

THE CARTELS AND
LENIENCY REVIEW

ELEVENTH EDITION

Editors

John D Buretta and John Terzaken

THE LAWREVIEWS

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PREFACE

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

This book brings together leading competition law experts from 23 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. 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.

This book serves as a useful resource for the local practitioner, as well as those faced with navigating the global regulatory thicket in international cartel investigations. The proliferation of cartel enforcement and associated leniency programmes continues to increase the number and degree of different procedural, substantive and enforcement practice demands on clients ensnared in investigations of international infringements. Counsel for these clients must manage the various burdens imposed by differing authorities, including by prioritising and sequencing responses to competing requests across jurisdictions, and evaluating which requests can be deferred or negotiated to avoid complicating matters in other jurisdictions. But these logistical challenges are only the beginning, as counsel must also be prepared to wrestle with competing standards among authorities on issues such as employee liability, confidentiality, privilege, privacy, document preservation and many others, as well as considering the collateral implications of the potential involvement of non-antitrust regulators.

The authors 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 a chapter on each of the jurisdictions) and analytical depth for those practitioners who may find themselves on the front line 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 11th edition of *The Cartels and Leniency Review*. We hope you will find it a useful resource. The views expressed are those of the authors, not 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.

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January 2023

SPAIN

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I ENFORCEMENT POLICIES AND GUIDANCE

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

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

Article 1 of the Competition Act establishes a general prohibition against any kind of agreement, decision or concerted practice that has as its object, or 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.⁷ Furthermore, the prohibitions under Article 1 of the Competition Act do not apply to agreements resulting from the application of a law.⁸

1 Alfonso Gutiérrez is a partner and Jokin Beltrán de Lubiano is a senior associate at Uría Menéndez.

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

3 Royal Decree 261/2008 of 22 February 2008, 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 of 4 June 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 2002 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.

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.

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

Furthermore, the Competition Act incorporates into Spanish law the EU definition of a cartel as:

an agreement or concerted practice between two or more competitors aimed at coordinating their competitive behaviour on the market or influencing the relevant parameters of competition through practices such as, but not limited to, the fixing or coordination of purchase or selling prices or other trading conditions, including in relation to intellectual property rights, the allocation of production or sales quotas, the sharing of markets and customers, including bid rigging, restrictions of imports or exports or anticompetitive actions against other competitors.⁹

The Spanish competition authority has stated that the mere exchange of sensitive commercial information between competitors can constitute a cartel.¹⁰

The CNMC has declared the ‘fight against cartels to be its number one priority in competition enforcement’. Since the adoption of the current Competition Act in 2007, as of 2017, more than 60 cartels had been discovered and sanctioned in Spain with fines totalling over €1 billion.¹¹ In 2022, the CNMC issued only one decision sanctioning cartels, as opposed to 2021, when the CNMC sanctioned six different cartels.¹² Additionally, the CNMC has intensified its efforts in the detection of bid-rigging conduct with the recent creation of an intelligence unit dedicated to identifying indicia of such conduct based on the analysis of data regarding offers submitted in public tenders.

Spain’s leniency programme was introduced in February 2008. Leniency is only available to practices falling within the scope of the definition of a cartel. The leniency programme has been applied in 33 cases since its adoption in Spain in 2008.

On a different note, on 26 May 2017, the Spanish government enacted Royal Decree-Law 9/2017 (RDL 9/2017) implementing the EU Damages Directive. RDL 9/2017 introduced important amendments aimed at incentivising claimants to bring damages actions for antitrust infringements in Spain. On 27 April 2021, the government introduced certain reforms to the Competition Act pursuant to Directive (EU) 2019/1 (the ECN+ Directive), providing for certain technical upgrades of the investigative powers of the national competition authority (introducing interviews as a fact-finding tool) and increasing the total amounts of fines that can be imposed, in particular the maximum fines for breaches of companies’ duties to collaborate with competition investigations.

