
THE PRIVATE COMPETITION ENFORCEMENT REVIEW

FIFTH EDITION

EDITOR

ILENE KNABLE GOTTS

LAW BUSINESS RESEARCH

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ILENE KNABLE GOTTS

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EDITOR'S PREFACE

Private 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 and 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 has created 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 litigation activity in the near future, particularly involving intellectual property rights and cartels.

The United States has not been alone, however, in having a long established private litigation history. Brazil, for example, has had private litigation arise involving non-compete clauses since the beginning of the twentieth century, and monopoly/market closure claims since the 1950s. Nonetheless, Brazil – as well as many of the other jurisdictions discussed in this book – has seen an increasing role for private antitrust litigation in the past few years. In addition, other jurisdictions have more recently initiated private litigation regimes (for instance, Israel and Poland) as a complement to increased public antitrust enforcement. In some jurisdictions (e.g., Lithuania, 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. In some of these jurisdictions, legislation is pending that would potentially provide a greater role for private enforcement (e.g., Norway and Switzerland). Many jurisdictions still have very rigid requirements for 'standing', which limits the types of

cases that can be initiated (e.g., Switzerland). 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 or Canada with respect to Competition Act claims) or injunctive litigation. Some jurisdictions base the statute of limitations upon when a final determination of the competition authorities is rendered (e.g., Romania or South Africa) or from when the agency investigation commences (e.g., Hungary). In other jurisdictions (e.g., Australia or Chile), it is not as clear when the statutory period will be tolled. In other jurisdictions, the interface between leniency programmes (and cartel investigations) and private litigation is still evolving; in these 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. Some jurisdictions seek to provide a strong incentive for utilisation of their leniency programmes by providing full immunity from private damages claims for participants (e.g., Hungary).

The European Union remains in a state of flux. In April 2008, the European Commission published a White Paper suggesting a new private damages model for achieving compensation for consumers and businesses who are victims of antitrust violations, noting that 'at present, there are serious obstacles in most EU Member States that discourage consumers and businesses from claiming compensation in court in private antitrust damages actions [...]. The model is based on compensation through single damages for the harm suffered.' The key recommendations included collective redress, in the form of representative actions by consumer groups and victims who choose to participate, as opposed to class actions of unidentified claimants; disclosure of relevant evidence in the possession of parties; and final infringement decisions of Member States' competition authorities constituting sufficient proof of an infringement in subsequent actions for damages. Commissioner Kroes was unable to achieve adoption of the legislation on private enforcement before the end of her term. Commissioner Almunia entered into a new round of consultations and may combine the initiative with forthcoming legislation on consumer protection. Both proposals will likely contain some form of collective redress, a mechanism that is highly controversial in Europe. It is not clear whether the policy review being undertaken will conclude any time soon. The EU has also issued a report regarding quantifying damages.

Even in the absence of the issuance of final EU guidelines, 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 many of these jurisdictions have supplanted the EU's initiatives. The English and German courts 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 legislation. 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.

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. In contrast, some jurisdictions, such as the UK, are prepared to allow claims in their jurisdictions where there is relatively limited connection, such as where only one of a large number of defendants is located. 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 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. 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*). A few jurisdictions believe that private litigation should only be available to victims of conduct that the antitrust authorities have already penalised (e.g., Chile, 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). 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.

Varying 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 are not available except to organisations formed to represent consumer members. 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, 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 '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 pre-trial 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 appears to be to acknowledge that private antitrust enforcement has a role to play. 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 only recently has a derivative shareholder action been filed. In other jurisdictions, the transformation has been more rapid. During the past 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 year alone, 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).

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 proposed legislative changes. 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 2012

Chapter 24

SPAIN

Alfonso Gutiérrez¹

I OVERVIEW OF RECENT PRIVATE ANTITRUST LITIGATION ACTIVITY

In the past 12 months, antitrust litigation has largely focused on contractual disputes (often in the petrol station sector) in which parties invoke EU or Spanish competition rules to combat contractual breach arguments or, occasionally, to directly request a declaration from the courts invalidating the restrictive contractual clause. Claims of compensatory damages often accompany disputes on contractual issues. The main judgments rendered during the year are as follows.

