



Cartels

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Contributing Editors:
Nigel Parr & Euan Burrows

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Antonio Guerra Fernández, Patricia Vidal Martínez &
Tomás Arranz Fernández-Bravo
Uría Menéndez

Overview of the law and enforcement regime relating to cartels

The Spanish legal provisions applicable to cartel agreements and practices, in particular, Article 1 of the Spanish competition act (Law 15/2007 of 3 July, “LDC”), mirror those under Article 101 of the Treaty on the Functioning of the European Union (“TFEU”).

As in the EU regime, Article 1 of the LDC prohibits agreements on competition, concerted practices and decisions of undertakings that are capable of restricting competition in Spain. However, in contrast to the EU regime, the LDC also contains a legal definition of the concept of a “cartel” practice that theoretically would narrow the concept to very specific secret agreements between competitors, thereby excluding other, potentially restrictive practices.

In particular, the Fourth Additional Provision of the LDC defines cartels as: “*any secret agreement between two or more competitors with the purpose of setting prices, production or sales quotas, market sharing, including bid rigging, or restricting imports or exports*” (literal translation).

Despite the narrow wording of this provision, the Spanish competition authorities tend to apply the concept of cartel broadly. For instance, mere exchanges of information between competitors, even when not referring to future prices or quantities, were heavily sanctioned as cartel agreements in the motor-vehicles case (S/0482/13), despite the fact that the practices did not meet the legal definition of “*an agreement to set prices or quantities*”. The Spanish competition authorities even published, on 19 June 2013, non-binding guidelines on the application of the Spanish leniency programme set forth in Articles 65 and 66 of the LDC, extending the concept of a cartel to agreements that are not secret – which clearly contravenes the wording of the LDC – or to other secret agreements not mentioned in the legal definition (e.g., boycott agreements).

This expansive application of the legal concept of cartel has been widely criticised and has given rise to intense debate in recent years that remains unresolved. While it is logical that the Spanish competition authority seeks to align the concept of cartel under Article 1 of the LDC with that developed by the EU Commission under Article 101 of the TFEU to the maximum extent possible, doing so without amending the wording of the LDC is more questionable.

The most recent movement in this debate involves an appeal lodged before the Constitutional Court (“CC”) in the *Professional Hairstyling Products* case (S/0086/08) (pending), which had applied the concept of cartel to a mere exchange of information that included, *inter alia*, future prices and quantities. Even if the judgment is upheld, it remains unclear whether it is possible to apply the concept of cartel to other practices that do not directly or indirectly refer to the fixing of prices or quantities (e.g., as mentioned, a boycott agreement against

a common supplier, competitor or client). Nor will it resolve the question of whether, for instance, a mere exchange of information of past or recent data, not including future prices or quantities, can be qualified as a cartel when such practices are not even (in principle) considered as such under Article 101 of the TFEU.

Within this context of relative legal uncertainty, we cannot exclude the possibility that the future act transposing Directive (EU) 2014/104 on antitrust damage actions of 26 November into Spain may bring some changes to the concept of cartel in sanctioning proceedings in line with the broader concept of the Directive. In fact, the current wording of the proposal of the transposition act (drafted by the special commission of the codification committee of the Spanish Ministry for Justice) brings to the Spanish legal order the definition of cartel included in the Directive that, for instance, does not require the agreement to be secret, and in turn includes “*concerted practices between two or more competitors aimed at coordinating their competitive behavior on the market or influencing the relevant parameters of competition*”.

In addition, the definition included in the Directive and its proposal of the transposition act covers “*practices **such as, but not limited to**, the fixing or coordination of purchase or selling prices or other trading conditions, including in relation to intellectual property rights, the allocation of production or sales quotas, the sharing of markets and customers, including bid-rigging, restrictions of imports or exports or anti-competitive actions against other competitors*”. However, the proposal of the transposition act does not modify the abovementioned Fourth Additional Provision of the LDC, thus it is not clear whether this broader definition would only apply to claims for damages or to any infringement proceedings initiated by the authority.

