendant's reply. Possible evidence covers any admissible means, such as documentary evidence, testimony by the parties' representatives or third parties, or expert opinions. As regards the limits, in particular regarding leniency documents, see Section XI, *infra*.

Article 328 CPL establishes a duty of making available to the parties the documents that refer to the object of the proceedings.

Third parties may only be required to produce documentary evidence where the court deems that such documents are essential to reach a judgment (Article 330 CPL). In addition, unless there is a special legal duty to secrecy or reservation, public bodies are subject to the obligation of making available the necessary documents and issuing certifications and attestations (Article 332 CPL).

VI USE OF EXPERTS

Economic experts are widely used in civil competition litigation, both to establish the existence of a violation in stand-alone actions[13] and to prove the existence of damages in follow-on actions, particularly as regards the quantification of lost profit. Article 299 CPL includes expert reports among the evidence that can be submitted by the parties, and the court may also appoint an independent expert or seek advice from the Spanish competition authority on the quantification of damages.

In the above-mentioned judgment of 7 November 2013 in the *Sugar* cartel case, the Supreme Court rejected the expert opinion submitted by the defendant, declaring

13 See, e.g., the judgment of the Commercial Court of Madrid of 4 March 2010, *Cableuropa v. Sogecable,* Wes. AC 2014\670.

that it was not enough to question the accuracy of the claimant's expert opinion. The expert must provide an alternative quantification that is better founded. In the case at issue, the Court confirmed that the only acceptable economic evidence submitted in the proceedings was that of the claimants' expert and awarded the full amount originally claimed (the lower instances had first granted 50 per cent of the claimed amount and then nothing on appeal). With regard to the method used in this report, the Supreme Court stated that the difficulty of reproducing the counterfactual scenario should not prevent the injured party from receiving a proper amount of compensation. What should be required is that the expert report provides a reasonable and technically founded hypothesis on contrasted and reliable data.

The Court also acknowledged the difficulty of appointing a judicial expert due to the specialisation required of the expert and the list-system, which impeded any meaningful selection by the court.

VII CLASS ACTIONS

Spanish legislation does not contain any specific provision regarding US-style class actions. However, a collective antitrust damages action may be brought pursuant to Article 11 CPL. Both consumer and user associations can bring actions to protect the rights and interests of their members as well as the general interests of consumers and users.

This provision distinguishes between two possible scenarios. First, actions to protect the 'collective interest' under Article 11(2) CPL, when the claimants affected are identified or are easily identifiable. These may be brought by a consumer association, by other authorised legal entities or by the affected group. To inform the potential claimants about an action, the claimant must give prior notice of the filing of the claim to all those parties that may be interested in joining the action.[14]

Second, actions to protect diffuse interests of individuals under Article 11(3) CPL, when those damaged by an event are an undetermined number of consumers or users or a number difficult to determine. In such cases, the standing to lodge a claim corresponds exclusively to the associations of consumers and users which, in accordance with the law, are 'representative'. The publication of the claim suspends the course of the proceedings for two months. Affected consumers or users who do not identify themselves before the court within this period will not be able to join the action, notwithstanding the possibility of benefiting from the final outcome of the case. In such case, the judgment will be binding on all affected consumers and users, not only on those that have appeared in the proceedings.

It is also possible for other interested parties, who were not original parties to the proceedings, to be admitted as claimants in the proceedings as long as they prove a direct and legitimate interest in the outcome of the case.[15]

14 Article 15 CPL.

15 Article 13 CPL.

Pursuant to Article 222 CPL, the *res judicata* effect also extends to parties who have not participated in the collective action brought by an association that defends their interests. Thus, consumers would be barred from bringing an individual action if a consumer association has already brought a collective action.

VIII CALCULATING DAMAGES

Damages claims for breach of EU and Spanish competition law are based on the general rules on tort liability. Under Spanish tort law any party causing harm to another party must restore the injured party to the position it had before being harmed. Damages awarded are monetary sums equivalent to the harm caused to the claimant. Punitive or exemplary damages do not exist under Spanish law.

The CC differentiates between actual damage (*damnum emergens*) and damage in the form of lost profits resulting from the infringement (*lucrum cessans*). The courts will only grant damages under either category if the harm is certain and can be demonstrated.

In the above-mentioned judgment of 7 November 2013 in the *Sugar* cartel case, the Supreme Court established that the right to effective judicial protection to be indemnified must be granted to any victim of anti-competitive behaviour. The judgment also acknowledges that the difficulty of establishing a counterfactual justified a greater freedom of judges to estimate damages. According to the Court, hypothesis of factual situations that have not occurred in reality may justify a greater flexibility for the judge in estimating the damages, particularly as regards lost profit. In accepting a counterfactual scenario, the judgment of the Commercial Court of Madrid of 25 February 2014 in the *Estació de Servei Cornellà v. Cepsa* case [16] concerning an anti-competitive petrol supply agreement explained that 'although these estimations are not perfect, the defendant does not raise valid objections or, at least, they are not quantified.'

