
THE CARTELS AND LENIENCY REVIEW

THIRD EDITION

EDITOR
CHRISTINE A VARNEY

LAW BUSINESS RESEARCH

THE CARTELS AND LENIENCY REVIEW

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Third Edition

Editor
CHRISTINE A VARNEY

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CONTENTS

Editor's Prefacevii
	<i>Christine A Varney</i>
Chapter 1	INTRODUCTION.....1
	<i>Christine A Varney</i>
Chapter 2	AUSTRALIA.....5
	<i>Ayman Guirguis, Mark McCowan and Jackie Mortensen</i>
Chapter 3	BRAZIL26
	<i>José Alexandre Buaiz Neto</i>
Chapter 4	CANADA39
	<i>George Addy, Anita Banicevic and Mark Katz</i>
Chapter 5	CHINA.....57
	<i>Susan Ning, Hazel Yin and Kate Peng</i>
Chapter 6	COLOMBIA.....73
	<i>Dario Cadena and Eduardo A Wiesner</i>
Chapter 7	CROATIA.....82
	<i>Marijana Liszt</i>
Chapter 8	CYPRUS93
	<i>Myria Chamatsou and Yiannis Eliades</i>
Chapter 9	EUROPEAN UNION.....104
	<i>Philippe Chappatte and Paul Walter</i>
Chapter 10	FRANCE119
	<i>Hugues Calvet and Olivier Billard</i>

Chapter 11	GERMANY	140
	<i>Matthias Karl and Petra Linsmeier</i>	
Chapter 12	GREECE	151
	<i>Stamatis Drakakakis and Vasiliki Brisimi</i>	
Chapter 13	HONG KONG	159
	<i>Joshua Cole</i>	
Chapter 14	HUNGARY	173
	<i>Levente Szabó</i>	
Chapter 15	INDIA	188
	<i>Farhad Sorabjee and Amitabh Kumar</i>	
Chapter 16	IRELAND.....	196
	<i>Vincent Power</i>	
Chapter 17	ITALY	207
	<i>Luca Toffoletti and Emilio De Giorgi</i>	
Chapter 18	JAPAN	224
	<i>Hideto Ishida and Yubki Tanaka</i>	
Chapter 19	KOREA.....	235
	<i>Sai Ree Yun, Cecil Saehoon Chung, Kyoung Yeon Kim and Seung Hyuck Han</i>	
Chapter 20	MAURITIUS.....	247
	<i>Nandinee Kiran Meetarbhan</i>	
Chapter 21	MEXICO	258
	<i>Luis Gerardo García Santos Coy and Mauricio Serralde Rodríguez</i>	
Chapter 22	NETHERLANDS	270
	<i>Jolling de Pree and Stefan Molin</i>	

Chapter 23	NIGERIA.....282 <i>Gbolahan Elias and Obianuju Ifebunandu</i>
Chapter 24	NORWAY288 <i>Carl Arthur Christiansen, Catherine Sandvig and Hanne Brun Haugen</i>
Chapter 25	PORTUGAL.....299 <i>Carlos Pinto Correia</i>
Chapter 26	ROMANIA313 <i>Iustinian Captariu</i>
Chapter 27	RUSSIA.....323 <i>Evgeny Khokhlov</i>
Chapter 28	SLOVENIA.....333 <i>Andrej Fatur and Helena Belina Djalil</i>
Chapter 29	SPAIN343 <i>Alfonso Gutiérrez and Ana Raquel Lapresta</i>
Chapter 30	SWEDEN355 <i>Tommy Pettersson, Johan Carle and Stefan Perván Lindeborg</i>
Chapter 31	SWITZERLAND365 <i>Nicolas Birkhäuser</i>
Chapter 32	TAIWAN380 <i>Stephen Wu, Rebecca Hsiao and Wei-Han Wu</i>
Chapter 33	TURKEY394 <i>Gönenç Gürkaynak</i>
Chapter 34	UNITED KINGDOM.....406 <i>Philippe Chappatte and Paul Walter</i>

Chapter 35	UNITED STATES	421
	<i>Christine A Varney and John F Terzaken</i>	
Appendix 1	ABOUT THE AUTHORS.....	463
Appendix 2	CONTRIBUTING LAW FIRMS' CONTACT DETAILS...	485

EDITOR'S PREFACE

Cartels are a surprisingly persistent feature of economic life. The temptation to rig the game in one's favour is constant, particularly when demand conditions are weak and the product in question is an undifferentiated commodity. Corporate compliance programmes are useful but inherently limited, as managers may come to see their personal interests as divergent from those of the corporation. Detection of cartel arrangements can present a substantial challenge for both internal legal departments and law enforcement. Some notable cartels managed to remain intact for as long as a decade before they were uncovered. Some may never see the light of day. However, for those cartels that are detected, this compendium offers a resource for practitioners around the world.