The Spanish competition authorities responsible for the enforcement regime of cartels in Spain are the *Comisión Nacional de los Mercados y la Competencia* – “CNMC” and the competition authorities of the regional autonomous communities (but only for practices whose effects do not extend to other autonomous regions). So far, eight autonomous regions in Spain have created their own competition authorities with capacity to investigate competition practices and make decisions on the merits (Andalusia, Catalonia, Valencia, Aragon, Castile and León, Navarra, the Basque Country and Extremadura). Four autonomous regions also have their own competition authorities (Murcia, the Canary Islands, Madrid and Navarra) that only hold investigation powers (i.e., the final decision is taken by the CNMC).

The CNMC’s main bodies are the Directorate of Competition, which is responsible for the investigation phase of the sanctioning proceedings, and the Board, which is responsible for the adoption of the resolution on the merits of the case and the imposition of fines.

Infringement proceedings pursued by the CNMC are considered administrative sanctioning proceedings, implying that the CNMC can only impose fines and order the cessation of the practices, not decide on potential damages arising from the infringement. In parallel, commercial judges also have jurisdiction to apply Articles 1 of the LDC and 101 of the TFEU in cartel cases, and may determine the amount of the damages to be paid to cartel victims, as well as declare the civil consequences of the infringement (total/partial nullity of agreements).

Cartel infringements can be subject to a sanction of up to 10% of the total turnover of the corresponding undertaking for the last year in Spain. The methodology traditionally used by the CNMC to calculate the fines was declared illegal by the Spanish Supreme Court in a ruling issued on 29 January 2015. In that case, the Supreme Court declared that the sanction

amounting to 10% of the total turnover can only be imposed for the worst infringements, and fines should be set at a lower level that is proportionate to the infringement's severity. Since the adoption of this ruling the CNMC has developed a new methodology that has not yet been tested by Spanish courts.

Article 63.2 of the LDC establishes that the CNMC can impose sanctions on “*legal representatives or members of the managing bodies*” of infringing undertakings. Although the CNMC had not made use of this mechanism since its creation in October 2013 (and was used only once by its predecessor, the *Comisión Nacional de la Competencia*) during year 2016, the CNMC has imposed fines on managers and representatives in three cases: *Adult incontinence* (S/DC/0504/14); *Train infrastructures* (S/DC/0519/14); and *Collection and counting of valuables* (S/DC/0555/15).

Additionally, a recent amendment to Spanish law in 2015 (currently Article 60 of the Spanish Public Sector Contracts Act 3/2011) establishes that a breach of competition law may result in a prohibition against contracting with public authorities for a maximum period of three years as from the date that the judgment or administrative decision declaring the infringement becomes final. This new provision, which is currently in force, was intended as a significant deterrent given the fact that many undertakings' activities depend primarily on contracting with the public authorities. The President of the CNMC has announced that they expect to make use of this prohibition in investigations to be concluded during 2017.

Overview of investigative powers in Spain

The CNMC and the regional competition authorities have extensive investigative powers, including unannounced searches at a company's premises and requests for information that are compulsory. Responses must be accurate, complete and non-misleading.

Dawn raids must be authorised by an inspection order issued by the CNMC's Competition Directorate. In order to enter a company's domicile, either the entity's consent is required or a judicial warrant (which can usually be obtained within 48 hours of the request). The Notice of the CNMC on dawn raids (published in October 2016) only refers to the need for a judicial warrant in cases of refusal from the company to grant its consent or if the dawn raid is at risk. However, no infringement proceedings have been initiated when companies refuse to grant consent in the absence of a judicial warrant.

In practice, the CNMC usually requests a judicial warrant before initiating an inspection, as failure to comply with the warrant may entail a criminal offence. Inspections of private domiciles of directors or employees are also possible with a judicial warrant, but are uncommon and require well-founded indicia that documents relevant to the inspection are located therein.