i Supreme Court judgments

- a Judgment of 29 March 2012 (*Sogecable and Audiovisual Sport/Tenaria*): the termination of a contract by an undertaking with a dominant position due to a partial breach by the other party was considered an abuse, despite Spanish law expressly allowing a party to terminate a contract if the other party fails to comply with its terms.
- b Judgment of 9 May 2011 (*Gobergas/Repsol Comercial*): when applying EU or Spanish competition rules, Spanish civil courts should protect private interests without taking into account public interest goals. This means that civil courts may choose not to declare the nullity of anti-competitive agreements in cases where the party invoking competition rules acts in bad faith (e.g., when it has

¹ Alfonso Gutiérrez is a partner at Uría Menéndez. The author wishes to thank his colleague, Estíbaliz Peinado, for her assistance with the update of this chapter.

long benefited from the anti-competitive agreement and uses antitrust rules as an excuse for walking away from its contractual obligations).²

- c Judgment of 21 May 2012 (*Costa de la Luz/Repsol Comercial*): the civil nullity of anti-competitive agreements should be invoked by the interested party, and not declared *ex officio* by the civil courts.

ii Civil court judgments

- a Audience of Madrid: judgment of 3 October 2011 (*Nestlé España et al./Ebro Puleva*): compensatory damages were denied to the plaintiff against the sugar manufacturer that, according to a previous decision by the Spanish Competition Authority, had participated in a cartel. The Audience admitted the passing-on defence for Ebro only on the basis that it had been proven that Nestlé increased its prices. The reasoning followed by the court states that denying this line of defence would entail an unfair enrichment for those companies allegedly harmed by a particular behaviour contrary to competition rules.
- b Audience of Barcelona: order of 16 February 2012 (*Televisión Autonómica Valenciana/Mediaproducción*): decisions issued by the Spanish Competition Authority do not bind Spanish courts. However when assessing whether to grant interim measures, and particularly in what regards the *fumus bonus iuris*, the conclusions reached in the administrative proceeding shall be considered as a very relevant element.
- c Audience of Madrid: judgment of 25 November 2011 (*Takata Petri/Dalphi Metal*): directors can refuse to provide information requested by a shareholder – even if the shareholder has the right to request such information under national law – when this exchange of information may represent an infringement of European competition law (for example, when the information refers to the cost structure).

II GENERAL INTRODUCTION TO THE LEGISLATIVE FRAMEWORK FOR PRIVATE ANTITRUST ENFORCEMENT

i Jurisdiction

Commercial courts are specialised civil courts that are directly entrusted with the application of competition rules, both national³ and EU.⁴ Therefore direct antitrust claims (whether or not seeking damages), under which a plaintiff seeks a declaration that a contractual clause or a commercial conduct is null for being contrary to competition rules, should be filed before these courts.

The situation may be different for indirect antitrust claims, when a defendant invokes competition rules to oppose a plaintiff's request (e.g., honouring of a contractual

2 See also judgment of 26 March 2012 by the Audience of Madrid (*Rani/Repsol Comercial*), judgment of 16 June 2011 by the Audience of León (*Ms Teresa/Grupo Indes Edades*) and judgment of 4 November 2011 by the Audience of Guadalajara (*Yves Rocher/Ms Martínez*).

3 As per the first additional provision of the Spanish Competition Act.

4 As per Article 86-ter 2(f) of the Judiciary Act.

obligation). In this scenario, the competent court will typically be an ordinary civil court rather than a commercial court. Practice by the judiciary shows that the ordinary civil courts tend not to reject these indirect antitrust claims (due to a possible lack of jurisdiction), but rather take into account the relevant competition law for ruling on the case.⁵

Practice by the judiciary also shows that follow-on actions may be lodged before the ordinary civil courts, since they are limited to seeking damages (and do not extend to the interpretation and application of competition rules), and are therefore not distinct from any other civil compensatory claim.⁶

ii Legal basis

Direct antitrust claims may be based upon EU law⁷ if trade between EU Member States is affected by the agreement or practice, or upon Spanish competition law.⁸ Invalidation of anti-competitive agreements or conduct may be based on the competition rules themselves (i.e., Article 101.2 of the TFEU or Article 1.2 of the Spanish Competition Act) or on the Spanish Civil Code (Article 6.3). Regarding the economic consequences of an antitrust breach, two scenarios may be differentiated:

- a In cases of contracts contravening competition rules – and hence being null and void – parties should reciprocally restore their economic contributions under Article 1303 of the Civil Code, with the important limitation contained in Article 1306 (*turpis causa* and prohibition of unjust enrichment).
- b Article 1902 of the Civil Code is the general legal basis for claiming damages under Spanish law (‘any person who by action or omission causes damage to another by fault or negligence is obliged to repair the damage caused’) and is generally invoked for claiming compensatory damages caused by an antitrust infringement, either under a follow-on action or otherwise.