This book brings together leading competition law experts from more than two dozen jurisdictions to address an issue of growing importance to large corporations, their managers and their lawyers: the potential liability, both civil and criminal, that may arise from unlawful agreements with competitors as to price, markets or output. The broad message of the book is that this risk is growing steadily. In part due to US leadership, stubborn cultural attitudes regarding cartel activity are gradually shifting. Many jurisdictions have moved to give their competition authorities additional investigative tools, including wiretap authority and broad subpoena powers. There is also a burgeoning movement to criminalise cartel activity in jurisdictions where it has previously been regarded as wholly or principally a civil matter. The growing use of leniency programmes has worked to radically destabilise global cartels, creating powerful incentives to report cartel activity when discovered.

The authors of these chapters are from some of the most widely respected law firms in their jurisdictions. All have substantial experience with cartel investigations, and many have served in senior positions in government. They know both what the law says and how it is actually enforced, and we think you will find their guidance regarding the practices of local competition authorities invaluable. This book seeks to provide both breadth of coverage (with chapters on 34 jurisdictions) and analytical depth to those practitioners who may find themselves on the front lines of a government inquiry or an internal investigation into suspect practices.

Our emphasis is necessarily on established law and policy, but discussion of emerging or unsettled issues has been provided where appropriate.

This is the third edition of *The Cartels and Leniency Review*. We hope that you will find it a useful resource. The views expressed in this book are those of the authors and not those of their firms, the editor or the publisher. Every endeavour has been made to make updates until the last possible date before publication to ensure that what you read is the latest intelligence.

Christine A Varney

Cravath, Swaine & Moore LLP

New York

January 2015

Chapter 29

SPAIN

Alfonso Gutiérrez and Ana Raquel Lapresta¹

I ENFORCEMENT POLICIES AND GUIDANCE

The legislation regulating cartel conduct in Spain is the Competition Act.² The Defence of Competition Regulation³ implements specific sections of the Competition Act including, *inter alia*, procedural questions related to the leniency programme. Furthermore, Spanish competition authorities are entitled to apply Article 101 of the Treaty on the Functioning of the European Union (TFEU) in cases in which restrictive practices potentially affect trade between EU Member States.⁴

Competition rules in Spain are enforced by the newly created National Markets and Competition Commission (CNMC).⁵ Certain regions also have authority to enforce the Act in their respective jurisdictions.⁶

Article 1 of the Competition Act establishes a general prohibition against any kind of agreement, decision or concerted practice that has as its object, or which may

1 Alfonso Gutiérrez is a partner and Ana Raquel Lapresta is an associate at Uría Menéndez.

2 Law 15/2007 of 3 July on the Defence of Competition.

3 Royal Decree 261/2008, of 22 February, approving the Defence of Competition Regulation.

4 Under Article 3 of Regulation (EC) No. 1/2003 of 16 December 2002 on the implementation of Articles 81 and 82 of the EC Treaty (currently Articles 101 and 102 TFEU).

5 Law 3/2013 provides for the creation of a single regulatory body in Spain, combining the functions of the former National Competition Commission (CNC) and the regulators of the energy, telecommunications, media, post, railway transport, air transport and gambling sectors.

6 Law 1/2002 of 21 February establishes the principles governing the allocation of antitrust authority between central and regional authorities. In particular, regional antitrust authorities may only exercise their enforcement powers in relation to infringements whose effects are limited to its specific jurisdiction.

produce, anti-competitive effects in the market. The Competition Act refers explicitly to price fixing, allocation of clients and market sharing as examples of restrictive practices.

Such agreements, decisions or concerted practices may nonetheless benefit from an exemption if they improve the production or distribution of goods or promote technical or economic progress, subject to specific requirements.⁷ Furthermore, the prohibitions under Article 1 of the Competition Act do not apply to agreements resulting from the application of a law.⁸

Agreements falling under the scope of Article 1 of the Competition Act that do not benefit from an exemption are illegal and void.