During dawn raids, the CNMC's officials may search the premises and professional vehicles of employees. They may also copy documents related to the investigation contained in all types of formats (physical or digital), review tablets, telephones, etc., and even sealed rooms, computers and document containers, or may even retain them for a maximum of 10 days. The CNMC's agents usually copy a very extensive selection of digital files stored on the employee's computer (nearly an image of the computer) and almost all email exchanges (excluding personal files previously identified by the employee). They also usually check private email accounts and phones/tablets to confirm that they are not used for professional purposes. The copied digital files are subsequently loaded into a Nuix e-discovery device that runs an automated search using agent-selected key words. The list of key words must be provided to the company at the end of the inspection. The officials record the results of

the search on two DVDs (one is provided to the investigated company) and review them at its headquarters without the presence of the company's representatives.

Over the past years, the Supreme Court has substantially limited the CNMC's powers during dawn raids:

- CNMC officials are obliged to inform the company whether a judicial warrant authorising entry has been denied (judgment of 16 June 2015 in the *Montibello* case).
- In the case of a discrepancy between the inspection order and the judicial warrant (which is not uncommon), the latter should always prevail (judgment of 10 December 2014 in the *Campezo* case).
- The inspection order should be sufficiently detailed and justified as to the scope of the infringement and the indicia of the infringement in order to avoid "fishing expeditions". The inspection order cannot simply quote the abstract types of infringements contained in Article 101 of the TFEU and Article 1 of the LDC, but should describe in precise and detailed terms ("*with the maximum precision possible*") the purpose of the inspection, and the information sought by the competition authority. Failure to fulfil this requisite led the Supreme Court to annul the inspections in two cases (*UNESA*, judgment of 10 December 2014 and *Transmediterránea*, judgment of 27 February 2015).
- The annulment of the inspection implies the inadmissibility of the seized documents for evidencing the infringement. This has led to the annulment of the sanctioning decision in some cases (judgment of 25 March 2015 of the *Audiencia Nacional* in the *UNESA* case). Moreover, even if the CNMC also had other evidence, if the sanctioning decision does not clearly differentiate the source of evidence used to sustain each charge (i.e., the evidence is mixed and the outcome is the result of the overall analysis), none of the evidence can be used against the company. This doctrine led the Supreme Court to annul the sanctioning decision in the *Transmediterránea* and *Montibello* cases despite the existence of leniency applications and other parallel inspections that were not declared illegal (judgments of 1 June and 15 June 2015).
- Documents seized outside the scope of the investigation cannot be used to open proceedings for a new infringement. The seizure of such documents is illegal (judgment of 16 June 2015 in the *Colgate* case).

Failure to cooperate during an investigation may lead to fines for obstruction up to 1% of the undertaking's total turnover. The concept of "obstruction" not only refers to acts that render the investigation impossible, but also those that may substantially hinder the inspection. The LDC and the CNMC's Notice on dawn raids expressly refer to the provision of incomplete, inaccurate or misleading information requested during the inspection (also for oral questions) or breaking seals placed by the authorities. In the *Transmediterránea* case, the Supreme Court upheld a broader interpretation, also covering the unjustified absence of an employee despite having been requested to attend, or unjustified delays in the initiation of the inspection. This notwithstanding, the Supreme Court significantly reduced the amount of the fine (0.1% of the total sales in contrast to the maximum potential fine of 1% of total sales).

Overview of cartel enforcement activity during the last 12 months

The CNMC has maintained its level of activity in the cartel field, but has not yet published statistical data on its activities in 2016. Nonetheless, according to publicly available information, approximately 10 cartel cases were decided from January to December

2016, with a total approximate value of €230m in fines imposed. The amount of fines represents a decrease compared to the previous year (€516m) but it is important to take into consideration that almost half of the cartel decisions in 2015 referred to the same sector (automotive industry). However, as compared to year 2014 (€29m in fines), the activity of the CNMC in the cartel field has increased. It should also be noted that more than half of the amount of the fines imposed in year 2016 corresponds to the *Adult incontinence* case (S/DC/0504/14) in which the CNMC imposed fines of €128.8m. However, such amount also includes the €68m fine imposed on the leniency applicant that benefited from full immunity. In addition to the above, the CNMC has carried out dawn raids or initiated formal infringement proceedings in eight new cases in 2016.

