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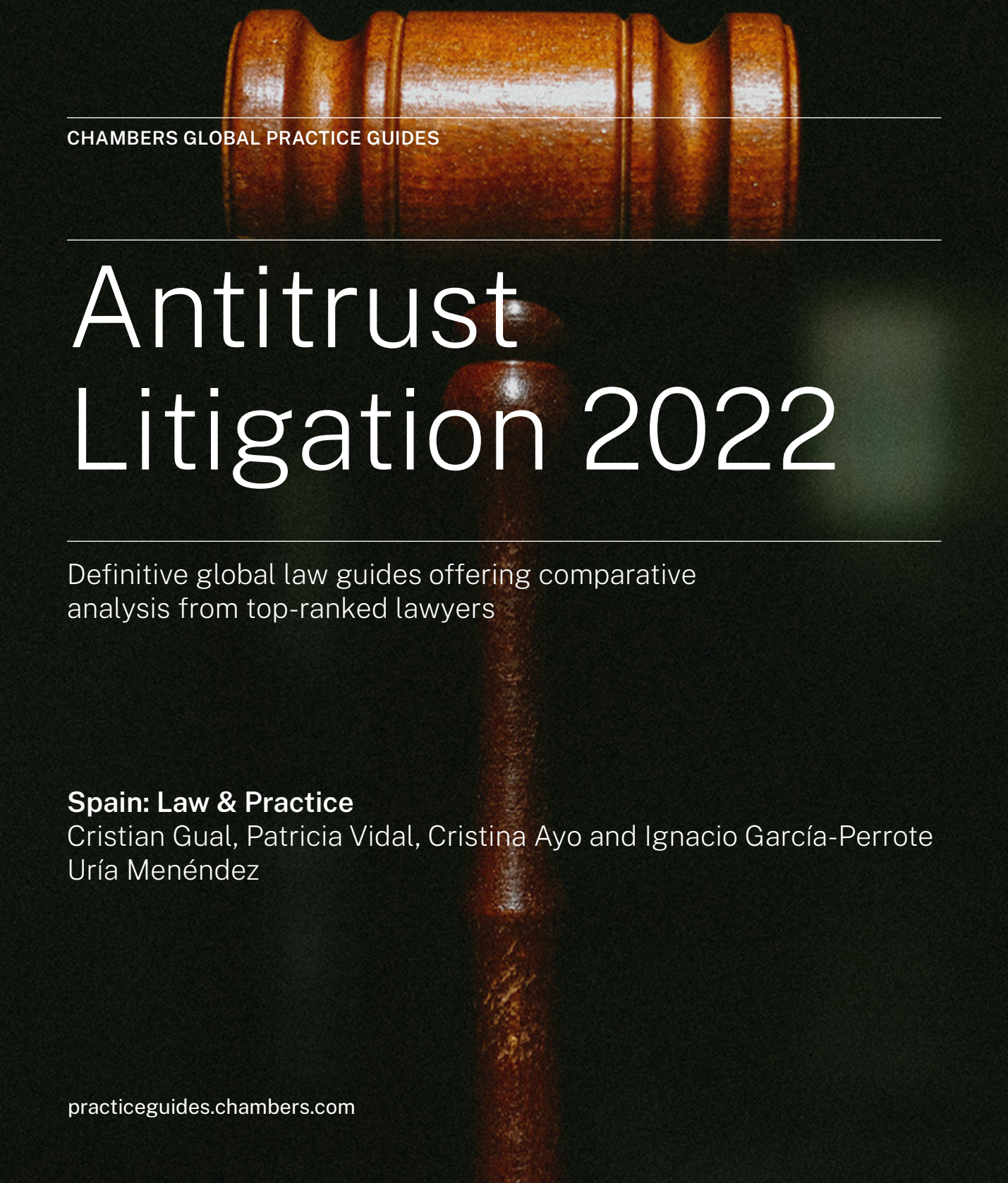

CHAMBERS GLOBAL PRACTICE GUIDES

Antitrust Litigation 2022

Definitive global law guides offering comparative analysis from top-ranked lawyers

Spain: Law & Practice

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SPAIN

Law and Practice

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1. Overview

1.1 Recent Developments in Antitrust Litigation

Spain has recently become a leading jurisdiction in antitrust litigation, with a number of judgments issued in cartel damages claims in the last three to four years. In previous years, however, Spain had some experience with nullity claims and damages claims resulting from distribution agreements with vertical restraints. The situation has drastically changed, and Spain is currently a very attractive jurisdiction for damages claims, with thousands of claimants and proceedings concerning cartel cases and abuse of dominant positions.

Active Antitrust Litigation Cases in Spain

Spain has several active antitrust cases giving rise to relevant damages claims.

- Nullity claims filed between petrol stations and petrol distributors for the inclusion of vertical restraints.
- Cartel damages cases giving rise to very proactive litigation and which developed case law from lower courts. The damages claims filed here are either follow-on or hybrid. There are also damages claims against dominant undertakings, but those are quantitatively fewer. Examples of these cases include:
  - (a) the Spanish paper envelopes cartel fined by the Comisión de los Mercados y de la Competencia (CNMC–the Spanish Competition Authority);
  - (b) the trucks cartel fined by the European Commission; and
  - (c) the Spanish decennial insurance cartel.
- Upcoming damages claims against:
  - (a) car dealers and car manufacturers fined by the CNMC after issuing several infringement decisions in 2015, upheld by the review courts in 2021;
  - (b) milk buyers after the CNMC found that there had been anti-competitive conduct within the dairy industry; and
  - (c) banks for the different infringements found by the European Commission for tampering the interest rates derivatives.

Developments in Spain Regarding Antitrust Private Litigation

In May 2017, Spain transposed Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 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 (Directive 2014/104); this was five months after the deadline to transpose the Directive expired. The transitory rules were crystal clear: substantive provisions transposed in Articles 71-81 of the Spanish Defence of Competition Law (*Ley 15/2007, de 3 de julio de defensa de la competencia* - LDC) could not be applied retroactively, while procedural provisions (ie, rules on disclosure of evidence) transposed into the Spanish Civil Proceeding Law (*Ley 1/2000, de 7 de enero, Enjuiciamiento civil* - LEC), in particular Articles 283 bis a) to 283 bis k) were applicable to actions filed after 27 May 2017.