The Competition Act establishes the definition of a ‘cartel’⁹ as ‘any secret agreement between two or more competitors which has as its object price fixing, the fixing of production or sales quotas, market sharing, including bid rigging, or import or export restrictions’. The former CNC expanded by means of its resolutions the definition of ‘cartel’ to include other practices not expressly mentioned in the Competition Act, such as the mere exchanges of sensitive commercial information between competitors.¹⁰

On several occasions, the former CNC declared the ‘fight against cartels to be its main priority’ given its stance that such conduct is the most egregious restrictive practice.¹¹ For that reason, the fines imposed in such cases are significantly high.

Since February 2008, the authority has implemented a very effective instrument to combat cartels: the leniency programme. It is relevant to mention that leniency is only available to practices falling under the scope of the definition of a ‘cartel’. The leniency programme has been applied in 19 cases since its entry into force in Spain in 2008.¹²

7 These requirements are established in Article 1(3) of the Competition Act, specifically: (1) they allow consumers a fair share of its benefits; (2) they do not impose concerned restrictions on the undertakings that are not indispensable to achieve these objectives; and (3) they do not afford participating undertakings the possibility of eliminating competition in respect of a substantial part of the products or services in question. Agreements falling within the scope of a block exemption regulation approved by the European Commission are also exempted under Spanish law.

8 Article 4 of the Competition Act.

9 Fourth Additional Provision.

10 CNC decision of 15 March 2011, in case S/86/08, *Professional hairdressing*.

11 See, for instance, page 11 of the 2010/2011 annual report of the CNC.

12 In particular, the CNC decisions of: 21 January of 2010 in case S/84/08, *Bath gel manufacturers*; 28 July 2010 in case S/91/08, *Jerez wines*; 31 October 2011 in case S/120/08 *Freight forwarders*; 15 March 2011 in case S/86/08, *Professional hairdressing*; 24 June 2011 in case S/0185/09, *Fluid pumps*; 10 November 2011 in case S/241/10, *Ceuta ship operators 2*; 2 December 2011 in case S/251/10, *Fruit and vegetable containers*; 15 October 2012 in case S/318/10, *Paper envelopes exports*; 13 October 2012 in case S/287/10, *Post-tensioning and geotechnical systems*; 12 November 2012, in case S/331/11, *Morocco ship operators*; 21 October 2012 in case S/317/10, *Archive material*; 4 January 2013, in case S/316/10, *Paper Envelopes*; 6 March 2013, in case S/342/11, *Polyurathane foam*; 18 February 2013, in case S/343/11,

II COOPERATION WITH OTHER JURISDICTIONS

The CNMC cooperates with the European Commission and other national EU competition authorities throughout the European Competition Network (ECN). The ECN's objective is to build an effective legal framework to enforce EU competition law in connection with companies engaged in cross-border business practices that restrict competition.

The ECN was created as a forum for the discussion and cooperation of European competition authorities in cases involving the application of Articles 101 and 102 TFEU. The ECN aims to ensure the efficient division of tasks and the effective and consistent application of EU competition rules. In particular, the ECN competition authorities cooperate by the mutual exchange of information on new cases and expected enforcement decisions; coordinating investigations where necessary; mutual assistance on investigations; exchanging evidence and other information; and discussing issues of common interest.¹³ On November 2012, the ECN published a revised model leniency programme setting out the treatment for leniency applicants in all ECN jurisdictions including Spain. It also includes a uniform type of short-form application that can be used by leniency applicants in cases of multiple leniency filings in different ECN jurisdictions to ensure the marker in cases where an application of immunity was filed with the European Commission.

The CNMC has not executed any bilateral agreements with other foreign competition authorities. International cooperation with authorities in other jurisdictions is implemented through agreements executed by the European Commission.

It should be noted that, since Spanish regulations do not provide for criminal sanctions for competition infringements,¹⁴ Spanish judges will be unlikely to accede to extradition requests from foreign jurisdictions.

Discovery mechanisms in Spain are rather limited and they are generally only available to the parties once judicial proceedings have already started. Thus, no mechanisms for extraterritorial discovery are available.

III JURISDICTIONAL LIMITATIONS, AFFIRMATIVE DEFENCES AND EXEMPTIONS

No special rules exist regarding extraterritoriality. Spanish competition rules apply to actions whose object, result or potential result is the prevention, restriction or distortion

Paper products; 5 August 2013, in case S/380/11, *Car rental*; 23 May 2013, in case S/303/10, *Sanitation distributors*; 26 June 2014, in case S/445/2012, *Firefighting equipment*.

