THE STRATEGIC VIEW

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Competition Litigation 2016

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Competition Litigation 2016

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SPAIN

Edurne Navarro Varona and Ana Raquel Lapresta Bienz reflect on the expected impact of the implementation of the Damages Directive, outline upcoming collective actions, and provide an overview of discovery and disclosure in Spain

1. Are there any particular sectors in your jurisdiction which tend to be a focus for competition damages actions? Why do you think this is the case?

In Spain, competition litigation remains scarce compared to other EU jurisdictions. Most of the actions brought have been from the petroleum sector. These actions were mainly stand-alone actions initiated by petrol stations against major brands supplying them and related to the excessive duration of exclusivity clauses. In most cases they were aimed at obtaining the nullity of the alleged anti-competitive contracts.

There have also been cases in other sectors, such as pharmaceuticals, electricity, insurance, sugar and telecommunications, but the number of judgments per sector has not been significant.

In addition, several actions have been publicly announced in recent months, including collective claims by consumer associations regarding sanctioning decisions issued in 2015 by the Spanish Competition Authority in the automotive sector.

A substantial increase in the number of claims is expected in the near future, as a consequence of the implementation of Directive 2014/204/EU (the "**Damages Directive**") into Spanish law. To this end, the former Spanish Government set up a group to draw up a draft proposal to implement the Damages Directive in Spain. Said proposal was published in January 2016 (the "**Draft Proposal**").

2. Who do damages claims tend to be brought by in your jurisdiction? (e.g. direct purchasers, indirect purchasers, end consumers?) If claims are not currently being brought by indirect purchasers and/or end consumers, why do you think this is?

So far, most damages claims in Spain regarding competition infringements have been brought by direct purchasers.

The lack of cases in which indirect purchasers have initiated damages claims could be due to the standard of evidence applied by Spanish courts to award damages, and the difficulties for indirect purchasers to gain access to evidence. Under Spanish civil law, the burden of proof in civil proceedings lies with the party that alleges the harm. In an antitrust action for damages before a civil court, the claimant must provide evidence of: (i) the unlawful conduct of the defendant; (ii) the causal link between the infringement and the damages claimed; and (iii) the existence of harm caused by the unlawful conduct and its quantification. As discovery mechanisms under Spanish law are quite limited, it may be burdensome for indirect purchasers to meet the legal standards required for the award of compensation. These actions would clearly be favoured by the changes introduced by the Damages Directive.

We are aware of only one case involving a claim by a consumer collective. It refers to a follow-on action in the telecommunications sector. A possible explanation for the limited number of damages claims brought by consumers could be that the costs of proceedings may be high compared to the potential damages that could be recovered. Class actions as such are not foreseen under Spanish law. Although there are different ways in which several parties may bring a collective action, these options do not always ensure that consumers will benefit from a significant reduction in litigation costs.

Firstly, the court may declare the consolidation of claims by different claimants, provided there is a link between all actions; namely the same object or the same petition. In such cases each consumer should still file its own claim, which means that cost savings for individual consumers are unlikely to be significant. It is important to mention that in recent years, in cases related to claims against banks for the sale of complex financial products made by individual consumers, some law firms have specialised in collecting individual claims with the same object to be filed before Spanish courts and requested that they be consolidated, reducing the cost of litigation for each individual consumer. An attempt to use this mechanism in cases involving consumer claims for damages is being made in some follow-on actions in antitrust cases.

Secondly, under Article 11 of the Spanish Civil Procedure Law, consumer associations are entitled to initiate a collective claim to defend the interests of consumers and end users. The final judgment will be binding on all affected consumers and users regardless of whether they appeared in the proceedings before the court.

However, in order to obtain compensation, after the judgment each individual consumer must apply separately to the court to be recognised as a member of the class so that the court can quantify the damages to be paid in each case.

3. What approach are the courts taking to claims that originate from investigations or infringements arising out of the jurisdiction?

Council Regulation (EC) 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ("**Regulation 44/2001**") states that persons domiciled in a Member State must be sued in the courts of that Member State regardless of their nationality. As this regulation is applicable in Spain, civil courts may accept a claim for damages against a person domiciled in Spain even if damage has been caused in other Member States. If there are several defendants domiciled in different Member States, the claimant may bring the action in any of these countries.