Courts must adjudicate active cases by applying the general damages claims regime and including the new provisions on disclosure of evidence. Consequently, lower courts have awarded damages applying general damages claims rules, namely Article 1902 Spanish Civil Code (*Real Decreto Ley de 24 de julio de 1889 por el que se publica el Código Civil* - CC), and the Supreme Court's case law developing it,

complemented by general principles of tort law, EU law and ECJ case law.

1.2 Other Developments

Spanish antitrust litigation is heavily affected by the preliminary rulings issued by the ECJ regarding certain aspects of competition law damages actions. Indeed, many of these preliminary rulings were requested by Spanish judges and almost all refer to the so called "trucks case". In particular, the latest and most relevant cases for Spain are the following.

CJEU, C-30/20, RH v AB Volvo

This preliminary ruling dealt with issues regarding jurisdiction, the interpretation of the concept "where the harmful event occurred or may occur" included within Article 7(2) of Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ("Regulation Brussels I recast") and, in particular, the scope of the jurisdiction granted by Regulation Brussels I recast.

The Court ruled that the courts with jurisdiction are those located in the state where the claimant purchased the goods affected by the infringement or where the claimant has its registered offices. Furthermore, the Court clarified that the jurisdiction granted by Article 7(2) is both international and territorial.

CJEU, C-882/19, Sumal v Mercedes Benz Trucks España

In this preliminary ruling, the Court was asked whether it is possible to bring a damages claim against a subsidiary which was not an addressee of the infringement decision for the harm caused by the parent company which participated in a cartel.

The Court ruled that liability is joint and several within the same undertaking and the subsidiary can be held liable for the harm caused by the parent company provided that it belonged to the same economic unit at the time of the infringement and the infringement affected the same products and services offered by the subsidiary. Nevertheless, the subsidiary can challenge this liability on two grounds:

- that the conduct did not actually infringe competition law; and
- the subsidiary did not belong to the parent company's economic unit or it did not market/offer the products affected by the infringement.

CJEU, C-267/20, Volvo and DAF

The Court had to decide whether the following were substantive or procedural provisions:

- Article 10 of Directive 2014/104 regarding limitation periods;
- Article 17(1) of Directive 2014/104 regarding the courts' possibility to quantify the damages awarded if it is excessively difficult or practically impossible for the claimant; and
- Article 17(2) of Directive 2014/104 regarding the rebuttable presumption that cartels cause harm.

It also had to decide on the applicable ratione temporis to the trucks' cartel litigation in Spain.

The Court, taking into account the fact that Spain transposed the Directive late, ruled as follows.

- On limitation periods, Article 10 Directive 2014/104 is a substantive provision. It can be applicable ratione temporis if the action arises after the expiry of the transposition deadline and the situation is not "consolidated"

according to the applicable damages claims rules on limitation periods.
- On a national court's ability to quantify the damage, Article 17(1) of Directive 2014/104 is a procedural provision (ie, it can be applied to actions filed after the approval of the Directive in 2014).
- On the rebuttable presumption that cartels cause harm, Article 17(2) of Directive 2014/104 is a substantive provision (ie, it cannot be applied retroactively). In the trucks case, it is not applicable ratione temporis because the infringement ended before the expiry of the Directive's transposition deadline.

2. The Basis for a Claim

2.1 Legal Basis for a Claim

Actions for damages arising from a breach of Spanish or EU competition law have to be filed with Commercial Courts.

Legal Basis

The legal basis for competition law damages claims, irrespective of whether they are collective actions, depends, as a general rule, on when the infringement took place.

- If it happened before 26 December 2016, the legal basis is Article 1902 of the CC, the general basis for damages claims in Spanish law. Some provisions of the new regime (those of procedural character) might be nonetheless applicable.
- If the infringement took place or lasted until after 26 December 2016, claims will be based on Articles 71-81 of the LDC, which transpose the substantive aspects of the Directive.

Damages Claims Available

In Spain, standalone, follow-on and hybrid claims are available.

Standalone claims

In standalone claims, claimants must file a double claim.

- A declarative claim requesting the court to rule that the defendant's conduct was anti-competitive. They must establish the anti-competitive conduct of the defendant(s) and bring evidence thereof.
- A damages claim, where claimants must establish for the claim to succeed that:
  (a) the defendant(s) infringed competition law;
  (b) the claimant suffered harm;
  (c) the causation between the infringement and the harm; and
  (d) the defendant's intent or, at least, fault.

Follow-on claims

Claimants only have to bring the damages claim and rely on a decision of a competition authority (eg, the European Commission, the CNMC, a regional competition authority) to establish the infringement. Decisions of competition authorities from other EU member states can also be used to declare the existence of the infringement. In these cases, claimants will focus on (b), (c) and (d) above.

The distinction of whether the decision is final after a court review of whether it is final because the time limits for appeal were exhausted is irrelevant if the claim is based on Articles 71-81 of the LDC. In these cases the final infringement decisions bind the court adjudicating damages claims regarding the infringement and its temporal and geographic scope. For further infor-

mation on this, see **2.3 Decisions of National Competition Authorities**.

Hybrid claims

Hybrid claims are also available. Claimants rely on the infringement decision, but only as "qualified" evidence of the infringement (not binding the civil court). Claimants shall file a declarative claim for the infringement and also a claim for the award damages.

2.2 Specialist Courts

Damages claims have to be brought before commercial courts.

Commercial Courts in Spain

Commercial courts are located in the capital of each province and judges are specialists in commercial matters.

By law, these courts are allocated cases relating to commercial matters, and competition law damages claims belong to that group. However, in some provinces there are no full-time commercial courts, and a first instance court (ie, a general civil court) assumes its functions and is allocated these cases.

Transfer of Cases between Courts

The procedure to transfer cases in Spain depends on the transferral grounds, which can be ratione materiae if the case should have been allocated to a specialist court, or may be based on territorial jurisdiction.