13 The basic foundations of the functioning of the ECN are laid out in the 'Commission Notice on cooperation within the Network of Competition Authorities' and the 'Joint Statement of the Council and the Commission on the Functioning of the Network of Competition Authorities'.

14 See footnote 29, *infra*.

of competition in all or part of the Spanish national market. The nationality of the undertaking is immaterial.

However, under EU Council Regulation 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, persons domiciled in an EU Member State must be sued in the courts of that Member State (and not abroad). As such, a party resident in an EU Member State that breaches Spanish competition rules leading to damages in Spain may not be sued in the Spanish courts, but rather in the courts corresponding to its residence. The converse also holds true: Spanish civil courts have jurisdiction over claims against a person domiciled in Spain, even if the damage occurs in another Member State.

Foreign companies are subject to sanctions under Spanish competition provisions for antitrust infringements committed by their subsidiaries. In particular, under Article 61(2) of the Competition Act, the actions of an undertaking are also attributable to the undertakings or natural persons that control it, unless its economic behaviour is not directed by any such persons. It is nevertheless important to take into consideration the fact that, according to well-settled European case law, if a company is wholly-owned by its parent company, there exists a rebuttable presumption that the parent company dictated the economic behaviour of its subsidiary.¹⁵ The CNMC repeatedly cites this European case law in cartel cases¹⁶ in order to extend the liability of cartel members to their parent companies.¹⁷

15 Although the presumption is theoretically rebuttable, in practice there are almost no European or Spanish precedents in which competition authorities have accepted arguments attempting to demonstrate the subsidiary's autonomy. This presumption has only been rebutted once before the EU Courts (judgment of the General Court of 16 June 2011, case *Gosselin Group and Stichting Administratiekantor Portielje*, T-208/08 and T-209/08) in the case where the parent company was a mere financial holding entity that did not exercise its voting rights as shareholder during the relevant period.

16 See former CNC decisions of 15 October 2012, in case S/318/10, *Paper envelopes exports*; of 24 June 2011 in case S/0185/09, *Fluid pumps*; of 2 March 2011 in case S/0086/08, *Professional hairdressing*; of 21 January of 2010 in case S/0084/08, *Bath gel manufacturers*; of 26 June 2014, in case S/445/2012, *Firefighting equipment*; of 22 September 2014 in case S/0428/12, *Pales*.

17 The Supreme Court's judgment of 29 March 2012 in *Sogecable and Audiovisual Sport/Tenaria* confirmed that, when a company is wholly-owned by its parent company, the CNMC may presume that the parent company determines the economic behaviour of its subsidiary. The Supreme Court also held that there is a rebuttable presumption of parent company liability when, *inter alia*, the parent company holds the majority of the subsidiary's voting rights or has the authority to appoint and remove members of the subsidiary's board of directors.

IV LENIENCY PROGRAMMES

The leniency programme¹⁸ was introduced in Spain in 2007 by the Competition Act and entered into force in February 2008. In June 2013, the authority published a Communication on Leniency Programme aimed at providing further guidance to leniency applicants and increasing the transparency of its decisions.

Following the European model, the programme offers full leniency (immunity from fines) as well as partial leniency (reduction of the fine). The benefits of the programme are available not only to undertakings but also to individuals (whether because the original applicant is an individual or because the company requests that leniency be extended to its employees).

Only the first undertaking or individual that provides evidence that enables the CNMC to order an inspection or prove a cartel infringement will be eligible for full leniency, and this is subject to the condition that the CNMC does not already have sufficient evidence of the infringement.

Undertakings or individuals are eligible for partial leniency when they provide evidence of the alleged infringement that adds significant value with respect to evidence that the CNMC already possesses (i.e., the new evidence makes it significantly easier for the CNMC to prove the infringement).

The immunity or the reduction of the fine will also be subject to satisfaction of the following requirements:

- a* full, continuous and diligent cooperation with the CNMC throughout the investigation;
- b* immediate cessation of its participation in the infringement, unless the CNMC considers participation necessary to preserve the effectiveness of an investigation;
- c* no evidence related to the application for the exemption has been destroyed;
- d* there has been no direct or indirect disclosure to third parties, other than the competition authorities, of the fact of the evidence's contemplated application or any of its content; and
- e* no measures have been adopted to coerce other undertakings to participate in the infringement; this last obligation is only required for full leniency applicants.