The sanctioning proceedings on which a decision was issued, and the new investigations initiated, affect highly disparate sectors; from advertising agencies to parcel companies, car parts, medical gases, transport of artwork, passenger transport, distribution of electric cables, secured private money transport services, travel agencies, software services providers, used batteries, etc. The CNMC has also initiated formal infringement proceedings against some of the major Spanish banks for alleged infringements in relation to derivatives on interest rates.

The regional competition authorities are also active in cartel enforcement. In general terms (not only in this area), the most active ones are the authorities in Andalusia, Castile y León, Catalonia and Valencia.

Key issues in relation to enforcement policy

In contrast to EU enforcement policy, the CNMC cannot prioritise cases and is obliged to investigate all cases that offer reasonable indicia of infringements. That does not imply that it must accept all complaints, but it is nevertheless legally bound to at least carry out a preliminary investigation in almost all cases.

In the last 12 months the CNMC's enforcement has mainly focused on cartel cases, which is the CNMC's main priority. The exchanges of sensitive data between competitors, even if they do not refer to future prices and quantities, has been a major concern and considered to constitute a cartel when the exchange has been secret. The CNMC's approach to this particular type of practice is indeed much stricter than that of the EU Commission, which tends to categorise it as a restriction "by object", avoiding the necessity of carrying out a rigorous analysis of the effects. Hub and spoke investigations have also been an important area of activity, followed by collective price recommendations by associations, including regional professional associations.

Within the field of restrictive vertical practices, new investigations have also been conducted in the retail beverages sector regarding potential market partitioning, and in the pharmaceutical sector in connection with potential dual pricing systems.

Abuses of a dominant position have also been relevant, but to a much lower extent.

Interestingly, the CNMC has been monitoring very closely the implementation of previous sanctioning decisions and the accuracy of the information provided by companies during proceedings. This follow-up has led to the imposition of sanctions in a case for failure to comply with a previous decision in the travel agency sector, with fines totalling €1.8m. The CNMC also imposed a sanction on a company that submitted a lower turnover figure than that of its annual accounts as a response to the request by the CNMC for the purpose of calculating the fine.

Key issues in relation to investigation and decision-making procedures

Sanctioning proceedings are carried out in two phases: an investigation phase, in which the parties are given access to the file, receive formal accusations and are entitled to submit pleadings; and a decisional phase. Each phase is carried out by a different body (the Directorate of Competition and the Board of the CNMC, respectively). The final decisions may be appealed to administrative courts and the investigation measures may also be appealed to the CNMC's Board. Therefore, from a general perspective, the parties' right to a defence seems to be respected.

This notwithstanding, some practical aspects of the proceedings mentioned below are obvious targets for improvement.

The maximum deadline established in the LDC for the duration of proceedings is 18 months as from the date of formal opening of the case (with possible suspensions in certain cases). The LDC distributes this maximum period between the investigation phase (a maximum of 12 months) and the decisional phase (maximum of six months). However, the Directorate of Competition's practice over the past year seems to have prolonged the duration of the investigation phase in certain complex cases, thereby leaving the Board with little time to carry out an in-depth review or digest long and complex cases contained in thousands of pages (sometimes less than two months).

Unlike the EU proceedings, the parties are given access to the file in the investigation phase from the very moment the formal proceedings are initiated, with the exception of the documents and statements of the leniency applications, which are only accessible after the issuance of a statement of objections. This entails that the parties have access to the incriminating evidence (although not all at the same time) from an early stage in the proceedings. In turn, the period given to the parties to submit observations on the statement of objections (including the proposal and submission of evidence) and a proposal decision prepared by the Directorate of Competition is much shorter (only 15 business days). The parties may request an extension of these deadlines of up to half the initially granted period. These extensions are normally granted but may be denied when the investigation is time-constrained.

