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# THE CARTELS AND LENIENCY REVIEW

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FIFTH EDITION

EDITORS

CHRISTINE A VARNEY AND JOHN TERZAKEN

LAW BUSINESS RESEARCH

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Editors

CHRISTINE A VARNEY AND JOHN TERZAKEN

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# EDITORS' PREFACE

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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 because of 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 30 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 fifth 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

**John Terzaken**

Allen & Overy LLP  
Washington, DC

January 2017

## Chapter 25

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# SPAIN

*Alfonso Gutiérrez and Ana Raquel Lapresta<sup>1</sup>*

### I ENFORCEMENT POLICIES AND GUIDANCE

The legislation regulating cartel conduct in Spain is the Competition Act.<sup>2</sup> The Defence of Competition Regulation<sup>3</sup> 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.<sup>4</sup>

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

---

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.

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 that may produce, anticompetitive 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.<sup>7</sup> Furthermore, the prohibitions under Article 1 of the Competition Act do not apply to agreements resulting from the application of a law.<sup>8</sup>

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’<sup>9</sup> 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 mere exchanges of sensitive commercial information between competitors.<sup>10</sup>

The CNMC has declared the ‘fight against cartels to be its number one priority in competition enforcement’. Between 2009 and 2015, 43 cartels were discovered and sanctioned in Spain, with total fines above €1 billion.<sup>11</sup> In 2016, the CNMC issued seven decisions sanctioning cartels.

Since February 2008, the CNMC 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 within the scope of the definition of a ‘cartel’. The leniency programme has been applied in 23 cases since its entry into force in Spain in 2008.<sup>12</sup>

---

7 These requirements are established in Article 1(3) of the Competition Act, specifically: they allow consumers a fair share of its benefits; they do not impose the concerned restrictions on the undertakings that are not indispensable to achieve these objectives; and 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*; CNMC decision of 28 July 2015 in Case S/471/13, *Car manufacturers*.

11 See page 19 of the Report published by the CNMC ‘Antitrust enforcement in Spain’.

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,

## 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 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:

- a* the mutual exchange of information on new cases and expected enforcement decisions;
- b* coordinating investigations where necessary;
- c* mutual assistance on investigations;
- d* exchanging evidence and other information; and
- e* discussing issues of common interest.<sup>13</sup>

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.

Since Spanish regulations do not provide for criminal sanctions for competition infringements,<sup>14</sup> 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.

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*Paper envelopes*; 6 March 2013, in Case S/342/11, *Polyurethane foam*; 18 February 2013, in Case S/343/11, *Paper products*; 5 August 2013, in Case S/380/11, *Car rental*; 23 May 2013, in Case S/303/10, *Sanitation distributors*; and 26 June 2014, in Case S/445/2012, *Firefighting equipment*; 28 May 2015, in Case S/0471/1315, *AUDI/SEAT/VW dealers*; 15 July 2015, in Case S/482/13, *Car manufacturers*; 3 December 2015, in Case S/481/13, *Modular constructions*; 31 May 2016, in Case S/DC/0504/14, *Adult diapers*; 6 September 2016, in Case S/DC/544/14, *International relocation services*.

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 note 29, *infra*.

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

However, under Regulation (EC) No. 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.<sup>15</sup> The CNMC repeatedly cites this European case law in cartel cases<sup>16</sup> in order to extend the liability of cartel members to their parent companies.<sup>17</sup>

<sup>15</sup> 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 a case where the parent company was a mere financial holding entity that did not exercise its voting rights as shareholder during the relevant period.

<sup>16</sup> 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*; and of 26 June 2014, in Case S/445/2012, *Firefighting equipment*. See also CNMC decisions of 22 September 2014 in Case S/0428/12, *Pales* and 28 July 2015 in Case S/471/13, *Car manufacturers*.

<sup>17</sup> 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 programme<sup>18</sup> 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, with 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.<sup>19</sup> During the course of the proceedings, the applicant has the right to be informed about whether the authority intends to maintain the conditional immunity that has been granted.<sup>20</sup>

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 sets 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.<sup>21</sup>

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.<sup>22</sup> Once it is issued, interested parties will have access to that information,<sup>23</sup> provided that this is necessary to submit a response to the statement of objections.

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19 See CNC decisions of 2 March 2011 in Case S/0086/08, *Professional hairdressing*, and 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.

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.

Private litigants may not request that the CNMC or other competition authorities produce materials submitted within the scope of a leniency programme.<sup>24</sup> In its Communication on Leniency Programme, the former CNC expressly stated its commitment not to 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.<sup>25</sup> The implementation of the Damages Directive<sup>26</sup> will ensure complete protection from disclosure to leniency statements and settlement submissions.<sup>27</sup> 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.<sup>28</sup>

## 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.<sup>29</sup> Legal representatives and managers who have directly participated in the cartel can be sanctioned with a fine of up to €60,000. Although the CNMC had not traditionally applied this provision, it has changed its practice and imposed sanctions on legal representatives and managers in three recent decisions (see Section VIII, *infra*).