Full cooperation with the CNMC during the proceedings is the leniency beneficiary's main obligation. Full cooperation implies that applicants must:

- a* provide the CNMC, without delay, all relevant information and evidence relating to the presumed cartel in the applicant's possession or that is available to it;
- b* remain available to the CNMC to respond, without delay, to all requests that could contribute to establishing the underlying facts;
- c* facilitate interviews with the company's employees and current executives and, if applicable, former executives;
- d* refrain from destroying, falsifying or concealing relevant information or evidence in relation to the presumed cartel; and

18 The Competition Act specifically refers to 'applications for the exemption from payment of the fine' (Article 65) and 'reduction of the amount of the fine' (Article 66).

- e abstain from disclosing the filing or content of the application for the fine exemption or reduction, prior to notification of the statement of objections or such time as may be determined by the CNMC.

The CNMC applies elevated standards when determining whether undertakings have fully and continuously collaborated. In several cases in which the information provided by the undertaking had added value, the former CNC nevertheless withheld the benefits of the leniency programme from undertakings on the basis that it considered that they had not complied with their collaboration obligations under the programme.¹⁹ During the course of the proceedings the applicant has the right to be aware whether the authority intends to maintain the conditional immunity that has been granted.²⁰

It is important to bear in mind that the moment at which participants in a cartel reveal information (prior to or following the opening of an investigation) is highly relevant not only for immunity applicants (who must be the first to report the information), but also for undertakings or individuals seeking partial leniency. The range for the reduction of the fine imposed depends on that timing: 30 to 50 per cent for the second party revealing information; 20 to 30 per cent for the third party; and up to 20 per cent for the remaining parties.

The Communication on Leniency Programme set out the information and documentation that has to be included in the leniency application. Although Spanish legislation does not have a 'marker' system, the CNMC may grant, upon an applicant's prior justified request, additional time for submitting evidence on the cartel. Following the submission of the evidence within the agreed time limit, the filing date for the leniency application will be understood to be the date of the initial application.²¹

At the request of the applicant, oral applications for leniency may be accepted. To do so, a meeting has to be arranged at the CNMC offices and, after the recording has been transcribed, the declaration will be registered. The transcript's entry date and time in the CNMC register will determine the order of receipt of that leniency application.

The filing of a request for immunity from a fine or a reduction application and all application data and documents will receive confidential treatment until the statement of objections is issued.²² Once it is issued, interested parties will have access to that

19 See CNC decision of 2 March 2011 in case S/0086/08, *Professional hairdressing*, and CNC decision of 23 February 2011 in case S/244/10, *Baleares ship operators*.

20 The Competition Directorate must specify, on a reasoned basis, both in the statement of objections and in the proposed resolution, whether it is maintaining the conditional exemption that was granted, and progressively evaluate the applicant's fulfilment of its cooperation duties over the course of the investigation. If the Competition Directorate believes such duties have been breached, it will so state and submit a reasoned proposal to the CNMC Council not to grant the exemption, so the applicant can submit the pleadings it deems fit on the matter.

21 Article 46(5) of the Defence of Competition Regulation.

22 Article 51 of the Defence of Competition Regulation.

information,²³ provided that this is necessary to submit a response to the statement of objections.

Private litigants may not request that the CNMC or other competition authorities produce materials submitted within the scope of a leniency programme.²⁴ In its Communication on Leniency Programme, the former CNC expressly stated its commitment to not disclose the information or documentation provided by leniency applicants in civil damages actions and to adopt measures to reduce the risks of disclosure in the scope of appeal proceedings.²⁵

However, under Articles 328 and 330 of the Spanish Civil Procedure Law, private litigants may request that the defendant or third parties submit documents to the court that (1) are not (and cannot be) available to it; (2) are related to the purpose of the proceedings; and (3) constitute important evidence of the alleged damage. Therefore, the court may order one party to submit documents related to administrative proceedings, including leniency applications.

In this regard, it should be noted that the implementation in Spain of the Damages Directive²⁶ would ensure complete protection from disclosure to leniency statements and settlement submissions.²⁷ As regards other evidence available in the CNMC's file, national courts would be able to order the disclosure only after a competition authority, by adopting a decision or otherwise, has closed its proceedings.²⁸

V PENALTIES

The Competition Act establishes civil and administrative sanctions against undertakings that participate in a cartel. Spanish law does not establish any criminal sanction for infringements of competition regulations.²⁹

Significant fines have been imposed in cartel cases, demonstrating the CNC's commitment to detecting cartels and sanctioning those involved. Fines imposed on undertakings can be up to 10 per cent of the violator's total turnover in the year

23 This access right does not include obtaining copies of any statement by the fine exemption or reduction applicant that has been specifically made for submission with the related application.