Transferral ratione materiae

When the case is allocated to a court, the court should ex officio assess whether it has jurisdiction ratione materiae. If the assessment's result is negative, it will issue a court order declaring that the court has no jurisdiction and identifying the court that has jurisdiction. If the court's assessment is positive and it declares it has jurisdiction ratione materiae, the defendant will have to file a plea as to jurisdiction of the court to challenge it.

Transferral on territorial grounds

If the court where the claim has been brought has no territorial jurisdiction, it cannot order the transfer ex officio. The defendant will have to file a plea as to jurisdiction or accept the court's lack of jurisdiction and file a new claim before the correct court.

Filing pleas as to jurisdiction

Defendants may file pleas as to jurisdiction during the first ten days of the term to file the statement of defence and it suspends the latter until jurisdiction is declared. Defendants will state the court to which they believe the case should be allocated. Claimants and other defendants (if any) will be allowed to argue for, or against, the jurisdiction of the court to which the case was initially allocated and the proposed new court with jurisdiction.

The parties may appeal the court order whereby the court refrains from dealing with the case. However, when the court recognises its own jurisdiction, the parties may raise the issue when appealing the court's judgment if the lack of jurisdiction is ratione materiae.

2.3 Decisions of National Competition Authorities

The binding effect of infringement decisions by national competition authorities depends on the competition authority of origin and whether the decisions are final.

Decisions of the CNMC

Under Article 75(1) of the LDC, infringement decisions of the CNMC that are final (because

they have been confirmed by a review court or they have not been appealed) bind the civil court that has to adjudicate on a damages claim. The binding effect extends to the legal qualification of the infringement itself and its material, personal, temporal and geographic scope. It does not extend to the "effects" of the infringement (if any) declared by the CNMC.

For those cases, Article 75 of the LDC is not applicable to ratione temporis, the binding effect differs between infringement decisions that have not been appealed and those upheld by review courts. According to the Spanish Supreme Court, the former are "strong pieces of evidence" ("*instrumento de gran convicción*") (Supreme Court, judgment 634/2014, of 9 January 2015). However, the latter bind the court where the damages claim has been filed (Supreme Court, judgment 651/2013, of 7 November 2013).

Decisions of National Competition Authorities of Other States

Under Article 75(2) of the LDC, final infringement decisions of national competition authorities of other EU member states do not bind the Spanish civil court, but they are not merely evidence either. Claimants may rely on the decision because it allows the existence of the infringement to be presumed, though defendants can rebut this.

When Article 75(2) of the LDC is not applicable ratione temporis, these infringement decisions are not binding either. Claimants can, however, use them as relevant pieces of evidence to build the claims.

Decisions of the European Commission

Infringement decisions of the European Commission bind civil courts adjudicating in damages claims from the moment they are adopted (even if pending on appeal), according to Article 16(1) of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty ("Regulation 1/2003"). The reason for this is that national courts cannot issue judgments that run counter to EC decisions. The legal qualification and the material, personal, temporal and geographic scope of the EC decision bind the court.

Commitment decisions under Article 9 of Regulation 1/2003 (which are not sanctioning decisions) will be considered prima facie evidence (CJEU, C-547/16, Gasorba).

Competition Authorities' Intervention before Civil Courts

Spanish competition authorities and the European Commission may intervene in competition law damages proceedings as an amicus curiae. The CNMC has lately been requested to advise upon the damages quantification criteria used by economic experts, though it is not empowered to quantify the damages award itself or to act as an impartial economic expert appointed to support courts.

2.4 Burden and Standard of Proof

According to the general principles of Spanish civil and commercial law, claimants have the burden of proof for those elements that support their claim. Defendants have the onus of proving the arguments leading to the dismissal of the claim.

Competition law damages claims, irrespective of whether they are standalone or follow-on, follow the same rules, and claimants bear the burden of proving the elements of the claim. Claimants, however, may rely on the infringement decision to prove the infringement when the claim

is follow-on and, depending on the decision's content and degree of detail (for instance a decision declaring an abuse of dominance against one particular entity), to prove the causal link. However, they will have to bring evidence on the other elements of the claim. Their burden is further alleviated when Article 76(3) of the LDC applies ratione temporis to cartel infringements in particular, as it provides for a rebuttable presumption that cartels cause harm. In this scenario, claimants who are direct clients of the infringing parties will only focus on quantifying the damage, while defendants will have to rebut the presumption.

If a defendant argues that claimants passed on the overcharge to their customers, they may raise the pass-on defence, and the burden of proof will be on the defendant.

2.5 Direct and Indirect Purchasers

Both direct and indirect purchasers may bring damages claims against infringers. Potential claimants base their claims on Article 1.902 of the CC or Article 72 of the LDC, depending on the application ratione temporis of the latter regime.

Article 79 of the LDC, a specificity of the new regime, includes a rebuttable presumption favouring indirect purchasers when bringing a damages claim based on passing-on. The overcharge will be presumed to have been passed on to them if the defendant infringed competition law, the infringement caused an overcharge to the direct client and the indirect purchaser acquired goods or services affected by it. Defendants, however, may rebut this presumption by arguing that there has been no actual pass-on downstream.

2.6 Timetable

Typical Duration of Proceedings

There is no average or typical duration of competition law damages claims proceedings. It varies depending on the facts of the case, the prior experience of the court dealing with this kind of claim, and the evidence submitted by the parties.

The Relation between Damages Claims and Parallel Investigations by the NCA

Since competition law damages claims can be standalone, their outcome can be independent from that of the public enforcement by the competition authority. However, defendants may request a stay of proceedings until the pending public enforcement procedure finishes and courts may accept it after hearing the parties' opinion. Although it is not legally obliged to, the court may agree to stay the proceedings either in the first instance or when the case is under appeal (Articles 434(3) and 465(6), LEC, respectively); the court must undertake all steps of the proceeding but for issuing the final ruling.

When the affected competition authority is the European Commission or when the case is under review of the General Court or the European Court of Justice, the ECJ judgment in Masterfoods (CJEU, C-344/98, Masterfoods) must be taken into account. There, the ECJ ruled that it is for the national court to decide whether to stay proceedings or not. However, if the damages claim's outcome depends on the validity of the EC's decision, the court will have to stay the proceedings.