Finally, a violation of the antitrust rules could in certain circumstances be regarded as an unfair commercial practice caught by Article 15 of the Unfair Competition Act and in such a case, Article 18 thereof provides an autonomous legal basis for claiming damages before civil courts.

5 An important exception applies: ordinary civil courts must reject the defendant’s antitrust argument when this amounts to a genuine counterclaim or *reconvencción* (i.e., a separate claim lodged against the original plaintiff). According to Article 406 of the Civil Procedure Act, a civil court may not accept a counterclaim when it lacks jurisdiction on the main claim. In such a case, the counterclaim amounts to a direct antitrust claim and should be filed with a commercial court.

6 Nonetheless, commercial courts remain fully competent to hear follow-on cases. See judgment of 20 January 2011 by Commercial Court No. 2 of Barcelona in *Centrica Energía/ENDESA Distribución Eléctrica*.

7 Articles 101 and 102 of the Treaty on the Functioning of the European Union (‘the TFEU’).

8 Article 1 and 2 of the Spanish Competition Act.

iii Limitation periods

A claim for invalidation of a contract (e.g., for breach of antitrust rules) is limited to four years under Article 1301 of the Civil Code. Claims for damages are limited to one year (Civil Code, Article 1968) from the day the plaintiff was aware of the damage. Under well-settled case law, in a case of damage caused by continuous or successive illegal acts, the one-year limitation period only begins when the harm is definitely caused. In follow-on actions, the date of the decision by the Competition Authority declaring the antitrust infringement does not normally coincide with the moment in which the plaintiff was aware of the harm. The one-year period is interrupted by any claim (judicial or extra-judicial) made by the harmed person (Civil Code, Article 1973).

III EXTRATERRITORIALITY

No special rules exist regarding extraterritoriality. Spanish competition rules apply to acts or conduct that have as their object, produce or may produce the effect of prevention, restriction or distortion of competition in all or part of the Spanish national market; it is immaterial whether the author of the conduct is a foreigner or not.

Under EU Council Regulation 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, however, persons domiciled in an EU Member State must be sued in the courts of that Member State (and not abroad). This means that a party residing in an EU Member State that breaches Spanish competition rules and causes damages in Spain should not be sued in the Spanish courts, but in the courts of its state of residence. The reverse also holds true: the Spanish civil courts may accept a claim against a person domiciled in Spain, even if the damage has been caused in another Member State.

IV STANDING

Under Spanish tort law, standing to bring a damages claim lies with the party that has suffered the damage or, in the case of consumers, consumers' associations that are mandated to protect their interests. Also, 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 that has been paid on their behalf.

Regarding standing as a defendant, actions for damages should be brought against the individual or company participating in the damage. Indirect purchasers that have suffered damages as a result of anti-competitive behaviour (such as a cartel in an upstream market) are also entitled to claim damages. There is always a possibility that in these cases, the plaintiff may have to jointly sue both the seller and the seller's supplier.

V DISCOVERY

Discovery mechanisms in Spain are rather limited and they are generally only available to the parties once judicial proceedings have already started. The Civil Procedure Law does not include any mechanism for pretrial discovery.⁹

Discovery may be mainly channelled through Article 328 of the Civil Procedure Law, which provides that a party to the proceedings may request that the other party submit to the court documents that are not (and cannot be) available to it (such as the defendant's internal documents) and are related to the object of the proceedings and of evidentiary importance.

These petitions for disclosure normally affect only the parties to the proceedings, but the court may also require a third party to produce documentary evidence if it is deemed fundamental for the final decision.¹⁰ Unjustified failure to produce the evidence requested will lead the court to take its decision on the basis of the evidence available, including possible non-authenticated copies or a description of the contents of the requested document, submitted by the party interested in the disclosure. In these cases, the court is also empowered to issue a formal request to the party in default if the circumstances dictate.