9 Fourth Additional Provision, recently amended by Royal Decree-Law 9/2017 of 26 May 2017 (RDL 9/2017), which transposes into Spanish law Directive 2014/104/EU on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and the European Union (EU Damages Directive). RDL 9/2017 has eliminated the secrecy element previously required and broadened the practices included in this definition in line with the approach adopted at EU level.

10 CNC decision of 2 March 2011 in Case S/0086/08, *Professional hairdressing*; and CNMC decision of 23 July 2015 in Case S/0482/13, *Car manufacturers*.

11 See the press release published by the CNMC on 24 October 2017 regarding the conference about 10 years of application of the Spanish Competition Act.

12 CNMC decision of 4 March 2022 in Case S/0012/19, *Scrap and steel*.

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 discussion and cooperation between European competition authorities in cases involving the application of Articles 101 and 102 of the 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* providing for the mutual exchange of information on new cases and expected enforcement decisions;
- b* coordinating investigations where necessary;
- c* providing for mutual assistance on investigations;
- d* exchanging evidence and other information; and
- e* discussing issues of common interest.¹³

In the context of this cooperation, in 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 if an application of immunity was filed with the European Commission.

International cooperation with authorities in other jurisdictions is usually implemented through agreements executed by the European Commission. In addition, on 6 November 2017, the CNMC entered into a memorandum of understanding with the Ministry of Commerce of China. The CNMC has also entered into agreements with other EU counterparts (e.g., the Italian competition authority, with effect from 27 October 2021). Moreover, the CNMC is cooperating closely with its Portuguese counterpart and has carried out several joint investigations, such as the wood flakes inspection on October 2022 carried out by the CNMC and the Autoridade da Concorrência (AdC).¹⁴

In relation to extradition, because Spanish regulations do not provide for criminal sanctions for competition infringements,¹⁵ Spanish judges will be unlikely to accede to extradition requests from foreign jurisdictions (according to press reports, there have been two instances where extradition to the United States has been refused, but the judicial decisions have not been published).

Although RDL 9/2017 facilitates claimants' access to relevant documents before substantiating the claim, this new mechanism should not be understood as creating a discovery system similar to that in Anglo-Saxon systems. Thus, no mechanisms for extraterritorial discovery are available.

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 the press release published by the CNMC on 26 October 2022 regarding the wood flakes investigation carried out by the CNMC and the AdC. The press release is available in English here: https://www.cnmc.es/sites/default/files/editor_contenidos/Notas%20de%20prensa/2022/20221026_NP_Inspecci%C3%B3n_Astillas_Madera_AdC_ESP_PT_DEF_en_GB_.pdf

15 See footnote [32].

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 national market. The nationality of the undertaking is immaterial.

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 undertaking 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.¹⁶ The CNMC repeatedly cites this European case law in cartel cases¹⁷ to extend the liability of cartel members to their parent companies.¹⁸ Moreover, the Spanish Supreme Court has confirmed that it would also be possible to sanction only the parent company for practices carried out by its subsidiary based on the exercise by the former of a decisive influence over the latter.¹⁹

In terms of civil litigation, Regulation (EC) No. 1215/2012 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Regulation 1215/2012), and its national counterpart for non-EU defendants, allows claimants to sue a foreign defendant in Spanish courts when Spain is the place where the harmful anticompetitive event occurred. The case law of the European courts has clarified that victims of cartel infringements have the alternative option of bringing an action for damages against several companies that have participated in the infringement, either before the courts of the place where the cartel itself (or one specific agreement that implied the existence of the cartel) was concluded or before the courts of the place where the loss arose.²⁰

16 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.

17 See former CNC decisions of 15 October 2012 in Case S/0318/10, *Paper envelopes exports*; 24 June 2011 in Case S/0185/09, *Fluid pumps*; 2 March 2011 in Case S/0086/08, *Professional hairdressing*; 21 January 2010 in Case S/0084/08, *Bath gel manufacturers*; and 26 June 2014 in Case S/0445/12, *Firefighting equipment*. See also CNMC decisions of 22 September 2014 in Case S/0428/12, *Pales*; and 23 July 2015 in Case S/0482/13, *Car manufacturers*.