As to Spanish subsidiaries of international groups, currently it is unlikely that their parent companies would be affected by liability claims in Spain. Indeed, under Spanish law, civil liability lies with the company that actually caused the damage (rather than other companies within the group). Therefore, it is unlikely that the Spanish courts would accept the claim against a parent company unless the latter had been declared directly responsible for the infringement. However, the Draft Proposal plans to extend liability for damage in antitrust infringements to parent companies, but it is uncertain what position the Spanish courts will eventually adopt.

Currently, Spanish courts are bound by the decisions of the European Commission according to the provisions of Regulation (EC) 1/2003. However, decisions adopted by the Spanish Competition Authority have no binding effect on Spanish courts, which can make their own assessment of the facts. In this vein, decisions adopted by competition authorities from other Member States have no binding effect either, but Spanish courts could take them into consideration as a relevant fact.

Article 9 of the Damages Directive establishes that Member States shall ensure that an infringement found by a final decision of a national competition authority is deemed to be irrefutably established for the purposes of actions for damages before courts in that jurisdiction (either under Article 101 or 102 of the TFEU or under national competition law). Decisions adopted by national

competition authorities of other Member States should be considered at least "*prima facie evidence that an infringement of competition law has occurred*".

In this regard, the Draft Proposal declares that final decisions adopted by the Spanish Competition Authority as well as by a national competition authority of another Member State will be irrefutable evidence of the infringement before Spanish courts.

4. Do claimants favour your jurisdiction when they have a choice as to where to lodge a claim? Why?

We are not aware of any case in which a conflict of jurisdiction has arisen. However, for claimants, Spain may currently not be as attractive as other EU jurisdictions (such as the UK, Germany or the Netherlands) for several reasons, including the length of proceedings, limited availability of discovery mechanisms, short limitation periods and high burden of proof applied by civil courts. However, this situation is expected to change significantly in the future as a result of the implementation of the Damages Directive in Spain.

5. In practice, are the courts generous to claimants when awarding disclosure, including pre-action disclosure?

Discovery mechanisms are rather limited under current Spanish law.

In civil procedure, each party is allowed to ask the other parties for disclosure of evidence that is not in its power and that relates to the object of the proceedings or to the effectiveness of the means of evidence. If there is an unjustified refusal, the court may request the refusing party to disclose, through an injunction. For that purpose it will consider the characteristics of the evidence requested, as well as other elements which justify the request.

However, in order for the court to order the disclosure of evidence, certain conditions apply, including the obligation to identify the information requested – without granting the request for broad categories of documents or inquisitorial requests – and the relevance of the evidence to be disclosed for the case. The parties are only obliged to provide pre-existing documents and do not need to prepare *ad hoc* documentation.

In addition, the disclosure of documentation is mainly granted after the exchange of pleadings. Pre-action disclosure is limited to the evidence required to prove the standing, and to establish the identity, of the defendants.

In practice, Spanish courts have been quite reluctant to award a broad discovery of documentation.

However, the Draft Proposal aims to modify the discovery system applicable to damages claims for antitrust infringements, in order to facilitate claimants' access to evidence required for substantiating their claims in the early stages. In particular, two important changes are foreseen: (i) access to evidence will be granted before the submission of the claim; and (ii) identifying the specific means of evidence will not be required, allowing requests for categories of documents (e.g. invoices of a certain client within certain dates).

The costs of accessing evidence will be borne by the claimant, who must also deposit a guarantee before the court to cover potential damages caused in the event that the claimant breaches its confidentiality obligations.

6. How do the dynamics of a settlement really work in your jurisdiction? Is there a mechanism by which a "global settlement" can be approved/enforced?

A civil settlement is defined as an agreement by means of which the parties avoid or

terminate litigation by giving, promising or retaining something.

As a general rule, in civil proceedings the parties have full power of disposition. Spanish Civil Procedure Law states that the parties to civil proceedings are entitled to waive their rights, abandon proceedings, accept the claim or settle the dispute.