Under this instrument, the court may order one party to submit documents related to administrative proceedings, including leniency applications.¹¹

The plaintiff may also try to obtain documents under Article 328 of the Civil Procedure Law by seeking interim protection from the court (even before submitting the claim). However, the approval of these measures by the courts requires the plaintiff to show that the arguments for the potential claim are, *prima facie*, well founded, and that there is some urgency in the need to obtain the documents. The courts will normally

9 Although the Civil Procedure Law provides for certain mechanisms that can be used by the future plaintiff to obtain information from the defendant, or even secure the future production of evidence, these mechanisms would have a very limited application in competition law claims. Under Article 256 of the Civil Procedure Law a future plaintiff may ask the court to order a number of measures aimed at obtaining information that is necessary to prepare the claim. However, the law establishes very limited types of information that can be obtained (basically data on the legal standing and capacity of the defendant, production of the elements on which the procedure is going to decide, production of certain documents such as wills, annual accounts, insurance policies, medical records or IP rights).

Article 297 of the Civil Procedure Law also foresees measures for securing the future production of evidence. This instrument could in theory be helpful to identify documents that can be part of the claim and whose production can be asked under Article 328 of the Civil Procedure Law. However, and from a practical perspective, these measures will usually not entail the production of documents for preparing the claim.

10 See Article 330 of the Civil Procedure Law.

11 The limits imposed in Article 15-bis of the Civil Procedure Law to the submission of leniency documents only affect the competition authorities, and not the private parties that prepared and submitted those documents (see Section XI, *infra*).

refuse to grant interim protection aimed at allowing the plaintiff to have access to the information necessary for preparing the substantive part of its claim.

VI USE OF EXPERTS

Under Spanish tort law, compensation in a damages case will only cover the damages that the plaintiff is able to prove in court. From this perspective, the courts have no discretion on granting damages. For this reason, expert reports quantifying the economic value of the damages are particularly important, as shown by recent judicial practice.¹²

Expert reports are generally permitted before civil courts under Article 299 of the Civil Procedure Law. In a claim for damages (either via direct antitrust claims or follow-on actions), the plaintiff must produce a written expert report and attach it to the claim (or to the response in the case of the defendant). The plaintiff may also ask the court to appoint an independent expert under Article 335 of the Civil Procedure Law.

Article 25(c) of the Competition Act empowers the Spanish Competition Authority to assist courts in determining the basis of the indemnification due to the harmed party.

VII CLASS ACTIONS

The Civil Procedure Law states that there are different ways in which several parties may submit a collective action.

The simplest collective action would be the consolidation of the claims of different plaintiffs, provided that there is a link between all the actions due to the same object or the same petition.¹³ To this effect, the court would presume that such link exists when the actions are based on the same facts.

Moreover, although there are no class actions as such under Spanish law, Article 11 of the Civil Procedure Law includes some provisions in relation to collective legal standing in cases involving only the defence of the interests of 'consumers and final users'.¹⁴ Consumers' associations can protect not only the interests of their associates but also the general interests of all consumers and final users. This could be applicable to antitrust cases, particularly those involving the declaration of antitrust infringements

12 See *CENTRICA Energía/Endesa Distribución Eléctrica*, op cit., which illustrates the importance of the expert reports.

13 See Articles 12 and 72 of the Civil Procedure Law.

14 To this effect, the definition of 'consumers and final users' is broad, including any individual or company that acquires, employs or enjoys, as final user, moveable and immovable goods, products, services, activities or functions that are manufactured, provided, supplied or delivered by any private or public entity.

or injunctions.¹⁵ When a consumers' association initiates a collective action under Paragraphs (2) and (3) of Article 11, the admission of the claim will be made public.¹⁶

Collective actions in defence of the interest of consumers and end users can be of two types, depending on the degree of certainty regarding the identification of the consumers or users affected by the claim.

First, in the event that a particular group of identifiable consumers or users is harmed by specific anti-competitive behaviour, the *locus standi* for defending the interests of that group would fall with consumers' associations and the groups of affected consumers.¹⁷ Here, consumers or users whose interests may be affected must be informed by the plaintiff so that all potentially affected consumers may intervene in the civil proceedings at any time (opt-in clause).

Second, if anti-competitive behaviour damages the interests of a group of consumers or users that cannot be easily identified, the only entities with the capacity to represent those interests in court would be the consumers' associations that are 'widely representative'.¹⁸ For this purpose, the courts will acknowledge that a consumer association is 'widely representative' if it is part of the Consumers and Users Council.¹⁹ Here, publication would be considered sufficient for all the interested consumers to identify themselves. The law provides a two-month term after which the proceedings will be resumed. Affected consumers or users who do not identify themselves before the court within that term 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.