3. Class/Collective Actions

3.1 Availability

At the time of writing, Spain has a judicial collective redress mechanism denominated "collective actions". The existing system is basically an opt-out system, in the sense that the Spanish Civil Procedure Law provides that a decision issued in a collective action is binding on all members of the class whether the court rules on the claim or dismisses it (ie, the decision has res judicata effects ultra partes). However, at the same time, this system has important limitations. To start with, it has no certification process and the Spanish Civil Procedure Law does not establish any mechanism to allow represented consumers to opt-out (to avoid being bound by the decision on the collective claim and, therefore, to preserve their individual action).

Likewise, pursuant to the Spanish Civil Procedure Law, represented consumers are entitled to appear in the proceedings to contribute to the case by filing allegations that are supplementary to the collective action and to those allegations made in the lawsuit. However, this cannot be understood as an opt-in mechanism since, as noted, the consumer will be bound by the decision (whether or not the consumer appears in the proceedings in which the supplementary allegations are filed).

In that regard, Spanish law establishes specific procedures for publicising a lawsuit to facilitate any class member's joinder to the claim on a supplementary basis.

The current regulation may suffer some changes in the future due to the approval of the Directive (EU) 2020/1828 of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC ("Representative Actions Directive") and the future modifications of the Spanish Civil Procedure Law that are still being discussed.

Although the Directive does not imply significant changes in the Spanish procedural regulation since, as noted, Spanish law already provides for the option to join the compensation remedy action to an injunction action, it may oblige the Spanish regulator to take important decisions on specific matters such as the standing of the entities permitted to file this type of action, the confirmation of the effects of the decision issued within this action or the publicity of the action before being filed.

Taking into consideration that this type of action is intended to defend consumers' rights and interests, both direct and indirect purchasers can be part of a collective action, provided that they are final consumers and the underlying factual issues are sufficiently similar with regard to the terms outlined in **3.2 Procedure**.

3.2 Procedure

Initially, the procedural standing to initiate a collective action under the Spanish Civil Procedure Law is not granted to a member of the class but to certain consumer associations and groups of aggrieved consumers.

In particular, if the number, identity and specific circumstances of the aggrieved consumers are determined or are easily determinable at the declaratory stage of the proceedings, both the consumer associations and the groups of aggrieved consumers by themselves can sue on behalf of all the aggrieved consumers. In this regard, a group of consumers has procedural

standing when at least 50% of its determined potential members have joined it.

However, when those circumstances are not met, the procedural standing is limited to certain consumers associations. In this regard, only consumer associations that are members of the Spanish National Consumer Committee have legal standing to file legal actions on behalf of an undetermined number of consumers.

Moreover, in March 2014, Spanish parliament passed Law 3/2014 of 27 March, amending the 2007 Consumer Protection Law and adding new regulations on standing to initiate collective actions to the Civil Procedure Law. Pursuant to the new regulations, Spanish public prosecutors also have standing to initiate collective actions seeking compensation for consumers.

As noted in **3.1 Availability**, there is no certification process under the Spanish regulation prior to initiating the proceeding itself. There is no express regulation of compliance requirements for class actions, such as numerosity, commonality, typicality or the adequacy of representation. Although it is understood that actions can only be considered class actions where the individual cases have underlying factual issues that are sufficiently common between the members of the group, this lack of regulation is problematic.

3.3 Settlement

Although there is no specific legislation relating to the settlement of collective action cases and no judicial experience on class settlement has been reported to date, it may be understood, given the consequences of the settlement, that court approval is required for collective actions to be settled. In any case, it must be noted that a court can only reject a settlement if it affects the fundamental individual rights of any of the parties that cannot be waived or the interests of third parties.

As there is no provision that provides for a mechanism that entitles consumers to opt-out from the class action, there is no specific provision that provides for a mechanism by which class members can object and refuse to be bound by the settlement. Taking into consideration the lack of judicial experience, the way in which a court would manage a petition by a class member not to be bound by the settlement cannot be described. In principle, and owing to the lack of any specific regulation, Spanish courts may be inclined to allow those individuals who are members of the class to keep their individual rights to claim if they expressly request this before the court in which the settlement has been enforced.

Finally, due to the lack of regulation on class action settlements, there are no provisions on the need to publish settlement agreements. This may make it more difficult for class members to exercise their right not to be bound by the settlement agreement, should such right be finally accepted by courts.

4. Challenging a Claim at an Early Stage

4.1 Strike-Out/Summary Judgment

Under Spanish procedural law, when the claim is filed, the judge or the law clerk may assess ex officio:

- the parties' legal standing;
- the international jurisdiction of the court the case has been allocated to; and
- the court's jurisdiction ratione materiae over the claim.

Furthermore, at the request of the parties, the judge will assess whether the court has territorial jurisdiction over the case.

If the court assesses any of these issues, it will issue a court order either confirming its jurisdiction or indicating that it has no such jurisdiction. Any other matter is considered to be part of the merits of the case and they will be dealt with in the judgment.

4.2 Jurisdiction/Applicable Law

Jurisdiction

If the damages claim has an international element, for example if the defendant's headquarters are located outside of Spain, jurisdiction will be established according to the rules of Regulation Brussels I recast or Spanish private international law, depending on the states involved. If the claim is purely national, then jurisdiction will be established according to national rules on jurisdiction as set out in the Spanish Civil Procedural Law.

General forums–international and national disputes

As a general rule, claimants can file their actions in the courts:

- of the defendants' domicile (Article 4 of Regulation Brussels I recast, and Articles 50 and 51 of the LEC); or
- that the parties agreed to give jurisdiction on the claims arising from the contract that bound them, provided that the claim falls within the scope of the agreement.

Alternatives forums–international disputes

Article 7.2 of Regulation Brussels I recast has a specific provision for jurisdiction when it comes to torts: claimants may bring their claims where the harmful events occurred. According to the ECJ's interpretation of "where the harmful event occurred or may occur" this place comprises:

- courts of the domicile of one of the infringers, even if there has been an out of court settlement with that defendant, provided that there is no evidence that there was an agreement between the claimant and the said defendant to artificially set the jurisdiction in those courts (CJEU, C-352/13, CDC Hydrogen Peroxide);
- courts of the place where the cartel was established (CJEU, C-352/13, CDC Hydrogen Peroxide);
- courts of the place where the agreement identified as the cause of the harm was signed (CJEU, C-352/13, CDC Hydrogen Peroxide; and CJEU, C-27/17, FlyLAL);
- courts of the place of the market affected by the infringement where potential victims suffered the harm (CJEU, C-27/17, FlyLAL; CJEU, C-30/20, RH v AB Volvo); or
- courts of the place where the potential victim acquired the cartelised product or service (CJEU, C-451/18, Tibor-Trans).