18 The Supreme Court's judgment of 29 March 2012 in *Sogecable and Audiovisual Sport v. 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.

19 Supreme Court judgment No. 674/2019 of 23 May 2019.

20 Judgment of the European Court of Justice of 21 May 2015 in Case C-352/13, *Cartel Damage Claims (CDC) Hydrogen Peroxide SA*. Regarding the *Trucks* cartel case, the judgment of the European Court of Justice of 29 July 2019 in Case C-451/18, *Tibor-Trans* states that the 'place where the harmful event occurred' is the place where the market affected by the infringement is located (i.e., the place where market prices were distorted and where the victim claims to have suffered that damage).

That place is identifiable only for each alleged victim taken individually and is located, in general, at that victim's registered office. Therefore, a claimant who is domiciled in Spain would be allowed to initiate actions before the Spanish courts.²¹

IV LENIENCY PROGRAMMES

The leniency programme was introduced in Spain in February 2008.²² 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). In addition, the CNMC has recently confirmed that full and partial leniency applicants should be exempted from the application of the ban to participate in public tenders.²³ 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 who 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 to evidence that the CNMC already possesses (i.e., the new evidence makes it significantly easier for the CNMC to prove the infringement).

Immunity from or reduction in fines will also be subject to the following requirements:

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

21 Even before the judgment of the European Court of Justice of 29 July 2019 in Case C-451/18 *Tibor-Trans*, the Spanish Supreme Court considered that, according to Regulation 1215/2012, Spanish courts have jurisdiction to hear Trucks cartel claims even if the registered offices of the cartelists (defendants) are not in Spain but in other Member States (e.g., judgments of the Spanish Supreme Court of 26 February 2019 and 4 April 2019, Nos 2140/2019 and ATS 4165/2019).

22 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).

23 See CNMC decision of 14 March 2019 in Case S/DC/0598/2016, *Rail electrification and electromechanics*. Note, however, that the most recent reform to the Competition Act states only that partial leniency applicants 'may' be exempted from such bans but does not clarify in which cases this exemption will or will not apply.

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 that is either in the applicant's possession or available to the applicant;
- 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
- 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.²⁴ 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.²⁵

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 have to be included in the leniency application. Spanish legislation allows leniency applicants who also plan to submit an application to the EC to file a 'short' leniency application (similar to a marker). In addition, the CNMC may grant, upon an applicant's prior justified request, additional time for submitting evidence about 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.²⁶

24 See CNC decisions of 2 March 2011 in Case S/0086/08, *Professional hairdressing*; and 23 February 2012 in Case S/0244/10, *Baleares ship operators*.

25 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 it must progressively evaluate the applicant's fulfilment of its cooperation duties during the course of the investigation. If the Competition Directorate believes these duties have been breached, it will state as much 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.

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

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.²⁷ Interested parties will then have access to that information,²⁸ provided that this is necessary to submit a response to the statement of objections.

Private litigants may not request that the CNMC or other competition authorities produce materials submitted within the scope of a leniency programme.²⁹ Indeed, RDL 9/2017 provides complete protection to the leniency statements and settlement submissions, which cannot be disclosed under any circumstances. As regards other evidence available in the CNMC's file, national courts would be able to order the disclosure only after a competition authority has closed its proceedings, by adopting a decision or otherwise.³⁰

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.³¹

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, in 2016 it changed its practice and since then it has imposed sanctions on legal representatives and managers in thirteen decisions.³² The fines imposed ranged between €1,000 and €60,000.³³

Significant fines have been imposed in cartel cases, demonstrating the CNMC's commitment to detecting cartels and sanctioning those involved.

27 Article 51 of the Defence of Competition Regulation.

28 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.