During the decisional phase, the parties are not given access to the file, and no indication of the estimated amount of a possible fine is provided. Nor are the parties given the opportunity to submit further pleadings unless they receive an information request, or the Board decides to admit new evidence or to adopt a new interpretation of the facts that allows them to make comments on the same. Although the LDC expressly foresees the possibility of having an oral hearing before the Board, oral hearings regrettably are only conducted in merger control proceedings. According to practitioners and scholars, this practice undermines the parties' right to a defence, depriving them of the possibility to present their case to the Board.

In relation to the parties' rights within the context of dawn raid investigations, we refer to our explanations above. Nonetheless, it is important to recall that correspondence between the client and its external legal counsel is legally privileged and cannot be used in sanctioning proceedings. The same applies to information internally prepared by the company at external counsel's request for the purposes of preparing a defence in competition law proceedings. The parties may also refuse to provide self-incriminating responses and documents outside the scope of the inspection.

Leniency/amnesty regime

The LDC offers a leniency programme that very closely mirrors that of the EU and which

has been quite successful during the last few years. The competition authorities have also issued practice guidelines for applications under the leniency programme.

Like the EU programme, the first company bringing evidence of a cartel infringement of which the authority was unaware, or which allows it to carry out targeted inspections, may be granted conditional full immunity from fines. Immunity is only available if the company has not coerced others to participate in the cartel practice, if it fully cooperates with the CNMC throughout the proceedings and ends its involvement in the cartel. The second and third companies providing evidence offering added value (which must also cooperate until the end of the proceedings and end its involvement in the cartel) may be granted conditional reductions of up to 50% and up to 30%, respectively, of the amount of the fine. Fourth and subsequent companies may obtain a reduction of up to 20% of their fine. The CNMC is quite strict in this field and it is difficult to obtain the maximum percentage reduction within each category.

A peculiarity of the Spanish regime is that the final decision on the fulfilment of the conditions for obtaining immunity from fines or a substantial reduction thereof is taken by the Board of the CNMC when it decides on the merits of the case. However, the initial discussions on the fulfilment of such conditions are carried out by the Directorate of Competition. The dichotomy of enforcement bodies applying the same programme may lead to inconsistent approaches and legal uncertainty, as the company may be deprived of the fine reduction at the last stage of the proceedings even if it has previously agreed on the reduction with the Directorate of Competition.

Finally, it is important to note that the current LDC already establishes that the CNMC will not provide civil courts with copies of companies' leniency statements.

Administrative settlement of cases

Article 52 of the LDC establishes an early termination procedure for infringements (*terminación convencional*). The procedure is discretionary for the CNMC, and the Board of the CNMC may decide to terminate the investigation early, when the remedies proposed are sufficient to resolve the competition concerns identified by the Directorate of Competition and to guarantee the public interest.

The Directorate of Competition has been highly reluctant to accept the initiation of early termination proceedings in cartel cases. In fact, the guidelines approved by the former CNC exclude the possibility of early termination for cartel cases. In some cartel investigations carried out in 2015, parties applied for the initiation of the early termination contracts but the Directorate of Competition refused them almost automatically. The CNMC's decisions refusing the initiation of the early termination proceedings can be appealed before the *Audiencia Nacional* but there is no single case in which the *Audiencia Nacional* has annulled the CNMC's decision.

The CNMC has recently been very active in monitoring compliance with early termination commitments, even making broad interpretations of the commitments when they were not sufficiently clear. Non-compliance with commitments is subject to heavy fines given its consideration as a very serious infringement.

Finally, the LDC does not expressly recognise plea-bargaining mechanisms or settlements with the authorities where a reduction of fines is available to companies admitting an infringement. Nonetheless, in a few cartel cases in which a party decided not to respond to the statement of objections, the former CNC considered that fact as a mitigating circumstance and reduced the fine imposed on the company.