24 Article 15-bis of Law 1/2000 of 7 January on Civil Procedure (the Civil Procedure Law).

25 Paragraphs 72 to 77.

26 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.

27 Article 6.6.

28 In particular, the following evidences: (1) information that was prepared by a natural or legal person specifically for the proceedings of a competition authority; (2) information that the competition authority has drawn up and sent to the parties in the course of its proceedings; and (3) settlement submissions that have been withdrawn.

29 Nevertheless, some practices such as bid rigging may constitute a criminal offence if it relates to public tenders.

preceding the imposition of the sanction. Nevertheless, if the undertaking is a wholly-owned subsidiary of a group, this cap could be applied to the turnover of the group's parent company. Legal representatives and managers who have directly participated in the cartel can be sanctioned with a fine of up to €60,000.

The final amount of the fine will be established taking into account the following criteria, *inter alia*:

- a* the size and characteristics of the market affected by the infringement;
- b* the market shares of the undertakings;
- c* the scope of the infringement;
- d* its duration;
- e* the effect of the infringement on the rights and legitimate interests of consumers or on other economic operators;
- f* the illicit benefits obtained from the infringement; and
- g* aggravating and mitigating circumstances in relation to each undertaking.

In February 2009, the former CNC published a communication clarifying the method for quantifying fines. The communication states that sanctions are quantified according to the following approach:

- a* the basic amount of the sanction is determined;
- b* an adjustment factor is applied to the basic amount according to the potential aggravating and mitigating circumstances; and
- c* the amount is adjusted by reference to the limits established in the Competition Act or the illicit gains obtained by the sanctioned undertaking.

The basic amount of the fine is calculated as a percentage (between 10 and 30 per cent) of the sales volume affected by the infraction (i.e., sales in the geographical and product market in which the violation occurred or is capable of producing effects during the time the violation took place). In recent cartel cases, the percentages have not exceeded 15 per cent.

The adjustment factor is determined in view of aggravating or mitigating circumstances, and varies between 5 and 15 per cent.

The amount of the fine must be adjusted in order to ensure that, when it is possible to calculate the profit obtained from the infringement, the fine is not less than that amount. The 10 per cent cap on the total turnover of the undertaking is then applied. However, in recent rulings, the National Court³⁰ has reduced the sanctions imposed on several companies by adopting a new interpretation as regards the calculation of the 10 per cent cap. It stated that the 10 per cent cap must be applied not to the total turnover of the undertaking but only to the sales obtained in the market affected by the infraction in the previous year to the imposition of the sanction. These rulings are currently pending appeal before the Supreme Court.

30 Judgments of 7 March 2013, appeal No. 535/2010, *Gonzalez-Byass, S.A.* and of 21 March 2013, appeal No. 699/2011, *Emilio Bolado, S.L.*

In cases in which the undertaking benefits from a reduction in application of the leniency programme, the reduction is applied to the final figure obtained as a result of the calculations indicated previously.

Spanish law does not establish any settlement procedure for cartel cases. Nevertheless, it is important to take into consideration that, in some cases, the CNC has granted significant (up to 15 per cent) reductions to undertakings that did not benefit from the leniency programme. This has occurred based on the mitigating circumstances of undertakings that admitted their participation in a cartel in their response to the statement of objections,³¹ and even in cases in which the CNC concluded that the undertaking had not complied with its collaboration obligations under the leniency programme.³²

VI 'DAY ONE' RESPONSE

Law 3/2013 grants broad powers to CNMC officials to carry out unannounced inspections of companies' premises. In the last year, the former CNC carried out eight inspections.

Under Spanish law, access to premises must be authorised by either the occupants or a court by way of a warrant.³³ Access to the premises is only mandatory if authorised by a court through a warrant. Under all other circumstances, undertakings are entitled to deny access.

During the inspection, officials are permitted to seize and make copies of all documents (whether physical or electronic) located at the company's premises (excluding private or legally privileged documents).³⁴ Personal and privileged documents must be identified during the inspection.³⁵

31 CNC decisions of 19 October 2011, case S/226/10 *Public tenders for roadway maintenance works*, and of 5 August 2013, in case S/380/11, *Car rental*.