The ECJ confirmed that the jurisdiction given by Article 7.2 of Regulation Brussels I recast provides both international and national jurisdiction (CJEU, C-30/20, RH v AB Volvo).

Alternatives forums–national disputes

Spanish national rules on jurisdiction have no specific provision for competition law damages claims, though Article 52.1.12 of the LEC has alternative forums for infringements of unfair competition rules. The Spanish Supreme Court has interpreted this provision analogously to establish jurisdiction in damages claims caused by anti-competitive conduct (Supreme Court, order of 15 June 2021 and, previously, order of

26 February 2019). According to this provision, the alternative forums are:

- courts of the place where the defendant has its establishment open to the public;
- otherwise, courts of the place where the defendant has its domicile; or
- otherwise, courts where the anti-competitive conduct happened or where its effects were felt, as identified by the claimant.

Applicable Law

Under Spanish law, the applicable law in relation to a competition law damages claim is generally governed by the agreement between the parties. Otherwise, the law applicable to a competition law damages claim will be that of the place where the harm arose (lex loci delicti).

4.3 Limitation Periods

Rules on limitation periods depend on the applicable law to competition law damages claims. As explained in **1.1 Recent Developments in Antitrust Litigation**, the point de rattachement temporal to be taken into account to set the applicable regime is the moment the action arises, taking into consideration whether it is still running when there is a change in the substantive regime.

General Principle and Plausible Regimes

The general principle is that people harmed by an infringement of competition law can file damages claims from the moment they know, or are reasonably expected to know, that they were victims of a competition law infringement, they suffered harm and they know the identity of the infringer. Under the pre-Directive 2014/104 regime, this was the case irrespective of whether there had been a public enforcement procedure.

The extension of the limitation period depends on the applicable regime:

- damages actions arising before the expiry of the transposition deadline of Directive 2014/104 have a one-year limitation period as established by Article 1968(2) of the CC, the general provision on limitation periods for damages claims;
- damages claims arising after the Spanish transposition of Directive 2014/104 or that were not time-barred when the Directive was transposed into Spanish law, will be subject to the five-year limitation period of Article 74 of the LDC, the specific provision for competition law damages claims.

Setting the Dies a Quo

Under the application of the general regime, the dies a quo starts running when injured parties know, or are reasonably expected to know, that they were victims of a competition law infringement, they suffered a harm and they know the identity of the infringer. There is no requirement for the infringement to cease to set the dies a quo if the claimant has the necessary information.

The Court of Justice's interpretation of the requirements of the principle of effectiveness in relation to setting the dies a quo in Volvo and DAF (CJEU, C-267/20, Volvo and DAF) added the following criteria and, thus, limitation periods cannot start running unless the following have taken place.

- The infringement ceased.
- The victim knows, or is expected to know:
  - (a) that there was an infringement of competition law;
  - (b) that the infringement caused them harm (ie, there has been a harm, and there is a

causal link between the infringement and the harm); and
(c) the identity of the infringer.

For claims against addressees of an EC decision, the limitation period will normally start running from the moment the summary of the decision is published in the Official Journal of the European Union, though defendants may prove that the claimant was aware of the requirements before that date.

Under the application of Article 74 of the LDC, the dies a quo of any damages claim (irrespective whether it is standalone or follow-on) starts running whenever the infringement ceased and the potential claimant knows, or should reasonably know, about the conduct and that it was an infringement of competition law, the harm suffered, and the identity of the infringer.

Interruption or Suspension of the Limitation Period

Under the application of the general regime of claims for damages caused by competition law infringements, judicial or extrajudicial claims interrupt the limitation period, provided that they are addressed to the infringer. Thus, the limitation period restarts on the day that the interruption occurred.

Under the application of Article 74 of the LDC, in addition to the general cause for interruption of judicial and out-of-court claims, the limitation period will be interrupted when one of the following occurs.

- The competition authority starts an investigation related to the competition law infringement that the damages claim is, or would be, based on. The limitation period would not restart until a year has elapsed since:
  (a) the competition authority's decision is final; or
  (b) the investigation proceedings finish in any other form.
- Out-of-court settlement negotiations start. The limitation period will not restart while they are ongoing. This interruption only affects those infringers that are part of the negotiations or represented therein.

5. Disclosure/Discovery

5.1 Disclosure/Discovery Procedure

Disclosure before and after the Transposition of Directive 2014/104

Before the transposition of Directive 2014/104, claimants could only file pre-trial proceedings to prepare the claim if the claimants' situation fell under the scope of Article 256 of the LEC. For competition law damages claims, the only circumstance where this would be possible is to prepare a collective action against an infringer of competition law. Otherwise, there was no specific procedure for the disclosure of documents.

After the transposition of Directive 2014/104, apart from pre-trial proceedings, claimants and defendants can seek the disclosure of evidence from the (future) claimant or defendant or from third parties according to Articles 283 bis a) and the following of the LEC.

Disclosure of Evidence: Procedure

When filing the request, claimants should identify the infringer, the infringement, the affected products, the identity of the affected direct or indirect purchasers and the prices set for the products or services. The elements taken into account by the court when deciding whether to accept or deny the request are the following:

- the prima facie evidence submitted with the request;
- the extent and cost of the disclosure;
- the proportionality of the request; and
- the information sought to protect confidential information.

Whenever there is confidential information not protected by legal professional privilege or by virtue of being leniency or settlement materials, the court may provide "data rooms" so that only the parties to the proceedings can access it.