As regards legal fees and costs, the general principle under Spanish law is that they are borne by the party who has had its pleas rejected with a cap of one-third of the value of the action[17] unless the court considers that the case raises difficult issues of law or fact. If the claim is partially rejected, each party bears its own costs and the common costs are shared equally.

Regarding the mitigation of damages defence, in the *Sugar* cartel case the members of the cartel argued that the plaintiffs could have reduced the losses arising out of the cartel by importing sugar from other countries. However, the Supreme Court held that this defence would have required negligent conduct on the part of the injured party which positively contributed to their losses.

IX PASS-ON DEFENCES

The passing-on defence was definitively accepted by the Spanish Supreme Court in the above-mentioned judgment of 7 November 2013 in the *Sugar* cartel case on the basis

16 *Estació de Servei Cornellà v. Cepsa*, Wes. RJ 40/2014.

17 Article 394 CPL.

that the CJEU also admits this defence in cases of devolution of tariffs and taxes contrary to EU law to avoid any unjust enrichment. This is also consistent with Article 12 of the Proposal for a Directive governing actions for damages,[18] according to which the burden of proving that the overcharge was passed on shall rest with the defendant (i.e., the infringer). Spanish tort law states that compensation must be equivalent to the damages effectively suffered by the claimant and the damages subject to compensation must be reduced by the profit or advantage that the injured party has gained through the actions causing the harm.

In the *Sugar* cartel judgment the Supreme Court held that the defendant has the burden of proving the passing-on defence (Article 217 CPL) and that the civil judge was not bound by any findings of the administrative decision (or judgment) because questions of causality are the exclusive competence of the civil jurisdiction. However, also based on the case law of the CJEU, the Court held that what must be passed on to the clients in a cartel case is not merely the overcharge but the economic damage derived from such a price increase (i.e., the entire damage, including loss of competitiveness, commercial reputation, and a possible reduction in sales volume). It is therefore necessary to prove that with the price increase to its clients the direct purchaser has been able to pass on the entire damage suffered due to the price increase of the cartel. The overcharge can involve a loss of competitiveness (especially serious in this case due to the intense export activity in this sector) and a negative effect on the brand image of the plaintiffs, all of which constitute the harm suffered.

X FOLLOW-ON LITIGATION

Under the previous Competition Act of 1989, follow-on litigation was the only way of seeking damages in antitrust matters. Parties could only seek compensation for damages caused by infringements of the competition rules once an administrative decision of the competition authority declaring the breach had become final (including any judicial appeals). This is why, for instance, the damages claims in the 1999 *Sugar* cartel case took until 2013 to reach the Supreme Court. Although the current SPA of 2007 has removed this requirement, injured parties often wait until the administrative decision becomes final before bringing judicial claims, because the cost risks are considerable.

To ensure that Articles 101 and 102 TFEU are applied uniformly, decisions of the European Commission are binding on national courts pursuant to Article 16 of Regulation (EC) 1/2003. However, there are no provisions regarding the binding effects of decisions adopted by the CNMC, both as regards the application of Articles 101 and 102 TFEU (the Proposal for a Directive on damages actions establishes the possibility of granting binding effect to these decisions) or the equivalent Articles 1 and 2 SPA. Pursuant to Article 434 CPL, a civil court may suspend delivering judgment in cases

18 Proposal for a Directive of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, 2013/0185 (COD), of 24 March 2014.

of application of the competition rules – both EU and national – if there is a risk of conflicting decisions with a case pending before the European Commission, the CNMC or a regional competition authority. In a judgment in the *Ausbanc v. Telefónica* case,[19] the Audiencia Provincial of Madrid held that this provision did not allow the judge to suspend the case at the beginning of the proceedings, but only at the very end before delivering judgment, so that in practice both proceedings – administrative (including judicial appeals) and civil – may run in parallel before their final resolution.

XI PRIVILEGES

The general rule in civil proceedings is full documentary access for the litigating parties, with confidentiality considerations being limited.

The Constitutional Court has recognised the obligation of lawyers to observe professional secrecy (they cannot be obliged to report information provided by the client for the purposes of obtaining such legal advice). The Spanish competition authority has in the past further recognised the client's right not to disclose any information submitted to an external lawyer in a competition case to seek legal advice. However, the administrative courts, both the Audiencia Nacional and the Supreme Court,[20] have recently interpreted legal professional privilege (LPP) in narrow terms, holding that as long as the CNMC does not use the legally privileged document retained during an inspection there is no violation of the company's rights of defence. The Supreme Court confirmed that there could be no infringement of the right to LPP if the company in question had not invoked a document's privileged nature during the inspection and evidence of the LPP nature of the documents was not provided by the company.