VIII CALCULATING DAMAGES

Spanish tort law has a purely compensatory nature. Any party causing harm to another party (materially or emotionally) must redress the affected party so as to restore the situation to what it was prior to causing the harm.²⁰ Therefore, damages awarded by the Spanish courts are monetary sums equivalent to the harm caused to the plaintiff. Other kinds of damages, such as punitive or exemplary damages, are alien to the Spanish legal system.²¹

15 Article 11(1) of the Civil Procedure Law.

16 Article 15 of the Civil Procedure Law expressly foresees the publication of the admission of the claim in the media.

17 Article 11(2) of the Civil Procedure Law.

18 Article 11(3) of the Civil Procedure Law.

19 See Article 24 of the Royal Legislative-Decree 1/2007 of 16 November 2007.

20 This rule applies even in the case of damages arising from criminal offences (civil liability *ex delicto*).

21 Compensable damage must be certain (not merely potential or hypothetical), although it can occur in the future.

The Spanish courts have acknowledged the possibility of claiming two kinds of damages: economic or material damages, including all the damages affecting the assets and estate of a person or company, and non-economic damages, including damages that affect the emotional well-being of a person.

Material damages are calculated as the financial or economic equivalent of the loss caused to the plaintiff. In this regard, the Spanish courts require the damage to be real and certain.²² Following the provision for contractual damages of Article 1106 of the Civil Code, and in line with the idea of complete compensation, case law has differentiated between two kinds of material damages:²³ *damnum emergens* (i.e., the cost of repairing the damages, including not only the damage itself but all the expenses reasonably necessary for such reparation) and *lucrum cessans* (i.e., the loss of profit resulting from the behaviour of the defendant). In both cases, the courts only grant damages under either of the two categories if the harm to the plaintiff's interests is certain and can be demonstrated. In this regard, actual damage is considerably easier to prove than the loss of profit.

Non-economic damages are more difficult to measure and value and, therefore, are more difficult to redress. Although in principle an antitrust offence would only entail material damages, moral damages cannot be excluded. Thus, any psychological stress caused by anti-competitive conduct or harm to the plaintiff's reputation or good name may be included in the claim.

In terms of legal fees and costs, the general principle under Spanish law is that litigation costs are paid by the losing party, unless the court finds that the case raises serious legal or factual doubts in view of the circumstances and the case law.²⁴ If the claim is partially rejected, each party will bear its own costs and the common costs will be shared equally. In addition, there is a limit to the costs that the losing party must bear: one-third of the value of the action.²⁵ These limits do not apply if the court finds that the claimant (or the counterclaimant, as appropriate) has acted recklessly.

IX PASS-ON DEFENCES

In principle, Spanish tort law does not contain an express provision regarding the possibility of a defendant arguing that the damages allegedly suffered by the plaintiff have been transferred to a third party. This situation is especially relevant in competition law cases where a distributor sues its supplier for damages and the supplier may reply that no damages have been suffered by the plaintiff insofar as they have been passed on to the plaintiff's customers.

22 See, *inter alia*, judgments of the Supreme Court of 16 November 2009 or of 25 February 2009.

23 See, for instance, judgment of the Supreme Court of 3 October 1997.

24 See Article 394 of the Civil Procedure Law.

25 See Article 394(3) of the Civil Procedure Law.

Although this defence has only been discussed by Spanish courts in few cases,²⁶ it seems that they should take it into account in examining a defendant's position. Spanish tort law provides that compensation must be equivalent to the damages effectively suffered by the claimant. It follows that damages subject to compensation must be reduced with the profit or advantage that the harmed person has gained through the actions causing the harm (*compensatio lucri cum damno*).²⁷ However, this rule would only apply where (1) the claimant's profit is real and quantifiable; and (2) a causal relationship exists between the behaviour that caused the damage and the claimant's profit.

The civil courts have seldom acknowledged the existence of these two requirements, particularly the causal relationship. It follows that, although some practical difficulties derive from the causality link requirement, a defendant in a cartel case could successfully argue before a civil court that the plaintiff has not suffered damages insofar as it has been able to transfer the alleged damages to a third party, provided that it produces evidence to substantiate this fact.²⁸

X FOLLOW-ON LITIGATION

Follow-up litigation was, until recently, the only way of seeking damages in antitrust matters in Spain. The old Spanish Competition Act of 1989 stated that parties harmed by antitrust offences could only seek compensation in court for damages caused once an administrative decision of the Competition Authority declaring the breach had been adopted and become final (i.e., not appealed against or confirmed by judicial review). The current 2007 Competition Act has removed this condition, and harmed persons may access the courts directly to claim for compensation of damages caused by anti-competitive conduct, without the need to wait for a prior administrative decision.