Disclosure can happen either as a pre-trial disclosure, with the subsequent obligation to bring the damages claim, or once the claim has been filed. In the former case, the court will have to assess its own jurisdiction regarding the damages claim itself. The requestor bears the costs of the access to evidence and will also be liable for the damages caused by the misuse of the information accessed. The court may ask the requestor of the disclosure, on behalf of the requested party, to provide a guarantee to compensate both the costs of the disclosure and the potential damages.

Once the request has been filed, the court will submit the request to the requested party and other interested parties, and it will organise a hearing on the adequacy and appropriateness of the request. Then, the court will issue a court order either ordering the disclosure including the details regarding the procedure and its organisation or not ordering disclosure. If the requested party hinders access to the evidence disclosed, the court may:

- accept the facts that the requestor sought to prove with the undisclosed evidence;
- understand that the requested parties acknowledge and acquiesce in the claims of the requestor;
- deny the defences raised by the defendant blocking access; and/or
- impose a fine on the requested party.

Requestors cannot disclose confidential information accessed during this proceeding. If requestors breach the rules on confidentiality or use of evidence obtained, courts may:

- dismiss the claim or the defences, depending on the party making the request;
- declare the requestor liable for the damages caused; and/or
- condemn the requestor to pay for the costs and expenses of the claim and the access to evidence proceedings.

5.2 Legal Professional Privilege

According to Article 283 bis b) (3) of the LEC, the court organising the disclosure of evidence must respect the legal professional privilege and, thus, privileged documents will be withheld from disclosure.

5.3 Leniency Materials/Settlement Agreements

According to Article 283 bis i) of the LEC, courts may grant access to the administrative proceeding before the competition authorities, provided that the requestor cannot reasonably find this evidence elsewhere once the administrative proceeding has ended. However, courts cannot order the disclosure of leniency materials and settlement requests (Article 283 bis i) (6) of the LEC).

6. Witness and Expert Evidence

6.1 Witnesses of Fact

Witness evidence is permitted in antitrust litigation. The parties propose the witnesses to the court, which evaluates how relevant and useful their evidence will be. Witnesses called to give evidence are obliged to do so and may be fined if they fail to appear without just cause.

Witness statements are given orally with few exceptions (eg, a legal person or public entity can make a written statement when it is not necessary that a specific individual with knowledge of the facts testify).

Although cross-examination is not expressly regulated in the Spanish Civil Procedure Law, this type of interrogation is permitted under the general rules. After the party that has proposed the witness has conducted its examination, the opposing party may cross-examine the witness on any issue. The judge may also ask the witness additional questions.

In antitrust litigation, witness evidence is not particularly important. Circumstances such as the length of time that usually elapses between the facts at issue and the litigation starting, or, typically in the context of follow-on litigation, discussion about the reading and interpretation of the infringement decisions of the competition authorities tend to imply that witness evidence is regarded as having a secondary role.

6.2 Expert Evidence

Procedural Issues

Unlike in other jurisdictions, courts in Spain cannot appoint an expert witness on their own initiative. However, as per Article 76(4) of the LDC and Article 15 bis of the LEC, courts can request the corresponding competition authority to intervene to provide technical and theoretical knowledge in the proceedings, but limited to the criteria for quantifying damages. They cannot act as court appointed experts to quantify damages themselves. In practice, competition authorities are notably reluctant to intervene and it is far from a common practice.

Thus, each of the parties mandates its own independent expert to submit the opinions. They may request the court to appoint an expert witness, but this is rarely used, and this is almost unprecedented in antitrust litigation practice.

The law does not provide for the possibility of agreeing on the way of appointing, or on the identity of, the court-appointed expert. Furthermore, the existing expert list available for court-appointment may lack the required technical expertise. Consequently, given the complexity of the subject matter and the uncertainty of the outcome of the court-appointed expert's opinion, it is highly unusual for the parties to request such a court appointment.

Expert opinions are presented in the form of a written report. The parties may seek verbal clarifications during the trial. For these purposes, experts are examined according to the same rules as non-expert witnesses.

Spanish courts do not typically require experts to produce joint statements indicating the areas on which they agree and disagree in advance of trial. A court may agree to a "confrontation" between the experts during the clarification phase, where they are asked questions on the points on which there are discrepancies.

An interesting phenomenon is the increased use of cross-examination and expert conferencing, both of which had been alien to Spanish civil

litigation and, for the time being, lack a positive legal grounding. Practice and the natural complexity and relevance of economic discussions are clearly driving this change.

Importance of and Usual Approach to Expert Reports

Economic reports prepared by experts are common and of crucial importance in antitrust litigation.

Plaintiffs have the onus of proving the existence of damage and its quantification. The claimants' expert report ought, then, to address these two main issues. In follow-on litigation, it is relatively common to see claimant experts reports addressing the quantum and devoting either little or no effort to discussing matters of causation, let alone the existence of the damage. This seems to be highly correlated with the discussion regarding the binding effect of infringement decisions.

In contrast, defendants' experts must propose a reasonable alternative that refutes the existence of damage (if it has not been established as an undisputed proven fact) or justifies a lower quantification of the damage. It is also common for defendants' experts to critique the plaintiffs' expert report.

The precise limits and scope are still subject to much debate and discussion. It is now very frequent for lower courts to paraphrase some considerations made by the Supreme Court in judgment 651/2013 of 7 November. According to this ruling, a claimant's expert needs to formulate a reasonable hypothesis with a technical basis supported by verifiable and non-erroneous data. There is a strong and intense debate as to the extent to which these findings translate into practice. In the said judgment, the Court ruled that, since the existence of damage was clear in that case, the defendant's expert report should not exclusively criticise the claimant's report, but rather suggest an alternative quantification. Even if the debate in the above-mentioned ruling was limited to the quantum, judicial debate remains as to whether this alternative approach should encompass the theory of harm and causation as well.

7. Damages

7.1 Assessment of Damages

Compensatory Damages

Article 72(2) of the LDC recognises the right to full compensation for damages suffered and specifically for the following concepts:

- actual loss, understood as the overcharge caused by the infringement;
- loss of profit, understood as profits lost due to the pass-on of the overcharge; and
- interest.

Damages are strictly compensatory and aim to place the injured party in the situation it would have been in had it not suffered the damage. Article 72(3) of the LDC expressly prohibits overcompensation by means of punitive damages.