In follow-on cases, a civil court may, under Article 15a CPL, request a copy of the administrative file from the CNMC, which could become subject to the full access principle governing civil litigation. As an exception to this principle, this article provides that the CNMC is under no obligation to provide copies of documents obtained in the framework of its leniency programme. It has not yet been judicially clarified whether this special protection of oral statements and documents submitted in a leniency application also gives leniency applicants the right to oppose submitting such documents in civil proceedings, where confidentiality claims are rarely successful.

The duty of secrecy contained in Article 43 SPA could be jeopardised if a party intervening in the previous administrative proceedings were to use information obtained from the CNMC's file to substantiate a subsequent private claim. Under Article 43, anyone who takes part in the handling or resolution of proceedings or becomes aware of the referred proceedings by reason of his or her profession, post or participation as a party, must keep the facts that they have learnt through them and the confidential information learnt during the course of their employment secret, even after ceasing their functions. In

19 Judgment of the Audiencia Provincial of Madrid of 21 July 2009, *Ausbanc v. Telefónica,* Wes. JUR 2009\472163.

20 Judgment of the Audiencia Nacional of 2 April 2014, Wes. JUR 2014\114626; Judgment of the Supreme Court of 9 July 2012, Wes. RJ 2012\888.

addition, several documents included in the administrative file will typically be declared confidential by the CNMC.

XII SETTLEMENT PROCEDURES

Article 1809 CC establishes the possibility of entering into agreements between private parties to avoid or terminate litigation. A distinction should be made between judicial and non-judicial settlements.

Under the CPL, should the parties state at the beginning of the preliminary hearing they have reached an agreement or show they are ready to do so immediately, they may abandon the proceedings and seek the court's certification of the matters agreed upon. Once approved by the court, the settlement has the same effect as a judgment.

Extra-judicial settlements have the value of a private agreement between the parties, but they may have an effect in the early termination of the judicial proceedings as a waiver or abandonment by the claimant or acquiescence to the claim by the defendant. When the object of the proceedings is removed the parties must notify this circumstance to the court and if there is no objection the court will close the case.

XIII ARBITRATION

Under Article 2(1) of the Spanish Arbitration Act disputes on subjects within the free disposition of the parties can be submitted to arbitration. Commercial or contractual disputes are subjects within the free disposition of the parties, regardless of whether mandatory rules of public policy, such as the competition rules, are applicable to such disputes.

Hence, the competition rules must be applied in arbitration proceedings. In line with the judgment of the CJEU in the *Eco Swiss* case,[21] Spanish courts have confirmed that the 'existence of mandatory rules must not be confused with the existence of subjects that are not within the free disposition of the parties'.[22]

A recent ruling of the Audiencia Provincial de Madrid of 18 October 2013[23] has confirmed that the arbitrator must implement the applicable mandatory rules. Otherwise, any party may bring an action for annulment of the arbitral award before the ordinary jurisdiction if the arbitral award infringes public policy (due to the disregard of EU or national competition law).

As stated by Spanish courts,[24] the judicial review of arbitral awards aims to protect the public order and does not analyse the substance of the subject. However, regarding the intensity of control in the judicial review, the High Court of the Basque Country[25]

21 Judgment of the Court of 1 June 1999, C-126/97, *Eco Swiss China Time Ltd*.

22 Ruling of Audiencia Provincial de Madrid of 27 May 2004, Wes. JUR/2004/227176.

23 Ruling of Audiencia Provincial de Madrid of 18 October 2013, Wes. JUR/2013/354923.

24 Ruling of Audiencia Provincial de Valencia of 14 July 2008, Wes. AC. 2008/2376.

25 Ruling of Tribunal de Justicia del Pais Vasco of 19 April 2012, Wes. RJ 2012/6133.

declared that the courts should follow criteria of reasonableness and should verify that the arbitral award is sufficiently motivated.

XIV INDEMNIFICATION AND CONTRIBUTION

Contrary to what is common under the civil laws of other EU Member States, Article 1137 CC establishes as a general rule that, in case there is a plurality of debtors in a single obligation, this obligation is in principle joint, unless the agreement or a statute expressly determines that it is joint and several. As far as non-contractual liability (tort) is concerned, the Spanish Civil Code does not include any provisions as to whether or when such liability should be deemed joint and several.