Certainly, follow-on claims remain possible;²⁹ however, claimants are advised to take into account the one-year limitation period for filing the compensation claim that – as previously discussed – does not necessarily run from the date on which the administrative decision is taken. In fact, in a recent non-reported case, a follow-on action was declared to be time-barred by an ordinary civil court for this reason.

26 See judgment of 20 February 2009 by Civil Court No. 11 of Valladolid in *Gullón et al./Acor*; judgment by the Audiencia Provincial de Madrid of 9 October 2009 in *Nestlé España et al./Acor*; and the recent judgment of the Audiencia of Madrid of 3 October 2011 (*Nestlé España et al./Ebro Puleva, SA*) already cited.

27 See judgments of the Supreme Court of 8 May 2008 and of 15 December 1981.

28 See judgment of the Audiencia of Madrid of 3 October 2011 (*Nestlé España et al./Ebro Puleva, SA*).

29 See judgment of 20 January 2011 by Commercial Court No. 2 of Barcelona in *Centrica Energía/ ENDESA Distribución Eléctrica*.

XI PRIVILEGE

The Spanish Constitutional Court has generally recognised the obligation of lawyers to observe professional confidentiality, and therefore they cannot be forced to report advice given to a client or other information provided by the client for the purposes of obtaining such legal advice. The Spanish Competition Authority has further recognised the other side of the lawyer's confidentiality obligation, which is the client's right not to disclose any information submitted to an attorney in competition case documents in order to seek legal advice. However, it is unclear whether this would be also accepted in private litigation.

As a general rule, all documents contained in civil proceedings are fully accessible to the parties. The only reason for the courts to restrict access to information is if it is deemed necessary for the protection of public policy, national security or protection of any other rights and liberties.³⁰

A specific set of problems arises in follow-on cases, which presupposes a previous administrative file with the Competition Authority, typically containing documents (including leniency applications) that will be relevant to the damages claim. Nonetheless, the use of and access by parties to private litigation to such documents may be problematic for two reasons.

First, Article 43 of the Competition Law imposes a stern duty of secrecy on any person taking part in the administrative proceedings in relation to the facts of which they have become aware of during these proceedings. In fact, the Spanish Competition Authority has publicly warned parties of the consequences of breaching this duty of secrecy in several cases.³¹ Arguably, this duty of secrecy could be jeopardised if a party intervening in the previous administrative proceedings were to use information obtained from the Authority's file in order to ground a subsequent private claim.

Second, a number of documents included in the administrative file will typically be declared confidential by the Competition Authority with regard to some of the interested parties. This will be the case for documents containing business secrets of any of the affected parties and, in particular, for leniency applicants. However – and as already noted – the general rule in civil proceedings is full documentary access for the litigating parties, with confidentiality limitations playing only a marginal role.

In follow-on cases, the civil court may request a copy of the administrative file from the Competition Authority, which could become subject to the full access principle. Article 15-bis of the Civil Procedure Law is the legal basis that empowers the civil court (*ex officio* or at the request of any of the parties) to request the Competition Authority to submit the relevant information to the judicial proceedings.

A special rule applies to leniency documents contained in the administrative file: as an exception to the general principle, Article 15-bis of the Civil Procedure Law states that competition authorities cannot be forced by civil courts to submit information obtained in the course of a leniency application. However, this special rule does not

30 See Article 140(3) of the Civil Procedure Law.

31 See Spanish Competition Authority press releases of 28 December 2008, 21 January 2009 and 16 July 2009.

enjoin the civil court – typically at the request of a damage seeker – from requiring defendants to submit information prepared and filed in the context of the leniency application with the Competition Authority.

This is a natural consequence of the strictly private and compensatory nature of Spanish tort law: persons or companies injured by anti-competitive behaviour should not in principle be deprived of their compensation rights simply because the company causing the damage chose to cooperate with the Competition Authority in order to limit its own administrative liability.