29 Article 15 *bis* of Law 1/2000 of 7 January 2000 on Civil Procedure (the Civil Procedure Act).

30 Article 283 *bis* (j) of the Civil Procedure Act.

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

32 CNMC decisions of 26 May 2016 in Case S/DC/0504/14, *Adult diapers*; 30 June 2016 in Case S/DC/0519/14, *Rail infrastructures*; 10 November 2016 in Case S/DC/555/15, *Cash transport*; 15 December 2016 in Case S/DC/0538/14, *Photographic Services*; 23 February 2017 in Case S/DC/0545/15, *Concrete manufacturers in Asturias*; 3 May 2018 in Case S/DC/584/16, *Media agencies*; 14 March 2019 in Case S/DC/0598/16, *Rail electrification and electromechanics*; 1 October 2019 in Case S/DC/0612/17, *Assembling and maintenance*; 22 December 2020 in Case S/DC/0620/17, *Solid fuels*; 4 February 2021 in Case S/0644/18 *Radiopharmaceuticals*; 11 May 2021 in Case S/DC/0627/18 *Consulting firms*; 29 September 2021 in Case S/DC/0614/17 *Train security and communications*; and 14 September 2021 in Case S/0025/19 *Archive management*.

33 The legal maximum of €60,000 was imposed recently in the CNMC decision of 29 September 2021 in Case S/DC/0614/17 *Train security and communications*.

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. On 29 January 2015, the Supreme Court issued a judgment clarifying the interpretation of this limit.³⁴

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. 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 CNMC had 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* the infringement's 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.

As a result, the CNMC adopted a new methodology to calculate the amount of the fines. On 6 November 2018, the CNMC published provisional guidance on the setting of fines explaining this methodology. Under the new system, the determination of the fine is a two-tier process.

First, approximately 60 per cent of the fine corresponds to the application of the general penalty regime. It determines the infringement's level of unlawfulness. It takes into account several factors, such as the particularities of the affected market, the market share of the companies involved, the infringement's scope, the effect on consumers, users and economic operators, and whether multiple companies are involved.

Second, approximately 40 per cent of the fine corresponds to the application of an individual penalty regime. It depends on the specific conduct of each company and considers factors such as the duration of the conduct or the individual aggravating or mitigating factors.

Based on these factors, the CNMC calculates a percentage that is applied to each undertaking's overall turnover of the infringing entity to determine the fine. (The recent reform has confirmed that the relevant turnover is the worldwide turnover of the infringing entity which, in principle, does not cover the group as a whole.)

34 Judgment of 29 January 2015, Appeal No. 2872/2015, *BCN Aduanas y Transportes SA*.

Afterwards, the agency reviews the final penalty to ascertain whether the amount is proportionate to the scale of the infringement.

If the undertaking benefits from a reduction following the application of the leniency programme, the reduction is applied to the final figure determined by application of these criteria.

The use of this methodology has not led to a reduction in the level of the fines imposed by the CNMC. Moreover, it has given rise to a great degree of legal uncertainty because undertakings cannot foresee the amount of the fine that they could be facing. It is relevant to mention that in 2020 the CNMC started including a proposal of the amount of the fine to be imposed in the resolution proposal notified to the parties so that they can submit observations about it.

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,³⁵ and even in cases in which the CNC concluded that the undertaking had not complied with its collaboration obligations under the leniency programme.³⁶

Finally, as from 22 October 2015,³⁷ natural and legal persons sanctioned for serious infringements that distort competition can be banned from contracting with public bodies for up to three years. The CNMC has declared in 11 cartel cases that the conditions set in the law for the application of this ban are met a priori.³⁸ However, for the prohibition to be effective, the sanctioning decision must be final. Until now, the Public Procurement Consultation Board, under the Treasury Ministry, decides the scope of the ban (i.e., the time period and material scope). In November 2022, the CNMC launched a public consultation with respect to the criteria for deciding the scope of the ban, which it intends to decide on its own without relying on the Public Procurement Consultation Board process. In this regard, the CNMC has declared that the implementation of effective compliance programmes by infringing undertakings would be taken into account to reduce the amount of the fine imposed and to prevent the imposition of a public procurement ban.³⁹

35 CNC decisions of 19 October 2011 in Case S/0226/10, *Public tenders for roadway maintenance works*; and of 30 July 2013 in Case S/0380/11, *Car rental*.