Third party complaints

As leniency applications have decreased in recent years, third party complaints have gained relevance for the initiation of infringement proceedings, even in cartel cases. In 2016 there have been several cartel cases initiated by complaints of clients or former employees.

In theory, a third-party complaint must include a detailed description of the facts that support the existence of the infringement and corresponding evidence; however, the Directorate of Competition often decides to start an investigation with limited evidence and an unclear description of the infringement.

The CNMC usually considers complainants to be interested parties (if the complaint is not anonymous), which implies that they will have access to the file and the right to submit their observations to the statement of facts and the Directorate of Competition's proposed decision.

Civil penalties and sanctions

The LDC considers cartels to be very serious infringements and the CNMC is entitled to impose fines of up to 10% of the company's total turnover in the previous financial year in Spain. The former CNC issued guidelines with a methodology for calculating fines similar to the ones of the European Commission. Those guidelines were usually followed in cartel cases.

As previously mentioned, the Spanish Supreme Court declared that methodology to be unlawful in a ruling issued on 29 January 2015, which has been consistently reaffirmed in subsequent rulings. In that ruling, the Supreme Court declared that the fine equating to 10% of total turnover can only be imposed in case of the worst infringements and fines should be set at a lower level that is proportionate to the severity of the infringement taking into consideration, amongst other factors, the dimensions of the affected market.

Following that ruling, the CNMC developed a new methodology that has yet to be tested by Spanish courts. The new methodology calculates the percentage of the company's total annual turnover (not the turnover in the market affected by the cartel) to be applied for the calculation of the fine, based primarily on the following elements: (i) the company's share in the market affected by the infringement; (ii) the duration of the infringement; (iii) the seriousness of the infringement; and (iv) the (theoretical) illicit benefit obtained by the infringer. This methodology raises important concerns and has been heavily criticised for, among other reasons, lack of proportionality, discrimination and, above all, lack of clarity in the way the CNMC decides to establish a fine at a certain percentage of the total sales of the company (not merely the sales affected by the infringement). The practice in the last 11 months shows that the percentages in cartel cases range between 0.5 to 8% of the total turnover of the undertakings concerned.

The LDC does not set specific reductions of the fines based on the implementation of compliance programmes. However, in the recent decision of *International movers* (case S/DC/0544/14), the CNMC may have reduced the fine to be imposed to one of the companies based on the creation and implementation of a compliance programme following the initiation of the investigation. Given that the content of the decision of the CNMC is not sufficiently clear, we expect this issue to be clarified in future cases.

If the infringer is an association, the CNMC may take into consideration the turnover of its members for the calculation of the fine. Additionally, the LDC entitles the CNMC to impose fines of up to €60,000 on natural persons. Fines on natural persons were

historically rare but the CNMC has imposed fines on managers and representatives in three cases: *Adult incontinence* (S/DC/0504/14); *Train infrastructures* (S/DC/0519/14); and *Collection and counting of valuables* (S/DC/0555/15). It is expected that the CNMC will continue imposing fines on natural persons and future decisions will provide answers to the concerns raised by practitioners and scholars (such as the proportionality of the fines or the objective and subjective limits of this mechanism).

Finally, the civil penalty associated with competition law infringements is the nullity of the conduct or the agreement, and the injured parties will be entitled to claim damages in commercial courts (see below).

Right of appeal against civil liability and penalties

Infringement decisions and fines imposed by the CNMC in cartel cases can be appealed to the *Audiencia Nacional*. The appeal must be lodged within two months of notification of the CNMC's decision. Along with the appeal, the parties may apply for the suspension of the execution of the decision as an interim measure. The *Audiencia Nacional* usually accepts the suspension of the payment of the fine when *periculum in mora* is duly justified and the payment of the fine is guaranteed.

The *Audiencia Nacional* has full jurisdiction to review the facts and the amount of the fines imposed.