XII SETTLEMENT PROCEDURES

Under Spanish law, settlement of a competition case is possible either before the Competition Authority (administrative proceedings) or before a court (judicial proceedings). These types of settlement serve different purposes, however, and are not interchangeable; while a settlement before a civil court refers to civil liability, a settlement before the Competition Authority only affects the administrative liability of the parties involved, with the result that a party to a settled antitrust administrative proceeding could subsequently be sued for damages before a civil court.³² Another difference is that judicial settlements will normally occur by means of a direct agreement between the parties (the judge simply certifying that agreement), while for administrative settlement to occur the parties must reach an agreement with the Competition Authority (which ensures that the terms of the settlement duly protect the public interest).

The legal basis for civil settlements under Spanish law is Article 1809 of the Civil Code, which contemplates agreements between private parties in order to avoid or terminate litigation. A distinction can be made between judicial and extra-judicial settlement, depending on whether it is submitted to the court for approval. Moreover, the courts should verify whether an agreement between the parties is possible at the beginning of the trial (Civil Procedure Law, Article 415) and once the subject matter of the proceedings has been defined (Civil Procedure Law, Article 428). If a settlement is reached, the court will assess whether there is any legal obstacle to it and, if not, it will officially approve the settlement. Once approved by the court, the settlement has the same effect as a judgment.³³

Extra-judicial settlement would have the value of a private agreement between the parties, but it may have an effect in the early termination of the judicial proceedings in any of the following ways: (1) waiver by the plaintiff, in which the proceedings will be

32 Nonetheless, administrative settlements with the Competition Authority are typically construed as avoiding a declaration or admission of a competition breach by any of the parties. This will, of course, render more difficult a subsequent follow-on judicial claim, since no illegal anti-competitive behaviour has been declared by the Competition Authority.

33 Article 19(1) of the Civil Procedure Law provides that the parties to civil proceedings are entitled to waive their rights, abandon the proceedings, accept the claim or settle the dispute, unless the law prohibits any of these actions or limits them for general interest reasons or for the benefit of a third party.

totally or partly terminated when the plaintiff waives all or part of its claim or rights; (2) acquiescence to the claim by the defendant, where the proceedings can be ended if the defendant totally or partly accepts the plaintiff's claim; or (3) formal abandonment of the proceedings by the plaintiff.³⁴ If the parties exercise their rights to dispose of the object of the civil proceedings, any extra-judicial satisfaction of the claim between the parties may lead to the closing of the proceedings due to lack of object. According to Article 22 of the Spanish Civil Procedure Law, when the object of the proceedings is removed the parties must notify this circumstance to the court. If there is no objection in the form of a subsisting interest, the court closes the case.

XIII ARBITRATION

Article 2 of Law 60/2003 of 23 December 2003 on Arbitration provides that private arbitration is allowed in relation to disputes on issues under the free control of the parties. This means that public policy matters cannot be submitted to arbitration. Following the ECJ judgment in the *Eco-Swiss* case,³⁵ arbitrators may apply competition rules in determining the civil validity of a contract or a commercial conduct, but not declare a breach of the rules or extract any administrative liability. Spanish courts have admitted that arbitrators have the possibility of examining the civil consequences of an antitrust infringement as a subsidiary issue.³⁶

In addition, Article 24(f) of the Competition Law provides that the parties can submit a dispute involving competition issues to the Competition Authority under the provisions of the Arbitration Law. Submission to arbitration before the Competition Authority may be carried out by means of an agreement between the parties or by an individual declaration signed by one party following commitments or conditions established in a decision ending antitrust proceedings.³⁷ The arbitration award must be notified to the parties within three months of the start of the proceedings.

34 The main difference with a waiver is that in the case of abandonment the plaintiff may restart the proceedings at a later stage.

35 See judgment of the Court of 1 June 1999, *Eco-Swiss China Time Ltd v. Benetton International NV*, Case C-126/97 (Rec. 1999, pI-03055).

36 Judgment of the Court of Appeal of Madrid of 30 March 2007.

37 In this case, this declaration will not be effective until the other party has accepted the arbitration on the same conditions as the first party.

XIV INDEMNIFICATION AND CONTRIBUTION

The general rule in Spanish contract law is joint liability, while joint and several liability is the exception³⁸ (see Articles 1137 and 1138 of the Civil Code). Regarding non-contractual liability, case law³⁹ tends to consider that when a plurality of parties have commonly caused damage, such parties would be jointly and severally liable to the victim. In this regard, it is particularly important for supporting the existence of joint and several liabilities that the particular intervention of each party in the damaging behaviour cannot be individualised. Thus, in principle, the Spanish courts may accept a claim of a party that has been injured by the action of a cartel against only one of its members.