32 CNC decision of 2 March 2011 in case S/0086/08, *Professional hairdressing*, and CNC decision of 23 February 2011, in case S/244/10, *Baleares ship operators*.

33 Information contained in the investigation order prepared by the Directorate for investigation or the warrant of the court must include the following information: (1) date of the inspection; (2) CNMC officials who will be in charge of the inspection; (3) identification of the undertaking and the address of the premises subject to inspection; and (4) object of the inspection. It is important to verify this information is correct before allowing the inspection to be carried out.

34 The attorney–client privilege only applies to correspondence between clients and external counsel. It does not apply to correspondence with in-house counsel.

35 Spanish courts have confirmed that CNMC officials have broad powers to seize documents during inspections. In particular, it is the obligation of the undertaking alleging that a document is protected or fall out of the scope of the inspection order to identify such documents and to provide proof of the protected nature of the same (see the Supreme Court judgment of 27 April 2012 in *Stanpa*).

Officials may also ask any questions to the company's employees. Employees are legally obliged to cooperate with the inspectors by providing them with all information requested and answering all questions unless the questions posed to them directly incriminate the company.³⁶

Fines of up to 1 per cent of its total turnover in the previous year can be imposed on a company that by any means obstructs the inspection tasks of the CNMC. Additionally, the former CNC imposed fines on several companies for breaching the duty to collaborate with the information request by submitting misleading or fake information.³⁷

VII PRIVATE ENFORCEMENT

Purely compensatory damage actions resulting from the CNC's declaration of an antitrust infringement may be based upon Article 1902 of the Civil Code, which 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').

As regards legal standing, Spanish law does not establish any specific rules for the private enforcement of competition rules. Consequently, those who have suffered any damages as a result of a cartel infringement will have standing to bring a private action (Article 1902 of the Civil Code).

The Civil Procedure Law also establishes different ways in which several parties may submit a collective action. The simplest collective action involves the consolidation of the claims of multiple plaintiffs, provided that there exists a link between all the actions due to the same object or the same petition.³⁸ Moreover, although class actions are not technically recognised under Spanish law, Article 11 of the Civil Procedure Law includes some provisions in relation to collective legal standing in cases that are limited to the defence of the interests of 'consumers and final users'. Consumers' associations have standing to 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 or injunctions. When a consumers' association initiates a collective action under Article 11(2) to (3), the admission of the claim will be made public.³⁹

36 In the last inspections carried out by the former CNC, it requested access to web e-mails of employees by requesting their passwords if the e-mail addresses have been used for professional purposes.

37 See CNC decision of 31 July 2012, case SNC/26/12, *Mediapro*, and CNC decision of 31 May 2012, case SCN/19/12 *CPV*.

38 The court would presume that such a link exists if the actions are based on the same underlying facts.

39 Collective actions in defence of the interest of consumers and end users fall into two categories depending on the degree of certainty as to the identification of the consumers or users affected by the claim:

Spanish tort law is purely compensatory in nature. Any party that causes material damages or pain and suffering must compensate the affected party so as to restore the situation to that existing prior to the harm. This purely compensatory nature has allowed Spanish courts to consider the ‘passing-on’ defence when considering a defendant’s position⁴⁰ in damage claims involving cartel infringements. However, the legal standard set by the Supreme Court to accept the passing on of damages is very high.⁴¹

Spanish courts have acknowledged the possibility of claiming two types of damages: economic or material damages (which include all damages affecting the assets and estate of a legal or natural person) and non-economic damages (which include all the damages that affect the emotional well-being of a person). Nevertheless, courts may only award compensation for damages that have been evidenced to the court and therefore may not award unsubstantiated damages or those that have not. As such, expert reports quantifying the economic value of the damages are crucial, as confirmed by consistent judicial practice.

Under Spanish law, the use of evidence in civil proceedings governed by, *inter alia*, the ‘freedom of evidence’, applies both to the parties and the court. The parties have significant freedom in the proposal and presentation of means of evidence of all kinds. In particular, the parties face no restrictions in deciding the content and methodology

First, if 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. In such cases, consumers or users whose interests may be affected must be informed by the plaintiff in order that all potentially affected consumers may defend their interests in the civil proceedings at any time (opt-in clause).