However, Spanish courts have consistently interpreted the Civil Code so as to facilitate the effective recovery by the injured party of the damages caused by an illicit conduct. Thus, according to the case law of the Supreme Court, tort liability is joint and several when the damage is the result of the conduct of a plurality of offenders and it is not possible for the claimant to determine *ab initio* the degree of liability of each particular offender. Based on this case law, the liability of the co-cartelists with regard to the alleged victims of the cartel would usually be deemed by Spanish courts to be joint and several, although there are no specific precedents to date.

With regard to contractual joint and several liability, the Civil Code provides for detailed rules governing the relations between the co-debtors and the creditor ('external relations') and the relations among co-debtors ('internal relations'). These rules are sometimes, but not always, applied to joint and several tort liability.

Article 1145 CC grants one of the joint and several debtors that has paid the common debt the right to claim from his or her co-debtors the reimbursement of the part corresponding to each of them (*acción de repetición*). For these purposes, the defendant in a civil case may call a third party to intervene in the proceedings as co-defendant (*intervención provocada*). However, according to Article 14(2) CPL, this is in principle only possible 'when provided by the law', although this requirement is not always strictly applied by the courts. This induced intervention has two main consequences: (1) proceedings are suspended until the third party responds to the claim or until the expiry of the time limit granted to this third party to respond to the claim; and (2) the ruling of the court is *res judicata* for all the intervening defendants, and is thus relevant in any subsequent contribution claim between the co-defendants in the first proceedings. Co-debtors that have not intervened in the initial proceedings may oppose against the contribution claimant not only the exceptions available against this claimant, but also those they could have opposed against the original creditor.

XV FUTURE DEVELOPMENTS AND OUTLOOK

In the European context of public enforcement of the competition rules by administrative authorities, the private enforcement of competition law focuses, also in Spain, on follow-on damages actions. Although some cases have been litigated or settled in recent years, relating in particular to abuse of dominance infringements and the myriad litigation surrounding petrol supply agreements, there has been nearly no follow-on litigation as

regards cartel cases. The only exception has been the *Sugar* cartel case, which dates back to a cartel decision of the Spanish competition authority from 1999 and which has taken until 2013 to be finally settled by the Supreme Court, since damages actions under the former Competition Act were only possible once the administrative decision had become final. Another reason for this lack of private enforcement in damages actions has been the fact that Spain lacked a leniency regime until 2008, which made cartel prosecution anecdotic. Since then, the CNMC's cartel enforcement activity has significantly picked up and it may be expected that this enforcement activity will also lead to an increased follow-on litigation for damages, although injured parties often prefer to wait until the CNMC's decision becomes final before launching judicial claims.

The landscape of private antitrust litigation law in Spain in the forthcoming years will undoubtedly be reshaped by the implementation into national law of the future Directive on antitrust damages actions,[26] which the EU's Council of Ministers is due to adopt soon. As a matter of fact, the Supreme Court already invoked the future Damages Directive in its judgment in the *Sugar* cartel case of November 2013 in anticipation of its imminent adoption.

Although several questions, such as the admissibility of the passing-on defence, the binding effect of decisions of the Spanish competition authority and the operation of limitation periods, have been addressed in the Supreme Court's most recent case law, many issues remain open, which the future Directive will at least partly address.

26 Proposal for a Directive of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, 2013/0185 (COD), of 24 March 2014.

Appendix 1

ABOUT THE AUTHORS

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Helmut Brokelmann joined Martínez Lage, Allendesalazar & Brokelmann, a leading Spanish boutique specialising in competition and EU law, in 1994 and became a partner in 2000. He has worked on a range of cases involving Spanish national and EU competition law, EU law in general and regulatory law, across sectors such as telecommunications, media, pharmaceuticals, energy, transport, sports and distribution, both in administrative proceedings (merger filings, cartels and other infringement proceedings) and in litigation before Spanish national courts (follow-on damages actions and stand-alone actions as well as administrative judicial appeal proceedings before the High Court and the Supreme Court) and the European courts.

According to *Chambers and Partners (2013)*, 'Sources describe Helmut Brokelmann as fantastic. He's a pioneer with exquisite technical expertise.' *Chambers and Partners (2014)* states that 'Clients describe Helmut Brokelmann as 'responsive, technically solid and absolutely committed' and as 'an expert in European law with in-depth knowledge of cross-border projects'.'

Helmut studied law at the University of Munich, holds an LLM from the London School of Economics, was a research and teaching assistant at the Institute of Public International Law of the University of Munich (1988–1993) and is a regular lecturer in EU and competition law. He is the author of various publications in English, Spanish and German on competition law and EU law. He is the Spanish correspondent for the German competition law journal *Wirtschaft und Wettbewerb*.

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