However, and notwithstanding the common acceptance of this joint and several liability, the Spanish civil courts also admit the theory of liability *in solidum*, under which a plurality of parties is jointly and severally liable but each individual party is assigned a liability share. Therefore, if the plaintiff has decided to bring actions against only one member of a cartel, the defendant may ask the court to bring the other members of the cartel to the proceedings in order to allocate the share of the responsibility that corresponds to each of them.⁴⁰

XV FUTURE DEVELOPMENTS AND OUTLOOK

To date, no legal reforms are envisaged that would foster the development of private antitrust litigation in Spain. The current 2007 Competition Act (which, *inter alia*, gave full competence to the civil courts for applying antitrust rules and introduced the leniency programme) is considered to be a sufficient legal framework for private enforcement to flourish. Indeed, a reasonably large number of cartel cases (most triggered by leniency applications) have been decided in the past year and will be decided in the near future; it is likely that follow-on actions will be initiated in many of them.

In any event, and in our view, some obstacles exist to stronger development of antitrust private enforcement in Spain:

- a Uncertainty regarding the courts and proceedings: private competition enforcement is quite a recent innovation in the Spanish legal system and there are still a number of legal elements (such as the identification of the competent court in every case, the possibility of a suspension of the proceedings or the difficulties in providing adequate evidence) that are not quite clear yet and that may jeopardise, or at least delay, a more recurrent flow of cases. Most of these uncertainties will be solved by the case law of the courts and, in particular, by the Supreme Court.

38 This means that the parties will respond jointly, but not severally, unless expressly agreed or imposed by a law.

39 In this regard, see judgments of the Spanish Supreme Court of 3 December 1998, 15 July 2000 and 27 June 2001.

40 This procedure is expressly foreseen in Article 14 of the Civil Procedure Law.

- b* The absence of certain rules for antitrust damages: from a substantive perspective, Spanish general tort law has very stringent requirements that have been shaped by the case law of the Supreme Court for more than a century. These rules are based on a concept of civil liability rooted in fault and, therefore, they impose high standards of evidence for proving damages on plaintiffs. This is coupled with very limited pretrial discovery mechanisms, which appear to be particularly important in direct antitrust claims (as opposed to follow-on actions). Finally, uncertainties on the full admission of joint and several liability in antitrust cases and the functioning of collective actions are capable of seriously undermining the effectiveness of damage compensation in large cartel cases.
- c* The cost of the proceedings in relation to the potential benefit: civil proceedings can be very expensive and lengthy in relation to the amount of the damages to be recovered, in particular in cases involving consumers. Therefore, the investment of financial resources and time required for these kinds of claims are a serious deterrent to potential plaintiffs.

The future of private antitrust enforcement largely depends of public awareness, in particular on the part of consumers. This is a task for the Competition Authority, which has among its functions an advocacy mission to create a ‘competition culture’ and encourage more intense and frequent application of antitrust rules. Increased participation of the Competition Authority as *amicus curiae* in private enforcement cases would undoubtedly be a relevant factor in this respect.

Appendix 1

ABOUT THE AUTHORS

ALFONSO GUTIÉRREZ

Uría Menéndez

Alfonso Gutiérrez is a lawyer in the Madrid office of Uría Menéndez. He joined the firm in 1999 and became a partner in January 2005. He is currently a member of the EU and competition law department of the firm.

His practice focuses on EU and Spanish competition law. He is regularly asked to advise on EU and Spanish mergers in many different sectors (such as banking, energy, telecommunications, aviation, industrial products and pharmaceuticals).

Mr Gutiérrez frequently acts in litigious matters concerning the individual or collective abuse of a dominant position and the conclusion of restrictive agreements between competitors or non-competitors. He also intervenes on a regular basis in proceedings for infringements of Articles 101 and 102 of the TFEU and Articles 1 and 2 of Spanish Law 15/2007 for the Defence of Competition. He also regularly represents clients before the European Commission in state aid cases.

He regularly lectures and writes on competition law matters and has repeatedly been nominated as a leading lawyer in competition and antitrust by specialist directories such as *Chambers Global*, *PLC Which Lawyer? Yearbook*, *Best Lawyers* and *The International Who's Who of Business Lawyers*.

URÍA MENÉNDEZ

Príncipe de Vergara, 187
Plaza de Rodrigo Uría
28002 Madrid
Spain
Tel: +34 91 586 0657
Fax: +34 91 586 0753
agh@uria.com
www.uria.com