Article 72 of the LDC is broad enough to allow injured parties in cartel cases to claim for harm suffered as a result of an infringement's umbrella effect. Causation in those cases needs to be carefully assessed.

Assessment of the Damage

The assessment of damage has two main steps. Firstly, proving the existence of the damage. Secondly, if proved, quantifying the damage.

Expert reports should address both of these steps.

In antitrust litigation, particularly in follow-on damages litigation, the first step is deeply intertwined with the discussions regarding the content and interpretation of the infringement decision, including whether the decision established and empirically assessed the effects of the infringing conduct on the market on the one hand, and causation and the specific harm suffered by claimants on the other hand.

The proper quantification of harm (ie, step two) only happens if the existence of damage has been proved. Current litigation shows that the main focus is set on step 2. Among the many aspects currently being debated (eg, the standard and burden of proof, methodologies, and availability and access to data sets), judicial estimation of the award, its availability before the transposition of Directive 2014 and the relevant requirements lie at the centre of the debate.

7.2 "Passing-On" Defences

Directive 2014/104 introduced the passing-on defence as hard law. In Spain, however, courts had already recognised it as a reflection of the compensatory nature of damages claims.

The passing-on defence allows the defendant to argue that the claimant passed on the overcharge caused by the infringement and, thus, the award should be reduced in part or in full. In practice, the evidentiary requirements make it excessively difficult to prove since it insufficient to prove only that the claimant increased its prices. Lower courts' judgments on this matter require defendants to prove that the damage has been passed on in its entirety, demonstrate how it was passed on and in what amount it was passed on (Court of Appeal of Valencia, judgment 4/2022 of 12 January).

Causation is essential in this respect. Defendants must prove that the price charged by the plaintiff to its customers is higher than the price that would have been charged had the infringement not occurred. Thus, the cause of the increase has to be the infringement of competition law and not other market effects, such as an increase in the demand.

According to the Supreme Court's case law, the defendant must also prove that the claimant's sales were not reduced due to the price increase (Supreme Court, judgment 651/2013 of 7 November).

It must be noted that it is common for the courts to reject the passing-on defence when the defendant denies the very existence of any harm. Courts argue that the premise of the passing-on defence rests on the recognition of the existence of harm that could have been passed on by the claimant and, thus, it is incompatible with its denial (Court of Appeal of Zaragoza, judgment 471/2021 of 20 April).

7.3 Interest

Interest is expressly listed as a head of damage for compensatory damages and it is considered an essential element of the right to full compensation. The most crucial question, given that in antitrust infringements several years usually elapse between the occurrence of the damage and the claim being filed, is to determine the date from which the interest should accrue (the so called dies a quo).

Although Article 72 of the LDC does not state the date on which interest must start to accrue, following the ECJ's doctrine and the wording

of Directive 2014/104, case law considers that interest accrues from the occurrence of the damage until the compensation is paid, without the need for judicial involvement (Court of Appeal of Girona, judgment 302/2022 of 20 April).

The applicable interest rate is the so-called "legal interest rate of money", which is currently fixed at 3%.

8. Liability and Contribution

8.1 Joint and Several Liability

General Rule

Directive 2014/104 states than where several undertakings breach competition rules jointly (eg, a cartel), it is appropriate to hold co-infringers jointly and severally liable for the entire harm caused by the infringement.

After the transposition of Directive 2014/104, Article 73 of the LDC expressly provides, as a general rule, that the co-infringers are jointly and severally liable to the injured parties for the resulting damages, regardless of whether or not they had a direct or indirect relationship with the claimant.

The basis of this liability rests on the premise that the intrinsic cause of the damage in such cases is the collusive behaviour of the co-infringers, irrespective of which infringer had a direct or indirect commercial relationship with the injured party.

Before Directive 2014/104, joint and several liability was applied on the basis of in solidum liability, which refers to joint and several liability that arises from a judgment and not from the law. Its application was very common when it was not possible to determine the specific role of each party in the harmful event or apportion the harm caused between co-infringers.

The consequence of the change from in solidum liability to joint and several liability is that it is now irrelevant whether it is possible to identify the specific role of each co-infringer in a particular harmful event, since they will continue to be jointly and severally liable without prejudice to their right to seek reimbursement from one another pursuant to Article 73(5) of the LDC (Court of Appeal of Pontevedra, judgment 242/2022 of 16 March).

Exceptions and Limitations

Article 73 of the LDC sets out two exceptions to the joint and several liability rule.

The first provides that when the infringer is considered a small or medium-sized company according to Commission Recommendation 2003/361/EC of 6 May 2003, it is liable only to its own direct or indirect purchasers, provided that:

- its market share was less than 5% throughout the infringement;
- the imposition of the joint and several liability regime would endanger its economic viability; and
- it did not direct the infringement or coerce other companies to participate in it, nor had it previously been found guilty of an anticompetitive infringement.

The LDC also states that beneficiaries of a leniency programme are only jointly and severally liable for damages directly or indirectly caused by other co-infringers when it is proved that the injured parties could not obtain full compensation from the other companies involved in the infringement.

Finally, there is no advantage or limitation for applicants or beneficiaries of a leniency programme with respect to their own direct or indirect purchasers.

8.2 Contribution

Article 73(5) of the LDC provides that the defendant who is liable to compensate for the damage on the basis of joint and several liability is entitled to claim the corresponding proportional amount paid from the other co-infringers. The amount shall be determined on the basis of the relative liability for the damage caused.

The right of reimbursement shall be brought in separate and subsequent proceedings to the main proceedings, since Spanish law does not allow third-party compulsory summons to proceedings unless expressly provided by the law, which is not the case in this regard.

According to Article 1964(2) of the CC, the limitation period for this action is five years.

The right of reimbursement is limited in cases where a claim is made against a beneficiary of immunity under a leniency programme (claims are limited to the damage that the beneficiary caused directly or indirectly to its own purchasers or suppliers).

9. Other Remedies

9.1 Injunctions

In all Spanish proceedings, parties have the option of requesting injunctive relief (Articles 720-747 LEC) to ensure the resulting judgment can be enforced.