Appeals against the fines imposed by the former CNC have been extremely successful in recent years as the *Audiencia Nacional* and the Supreme Court systematically annulled the methodology applied by the Spanish competition authorities for the calculation of fines. The courts have remanded the cases to the CNMC to recalculate the fine based exclusively on the elements established by the LDC and not on the content of the former guidelines.

Appeals on substantive issues of cartel cases have been much less successful as the *Audiencia Nacional* usually upholds the CNMC's analysis, particularly when leniency applications have been submitted.

Criminal sanctions

Criminal sanctions resulting from cartel infringements are extremely rare in Spain. The Spanish Criminal Code establishes the possibility of criminal sanctions for some antitrust infringements (e.g., bid-rigging in public tenders) but criminal courts have been highly reluctant to apply them.

Cartel practices can only give rise to a criminal offence in Spain in cases of bid-rigging and certain types of price manipulation. These provisions have rarely been applied. Nonetheless, in September 2015, the *Audiencia Nacional* admitted a lawsuit against several petrol companies and their executive managers regarding specific conduct already sanctioned by the CNMC under the LDC.

It is not yet clear whether the criminal court will dismiss the case on the grounds of the principle *ne bis in idem* (essentially equivalent to double jeopardy, *autrefois acquit*, in common law systems).

Cross-border issues

The Spanish competition authority is a member of the European Competition Network and actively participates in the working groups and other meetings held within that network.

In the last couple of years there has been closer cooperation between the former CNC and the current CNMC and the European Commission, as well as with other Member States' competition authorities.

In fact, a 2014 cartel case, *Polyurethane Foam*, involved cooperation with the Portuguese competition authority that was very relevant.

Developments in private enforcement of antitrust laws

Claims for damages before civil and commercial courts derived from antitrust breaches remain scarce in Spain as compared to other EU jurisdictions such as the UK or the Netherlands. Actions brought in the past were usually standalone actions in the petrol station sector and few were follow-on claims (the most relevant were claims brought a few years ago in relation to the *Sugar Cartel* case). Nevertheless, there has been a certain increase of activity recently (e.g., the standalone action brought by Musaat in the *Decennial Insurance* cartel case in May 2014).

A substantial increase of claims is expected in the near future as a consequence of the transposition of EU Directive 2014/204/EU into Spanish law. Indeed, an increasing number of potential victims of cartel infringements often address formal complaints to alleged cartel participants in order to interrupt the current statute of limitations (which remains one year for torts). Several claims have also been publicly announced, including class actions promoted by consumers' associations in relation to the sanctioning decisions issued in 2015 in the automotive sector mentioned above.

The transposition of Directive 2014/204, which should have taken place before the end of 2016 (but is delayed due to the lack of an operating government for the last months in Spain), will clearly increase the number of future claims for damages in Spain in several aspects. Some of them are the following:

- One of the main obstacles that cartel victims currently face when seeking to bring claims for damages is the one-year statute of limitations for tort liability. The law transposing Directive 2014/204 will extend the period to five years, in addition to its suspension during administrative appeal proceedings.
- Spanish civil procedural law does not currently provide for a sophisticated disclosure process and access to evidence is difficult and usually insufficient to prepare a claim for damages. The law implementing Directive 2014/204 will surely address this issue and establish a specific mechanism to facilitate access to categories of documents available to the cartel members or third parties before substantiating the claim. Specific protection for leniency statements will also need to be regulated, as the current procedural law does not prevent a court from requesting that the leniency applicant submit a copy of the leniency statement (if not made orally).
- Similarly, the CNMC's decisions are not currently binding on civil and commercial courts. The implementation of Directive 2014/204 will entail an important change in this field, as the CNMC's final decisions will be fully binding on civil and commercial judges. It will nevertheless be desirable to set forth some kind of "administrative prejudiciality" (*prejudicialidad administrativa*) to ensure that the damage claims substantiated before civil and commercial courts are not decided until the CNMC's decision becomes final. Otherwise, the risk of concurrent, conflicting judgments would lead to legal uncertainty and costly proceedings.
- An additional reform of the concept of a "cartel" for damage purposes and the

establishment of a presumption of damages in cartel cases would also be required. As previously explained, the legal concept foreseen in the LDC is narrower than that under the Directive.