Based on the above, a settlement agreement could be made between all the parties involved in the infringement or only between some of them. Depending on whether the settlement is submitted to the court for approval, we can distinguish between:

- judicial settlements: the parties decide to submit their agreement for judicial approval to the court at any stage of the proceedings. Spanish Civil Procedural Law encourages courts to seek an agreement between the parties at two stages: (i) at the start of the proceedings; and (ii) once the object of the proceedings has been defined. In this case, the court will assess if there is any legal obstacle to the settlement and, if there is not, will officially approve it. Once approved by the court, the settlement has the same effects as a judgment.
- extra-judicial settlements: they have the value of a private agreement between the parties and therefore could be enforced before the courts.

Article 19 of the Damages Directive establishes the rules applicable in cases of a partial extra-judicial settlement: (i) the claim of the settling injured party is reduced by the settling co-infringer's share of the harm that the infringement of competition law inflicted upon the injured party; (ii) any remaining claim of the settling injured party shall be exercised only against non-settling co-infringers; and (iii) non-settling co-infringers shall not be permitted to recover a contribution for the remaining claim from the settling co-infringer.

7. How long do damages actions take? What is the likely range of costs required to defend a claim?

Spanish Civil Procedure Law provides approximate deadlines. However, these time constraints are rarely observed. Although the total duration of proceedings will depend on the complexity of the case and the workload of the court that hears the case, in general, damages actions take between five and eight years from the submission of the claim before the court of first instance until a final decision is issued by the Supreme Court.

The cost of judicial proceedings in Spain largely depends on the specific characteristics of the case. Having said that, in general terms litigation costs in Spain are likely to be less than in other EU jurisdictions.

In particular, most court proceedings involve the payment of lawyer and court agent (*procurador*) fees. Depending on the case, other expenses such as preparing a report to quantify the damages could be highly advisable. These costs could vary significantly depending on the complexity of the case. In addition, the claimant must pay court fees that could amount to EUR 10,000 depending on the value of the claim.

However, if the claim is successful, most of these costs would be borne by the defendant. Spanish procedural law provides that litigation costs are normally paid by the party whose claim is rejected, and are limited to one third of the value of the claim (*cuantía*). This limit will not apply if the court finds that the claimant has acted recklessly.

In the event that a claim is partially rejected, each party will bear its own costs and the common costs will be shared equally.

8. What funding options are available for (i) claimants and (ii) defendants, in your jurisdiction?

There are no specific funding options available for claimants and defendants in Spain. However, we are aware of some firms that offer reduced prices for preparing the claim in exchange for a success fee. These mechanisms could reduce costs for claimants.

9. Do you anticipate any significant increase in damages actions in your jurisdiction over the next year or two? If so, where and why do you anticipate these increases coming?

Damages actions are expected to increase significantly in the future as a result of the implementation of the Damages Directive in Spain, which is planned to take place before 27 December 2016. The Draft Proposal includes significant changes that would make Spain more attractive for claimants, such as:

- increasing the limitation period from one to five years, which would be suspended if the Spanish Competition Authority initiates infringement proceedings;
- introducing discovery mechanisms to facilitate claimants' access to evidence;
- the presumption of harm for cartel infringements, and giving courts the possibility to estimate the damages if its quantification is not possible, and the presumption of harm for indirect purchasers;
- an infringement of competition law found by a final decision of a national competition authority in civil proceedings being recognised as having a binding effect; and
- extending parental liability to civil proceedings.

It is, however, unclear whether these changes would be implemented in a timely manner, given the current political situation.

10. In your opinion, what are the key changes (if any) required in your jurisdiction to improve the effectiveness of private enforcement of competition law?

The implementation of the Damages Directive in Spain is expected to significantly increase Spain's attractiveness as a jurisdiction for damages claims for competition infringements. Having said that, we will need to wait in order to assess the practical implications of such changes and, in particular, the actual position of the courts which will retain a significant margin of manoeuvre.

Furthermore, in order for the private enforcement of competition law in Spain to be more effective, some further changes in the current system would be welcome. A reduction in the length of proceedings, and modifications to the collective redress mechanism to include the possibility of class actions, could further increase the number of private enforcement cases in Spain.

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