Conditions

The requirements for injunctive relief are the following:

- the existence of fumus boni iuris, which is the existence of evidence sufficient to suggest, under a preliminary assessment, that the case has merits;
- the existence of periculum in mora, understood as the risk of it not being possible to enforce the judgment if the requested precautionary measures are not granted;
- the provision of a security, in that it is imperative to propose a security to cover the potential damages that the measures adopted by the court could cause, and to justify the proposed amount.

Procedure

Normally, injunctive relief will be requested together with the filing of the action. However, it may be requested prior to the filing of the lawsuit on urgency grounds, or even after the lawsuit is filed if there is a change of circumstances that makes it necessary.

Injunctive relief can be adopted without notifying the defendant (inaudita parte). In this case, the plaintiff will have to prove that the relief is needed urgently, or that notifying the defendant might risk the effectiveness of the precautionary measure. If the request is granted, the injunction will be adopted, but the defendant will have the opportunity to oppose it within 20 days. If the request is dismissed, the proceedings will be conducted according to the standard rules for notified injunctive measures.

In the standard procedure, the defendant is given prior notice and the parties are summoned to a hearing in which the defendant must be given the opportunity to argue that the requirements

necessary to grant the requested injunction are not fulfilled.

Article 733(2) of the LEC provides that, with regard to precautionary measures granted without notifying the defendant, the court shall grant them within five days of the filing. If the standard procedure is followed, according to the law, it should not exceed 25 days.

However, these time limits are not usually respected by courts and are, therefore, not useful in indicating time spans adopted by each court in practice.

The duration of the procedure depends on several factors. The main factor is the workload of the court dealing with the request. In this regard, there are significant differences between judicial districts and even between courts within the same district. Therefore, it is advisable to manage expectations of response times once the court that will hear the request for precautionary measures has been determined.

Finally, if the case is dismissed on its merits, the applicant for precautionary measures must compensate the defendant for the damage caused by the injunction and forfeit the security provided.

9.2 Alternative Dispute Resolution

The parties may submit their disputes to arbitration but cannot be forced to do so.

It is also possible for the parties to reach an out-of-court settlement, with or without the assistance of a mediator.

If an out-of-court settlement is reached, Article 77 of the LDC provides that the liability of the infringer who reaches the settlement can be limited. Any co-infringers who have not reached a settlement may not claim part of the remaining compensation from the co-infringer who has reached the settlement. Likewise, the injured party may not claim the part of the damage caused by the infringer with whom the out-of-court settlement was reached from the other co-infringers.

10. Funding and Costs

10.1 Litigation Funding

Litigation funding is not regulated in Spain.

In Spain, fundamentally, litigation funding can be described in two ways (Supreme Court, judgment 53/2020 of 22 January).

Assignment of the Right to Claim

This option basically consists of acquiring the claim rather than just investing in it. Some courts question the legal standing of the purchaser. Commercial Court 11 of Barcelona recently ruled in favour of the assignee in a case involving the assignment of a right to claim compensation arising from incidents on commercial flights (judgment 120/2022 of 19 January).

Funding

The Supreme Court stated that the absence of regulations means that this matter is left to the will of the parties, who can agree on the degree of control that the investor will have over the trial.

10.2 Costs

In Spanish proceedings, legal costs include several elements, including the fees of the lawyers and experts involved in the proceedings. These costs are limited to ⅓ of the amount claimed in the proceedings, except in the cases of bad faith.

Article 394 of the LEC provides that the costs must be paid by the party whose claims are fully rejected, unless there are "serious doubts of fact or law".

In antitrust litigation, although costs awards are common, there are judgments that do not award costs due to the existence of legal doubts resulting from the complexity and novelty of the matter, especially in favour of the claimant when its claim is rejected (Court of Appeal of Madrid, judgment 53/2022 of 31 January).

Furthermore, as stated above, technically, only fully successful claims should give rise to an award of costs. This issue led Commercial Court 3 of Valencia to request the ECJ for a preliminary ruling on whether this rule complies with the principle of full compensation.

Finally, it is not common for courts to order measures to secure the recovery of costs. In any case, such a request could be made to the court through a request for injunctive relief.

11. Appeals

11.1 Basis of Appeal

All first-instance judgments may be appealed, except those issued in oral proceedings determined by reason of the amount (instead of ratione materiae), when that amount is less than EUR3,000.

Appeals are heard by the Court of Appeal of the province corresponding to the court that issued the appealed judgment. The appeal may be based on factual or legal grounds.

A judgment issued by the Court of Appeal may be appealed before the Supreme Court on the basis of the existence of a relevant procedural error (*recurso extraordinario por infracción procesal*) or when the Court of Appeal has infringed the applicable rules (*recurso de casación*).

In particular, a *recurso de casación* will only be admitted and examined in the following cases.

- When the judgment was issued for the civil judicial protection of fundamental rights.
- Whenever the amount of the proceedings exceeds EUR600,000.
- When the amount of the proceedings does not exceed EUR600,000 or the proceedings have been determined ratione materiae, provided that, in both cases, the appeal presents cassational interest. It is understood that there is cassational interest when the contested decision applies new legislation (ie, in force for less than five years), when it opposes the case law of the Supreme Court, or when there are divergent positions on the issue among different courts of appeal.

The Supreme Court shall not modify the Court of Appeal's findings of fact and must instead analyse whether the law has been applied correctly, so the appeal will be only on points of law.

Uría Menéndez is the leading law firm in the Ibero-American market. With more than 600 lawyers, including 134 partners, the firm advises on Spanish, Portuguese and EU law in relation to all aspects of corporate, public, litigation, tax and labour law. The firm has 12 offices in eight countries and over 2,000 clients. Uría Menéndez lawyers' extensive experience and comprehensive knowledge of their clients' industries allow the firm to offer added-value advice in all areas of business and find innovative technical solutions to the most complex legal issues. In January 2015, after more than 20 years working in the region, the firm took a ground-breaking step by creating the first Latin-American integration between leading local firms (Philippi in Chile and Prietocarrizosa in Colombia). In 2016, the firm integrated two Peruvian firms, Estudio Ferrero Abogados and Delmar Ugarte, becoming Philippi Prietocarrizosa Ferrero DU & Uría (PPU), the first major Ibero-American firm.

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