An initial preparatory draft bill for transposing Directive 2014/204 has already been prepared by experts appointed to participate in a codification committee.

Reform proposals

The two most important challenges that the CNMC faces in cartel cases are:

- (i) The definition of the concept of a cartel. It remains unclear whether the CNMC can extend the concept of a cartel to conduct that is not explicitly characterised as a cartel-related activity under the LDC. This is particularly important in exchange of information cases, which the CNMC tends to almost systematically characterise as constituting cartels.
- (ii) The methodology for the calculation of fines in cartel cases. As mentioned, the former CNC guidelines were annulled by the Supreme Court early this year and the new methodology applied by the CNMC has faced strong criticism. The *Audiencia Nacional* is expected to issue its ruling on the new methodology during the course of 2017.

From a procedural perspective, a clear improvement would be holding oral hearings in all cartel cases. Although Spanish law establishes the possibility of an oral hearing before the Board, that body is very reluctant to hold oral hearings, particularly in cartel cases.



Antonio Guerra Fernández

Tel: +34 915 860 466 / Email: antonio.guerra@uria.com

Antonio Guerra is a partner based in the Madrid office of Uría Menéndez. He joined the firm as counsel in June 2007. Previously, Antonio was the Director of the Spanish Competition Tribunal for more than six years, where he participated directly in the decision-making process in a wide range of cases involving industries such as energy, telecoms, wholesale distribution, food and beverages and media. During his term at the Tribunal, he was also responsible for relations with the European Commission, national regulators (National Energy Commission and National Telecommunications Commission), the regional competition authorities, the Latin American competition authorities and multilateral institutions such as the IMF and World Bank.

His practice focuses on EU and Spanish competition law. He advises companies and associations from the banking, insurance, telecoms, media, environment, energy, food or transport industries in all types of proceedings before the National Competition Commission and the European Commission.



Patricia Vidal Martínez

Tel: +34 915 860 161 / Email: patricia.vidal@uria.com

Patricia Vidal is a lawyer and partner of Uría Menéndez (EU and competition law department). She joined the firm in 1996.

She has worked on a wide variety of national and international cartel cases (including leniency programmes) before the Spanish and EU authorities, and regularly advises on mergers (including international multi-filings), agreements and strategic alliances, state aid issues and infringement proceedings for the abuse of a dominant position. Patricia has vast experience in competition litigation before the Spanish and the EU courts.

She is a regular lecturer on EU and Competition Law in different Master's and postgraduate degree courses and is the academic director of the Master's Degree in International Legal Practice at the Instituto Superior de Derecho y Economía (ISDE). She has written several articles and books on Competition Law and is a member of the board of the Spanish Association for the Defence of Competition.



Tomás Arranz Fernández-Bravo

Tel: +34 915 870 853 / Email: tomas.arranz@uria.com

Tomás is a senior associate based in the Madrid office of Uría Menéndez. He joined the firm in 2010 and has worked in both the Brussels and Madrid offices. He was seconded to the Competition Department of the Amsterdam office of De Brauw Blackstone Westbroek from January 2013 to June 2013.

He has been involved in a variety of national and international antitrust infringement cases before the Spanish and EU authorities, and is regularly asked to advise on mergers (including the coordination of international multi-jurisdictional filings) and distribution agreements. He has also implemented antitrust compliance programmes and delivered training sessions for numerous clients.

Uría Menéndez

Príncipe de Vergara, 187 / Plaza de Rodrigo Uría, Madrid, Spain
Tel: +34 91 586 04 66 / Fax: +34 91 586 07 53 / URL: <http://www.uria.com>

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