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 preceding the imposition of the sanction. Nevertheless, if the undertaking is a wholly owned subsidiary of a group, this limit could be applied to the turnover of the group's parent company assuming that, under Article 61(2) of the Competition Act, the subsidiary's conduct is attributed to its parent company.

On 29 January 2015, the Supreme Court issued a judgment<sup>30</sup> clarifying the interpretation of this limit. On the basis of the proportionality principle, the Supreme Court held that:

- a* the 10 per cent limit on the annual turnover of a sanctioned company is the maximum sanction. This percentage is supposed to be the ceiling of a range within which the amount of the fine has to be fixed in proportion to the seriousness of the infringement.

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24 Article 15 *bis* of Law 1/2000 of 7 January on Civil Procedure (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: information that was prepared by a natural or legal person specifically for the proceedings of a competition authority; information that the competition authority has drawn up and sent to the parties in the course of its proceedings; and settlement submissions that have been withdrawn.

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

30 Judgment of 29 January 2015, appeal number 2872/2015, *BCN Aduanas y Transportes SA*.

The final amount of the fine must be set within a range of between zero and 10 per cent according to the principle of proportionality. As a consequence, the turnover limit should only be triggered in the most serious infringements; and

- b* this percentage must be calculated over a company's total annual turnover, including sales of products not affected by the infringement.

The Supreme Court also declared that the criteria contained in the Fining Guidelines adopted in 2009 by the former CNC are contrary to Spanish administrative and constitutional law. As a consequence, the fining method applied by the Authority has to be modified to comply with the proportionality principle.

The Supreme Court declared that the final amount of the fine should be established taking into account the following criteria mentioned in the Competition Act:

- 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.

The application of the principles included in this judgment has not led to a reduction in the amount of the fines imposed by the CNMC in new cases.

In cases in which the undertaking benefits from a reduction in application of the leniency programme, the reduction is applied to the final figure determined by application of these criteria.

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,<sup>31</sup> and even in cases in which the CNC concluded that the undertaking had not complied with its collaboration obligations under the leniency programme.<sup>32</sup>

Finally, since 22 October 2015,<sup>33</sup> Spanish competition authorities are empowered to ban natural and legal persons sanctioned for serious infringements that distort competition from contracting with public bodies for up to three years. This prohibition can be applied in addition to the penalties set out in the Competition Act.

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

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

33 Act 40/2015 of 1 October on the Public Sector.

## VI 'DAY ONE' RESPONSE

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

Under Spanish law, access to premises must be consented by either the occupants or a court by way of a warrant.<sup>34</sup> Access to premises is only mandatory if authorised by a court through a warrant. In practice, the CNMC usually requests a warrant in advance to secure access to premises. In a recent judgment, the Supreme Court declared the inspection of a company's premises illegal because the inspectors did not inform the company that a judge had rejected the CNMC's application for a warrant. As a consequence, the company's consent to the inspection was invalid.<sup>35</sup> In the absence of such a judicial warrant, undertakings are entitled to deny access to their premises (although not to oppose to the inspection, which is mandatory).

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).<sup>36</sup> Personal and privileged documents must be identified during the inspection.<sup>37</sup>

Officials may also address 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.<sup>38</sup>

In June 2016, the CNMC published an informative note regarding inspections, which contains a detailed description of the obligations of the companies under investigation and the possible sanctions if they fail to cooperate.

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

35 Judgment of the Supreme Court of 15 June 2015, appeal number No. 1407/2014.

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

37 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 outwith 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*).

38 In the last inspections carried out by the former CNC, it requested access to web emails of employees by requesting their passwords if the email addresses have been used for professional purposes.

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.<sup>39</sup>

## VII PRIVATE ENFORCEMENT

To date, there have only been a few cases regarding private litigation arising from antitrust infringements in Spain. However, it is noteworthy that the number of cases has increased progressively in recent years.

The implementation of the Damages Directive<sup>40</sup> in Spain is expected to increase the number of claims for damages from antitrust infringements. It was due to be implemented before the end of 2016; however, given that the Parliament has been almost inactive in the past year because of the need to repeat elections, it is not expected to be adopted until the second half of 2017.