Second, if anti-competitive behaviour compromises the interests of a group of consumers or users that cannot be easily identified, the only entities with the standing to represent those interests in court are consumers’ associations that are ‘widely representative’. For this purpose, the courts will acknowledge that a consumer association is widely representative if it is a member of the Consumers and Users’ Council. In such cases, publication would be considered sufficient for all interested consumers to identify themselves. Spanish law establishes that the proceedings will resume after a two-month term. Affected consumers or users who do not identify themselves to the court within that term will not be permitted to join the action, although they may nevertheless benefit from the case’s outcome. It is important to take into consideration that, in such cases, the judgment will be binding on all affected consumers and users, and not only on those that have appeared in the proceedings.

40 See judgment of 20 February 2009 of Civil Court No. 11 of Valladolid in *Gullón et al/Acor*; judgment by the Provincial Court of Madrid of 9 October 2009 in *Nestlé España et el/Acor*; and judgments of the Supreme Court of 8 June 2012 in *Acor/Gullón*, of 7 November 2013 in *Nestlé España/Ebro Foods* and of 4 June 2014 in *Endesa Distribución Eléctrica S.L./Energía-VM Gestión de Energía*.

41 Judgment of the Supreme Court of 7 November 2013 in *Nestlé España/Ebro Foods* stated that the passing on defence would only be admitted provided that two conditions are met: (1) the defendant bears the burden of proving that overcharge was passed on; and (2) the defendant must prove that claimants have not suffered a loss of sales because of the overcharges.

used in an expert report presented as *ex parte* evidence. In turn, courts also benefit from a significant amount of discretion in the assessment of evidence, being subject only to the rules of ‘sound judgement’. ‘Sound judgement’ requires that courts must assess the evidence in a reasoned and reasonable manner, using both logic and experience. Nevertheless, courts are not bound by the contents or conclusions arising from any means of evidence (e.g., an expert report), let alone a chosen methodology. Similarly, courts are not bound by the opinions of judicial experts.

Moreover, the Competition Act establishes a cooperation mechanism between the courts and the CNMC by virtue of which courts may request that the CNMC issue non-binding opinions regarding damages in private enforcement cases.

Finally, Spanish courts are – when applying EU competition rules – bound by prior decisions adopted by the European Commission (Article 16 of Regulation No. 1/2003). Similarly, courts are also bound by the declaration of proven facts made in previous non-appealed administrative decisions such as decisions adopted by the CNMC based on the same facts.⁴²

VIII CURRENT DEVELOPMENTS

On 10 November 2014, the Damages Directive was formally adopted by the EU Council of Ministers. This Directive is aimed at facilitating antitrust damages actions in the EU and to ensure full compensation for victims of antitrust violations.

Spain will have two years from the publication of the Directive in the EU Official Journal to adapt its national laws to comply with its provisions. Such implementation would entail several amendments to the current Spanish Procedural Law including the following:

- a* Limitations period: the Directive provides for a minimum five-year limitations period that is suspended during the proceedings of a competition authority until at least one year after the infringement decision has become final. The current Spanish regime provides only for a one-year limitation period.
- b* Exceptions in relation to the application of the joint and several liability of members of a cartel for the harm caused by the infringement: The Directive states that small and medium-sized firms and immunity recipients would not be liable for damages other than those caused to their direct or indirect purchasers in certain cases. These exceptions are not currently foreseen under Spanish law.
- c* Presumption of harm in cartel infringements: under Spanish Law, in order to apply for damages, claimants are required to prove both the causation of harm and its amount.

To date, there have only been a few cases regarding private litigation in Spain. However, in the recent years, their number has progressively increased. The implementation of the Damage Directive may open up the litigation floodgates in Spain as has happened in other EU jurisdictions.

42 Judgment of the Supreme Court of 7 November 2013 in *Nestlé España/Ebro Foods*.

Appendix 1

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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 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 *Who's Who Legal*.

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Her practice focuses on EU and Spanish competition law. She has wide experience advising clients in merger control proceedings, including international multi-filing coordination. Ms Lapresta has also wide experience in representing clients in procedures before the European Commission, the Spanish competition authorities and the EU courts, for the investigation of anti-competitive infringements, such as pan-

European cartels, cases involving abuses of dominance and other restrictive practices and agreements.

Ms Lapresta has advised companies and associations on compliance programmes on competition matters related to intellectual property and regulatory issues in a range of sectors, *inter alia*, in financial, insurance, electric and telecommunications.

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