In January 2016, the government published a draft proposal. This proposal included significant changes to make Spain more attractive for claimants. For example:

- a* Increasing the limitation period from one to five years. This period is suspended when a competition authority initiates proceedings until at least one year after the decision on an alleged infringement is made final.
- b* Introducing a presumption of harm in cartel infringements. Currently, to apply for damages, claimants are required to prove the causation of harm and its amount and it is not always easy for them to have access to the evidences required to quantify the amount of the damages claimed. The draft proposal sets out a presumption of harm and also allows courts to estimate the amount thereof if it is not possible to calculate the damages. These changes are expected to make it easier for claimants to obtain an indemnity. The Damages Directive provides for full compensation of the damages suffered. 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. Thus, currently claimants are already entitled to ask for full compensation of the damages suffered.
- c* Introducing a presumption of harm to indirect purchasers. Spanish civil law states that the burden of proof in civil proceedings lies with the party that alleges the harm. Thus, indirect purchasers must provide evidence of the defendant's unlawful conduct, the causal link and the existence of harm and its quantification. In the draft proposal published by the government this rule is reversed, introducing a presumption of harm in favour of indirect purchasers. The introduction of this presumption is expected to

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39 See CNC decisions of 31 July 2012, in Case SNC/26/12, *Mediapro* and of 31 May 2012, in Case SCN/19/12, *CPV*.

40 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.

facilitate claims by indirect purchasers. Spanish courts have recognised the ‘passing-on’ defence when considering a defendant’s position<sup>41</sup> in damage claims involving cartel infringements.

- d* Introducing specific mechanisms to facilitate claimants’ access to relevant documents before substantiating the claim. The pretrial disclosure process in Spain is currently rather limited and courts have been reluctant to award broad disclosures of documents to claimants. The provisions of the Damages Directive are expected to modify this regime and make it easier for claimants to access evidence. However, it is still uncertain as to how it would work in practice. Specific protection for leniency statements would be guaranteed, as it has been until now.
- e* Making final decisions of competition authorities declaring infringements of competition law binding. A final decision made by any Member State’s national competition authority regarding administrative proceedings would be binding in actions for damages. The CNMC’s decisions are currently not binding on civil and commercial courts.
- f* Extending parental liability to civil proceedings. 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 courts would accept a 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. The courts’ future position in this regard is uncertain.
- g* Limiting immunity recipient’s liability regarding damages caused to customers of other infringers.

The Civil Procedure Act sets out different ways to submit collective actions. The simplest type of 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.<sup>42</sup> Moreover, although class actions are not technically recognised under Spanish law, Article 11 of the Civil Procedure Act 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.

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41 See Judgment of 20 February 2009 of Civil Court No. 11 in *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 SL/Energys-VM Gestión de Energía*.

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

When a consumers' association initiates a collective action under Article 11(2) to (3), the admission of the claim will be made public.<sup>43</sup>

## VIII CURRENT DEVELOPMENTS

At the beginning of 2016, the CNMC announced the introduction of two new tools in their fight against cartels. The first enforces the provision already contained in the Competition Act regarding sanctions imposed on managers of companies that have participated in anticompetitive practices. The second imposes a ban on companies sanctioned for antitrust infringements from contracting with public authorities.

In three recent decisions<sup>44</sup> the CNMC has sanctioned several individuals for their participation in anticompetitive practices. The fines, imposed on several executives and legal representatives of companies involved in anticompetitive practices, ranged between €4,000 and €32,000. According to public statements made by the President of the CNMC, this measure aims to increase the deterrent effect of the authority's sanctioning power and encourage individuals to become whistle-blowers in the knowledge they will be 'protected' under the leniency programme.

In addition, since October 2015, the CNMC has been empowered to ban natural and legal persons sanctioned for distortions of competition from contracting with public authorities. The CNMC will also be able to determine the scope and duration of the ban from public contracts in its decision. Alternatively, it will be able to submit a copy of the

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43 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:

*a* First, if a particular group of identifiable consumers or users is harmed by specific anticompetitive 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).

*b* Second, if anticompetitive 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.

44 CNMC Decisions of 31 May 2016, in Case S/DC/0504/14, *Adult diapers*; of 30 June 2015, in Case S/DC/0519/14, *Rail infrastructures*; and of 16 November 2016, in Case S/555/15, *Cash transport*.

decision to the Procurement Board so that, where appropriate, it can initiate an *ex officio* procedure to declare the ban from public contracts. For the prohibition to be effective, the sanctioning decision must be final. A prohibition has not yet been imposed but the President of the CNMC has announced that they expect to publish their first decision including a ban of this kind in 2017.

## Appendix 1

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# ABOUT THE AUTHORS

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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. In addition, he 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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Ana Raquel Lapresta is a lawyer in the Brussels office of Uría Menéndez. She joined the firm in 2009 and is currently an associate of the EU and competition law department.

Her practice focuses on EU and Spanish competition law. She has wide experience advising clients in merger control proceedings, including international multifiling coordination. Ms Lapresta also has wide experience in representing clients in procedures before the European Commission, the Spanish competition authorities and the EU courts for the investigation of anticompetitive 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, including the financial, insurance, electric and telecommunications sectors.

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