36 CNC decisions of 2 March 2011 in Case S/0086/08, *Professional hairdressing*; and 23 February 2012 in Case S/0244/10, *Baleares ship operators*.

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

38 CNMC decisions of 14 March 2019 in Case S/DC/0598/2016, *Rail electrification and electromechanics*; 20 June 2019 in Case SAMUR/02/18, *School transport*; 1 October 2019 in Case S/DC/0612/17, *Assembling and maintenance*; 9 September 2020 in Case SANAV/02-19, *School transport Navarra*; 13 February 2020 in Case S/0626/18, *Meteorological radars*; 29 September 2021 in Case S/DC/0614/17, *Train security and communications*; 14 September 2021 in Case S/0025/19, *Archive management*; 17 August 2021 in Case S/0013/19, *Road maintenance*; 16 June 2021 in Case S/0011/19, *Travellers transport in Cantabria*; 11 May 2021 in Case S/DC/0627/18, *Consulting firms*; and 4 March 2022 in Case S/0012/19, *Scrap and steel*.

39 On 10 June 2020, the CNMC published the 'Guide on Regulatory Compliance Programmes in Relation to Anti-Trust Laws' that contains the criteria that the CNMC would take into consideration when analysing the effectiveness of a compliance programme.

VI 'DAY ONE' RESPONSE

Law 3/2013 grants broad powers to CNMC officials to carry out unannounced inspections of companies' premises. In 2019, the CNMC carried out 13 inspections, four in 2020 and another four in 2021.⁴⁰

Under Spanish law, consent to access premises must be obtained from either the occupants or a court by way of a warrant.⁴¹ Access to premises is only mandatory if authorised by a court through a warrant. In the absence of a judicial warrant, undertakings are entitled to deny access to their premises (although not to oppose the inspection, which is mandatory). In practice, the CNMC usually requests a warrant in advance to secure access to premises. The Supreme Court has 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 and, therefore, the company's consent to the inspection was deemed invalid.⁴² Notably, following the 2021 reform for the implementation of the ECN+ Directive, it is now possible for the CNMC to conduct inspections from the CNMC's own premises, hence opening the way to continued inspections.

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).⁴³ Personal and privileged documents must be identified during the inspection.⁴⁴ Some CNMC inspections have been annulled by the Supreme Court since it considered that officials had exceeded the original scope of the inspection orders, which constituted a violation of the fundamental right to inviolability of domicile.⁴⁵

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 directly incriminate the company.⁴⁶

40 Inspections were carried out in 2019 in relation to the following sectors: solid fuels, road transport, pharmaceutical industry (three inspections), file management, chemical, banking, work uniforms, real estate and maritime transport. In 2020, the sectors affected by inspections were chemical, scrap metal, natural gas and death insurance. In 2021, the sectors were waste recycling, military equipment and corporate databases.

41 Information contained in the investigation order prepared by the Competition Directorate for investigation or the warrant of the court must include the following information: (1) the date of the inspection; (2) the names of the CNMC officials who will be in charge of the inspection; (3) the identification of the undertaking and the address of the premises subject to inspection; and (4) the object of the inspection. It is important to verify this information is correct before allowing the inspection to be carried out. The Supreme Court (judgment of 27 February 2015, Appeal No. 941/2015) has stated that inspection orders must have a degree of specificity, meaning that they cannot be defined so vaguely that they allow 'fishing expeditions', and they cannot simply quote the infringements set out in the Competition Act in abstract terms.

42 Judgment of the Supreme Court of 15 June 2015, Appeal No. 1407/2014.

43 Attorney–client privilege only applies to correspondence between clients and external counsel. The question whether correspondence with in-house counsel may be privileged under Spanish law is not settled.

44 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 falls outside the scope of the inspection order to identify the document and to provide proof of its protected nature (see the Supreme Court judgment of 27 April 2012 in *Stanpa*).

45 Judgment of 16 June 2015, Appeal No. 2717/2015.

46 The CNMC usually requests access to employees' webmail by asking for their passwords, to confirm whether email addresses have been used for professional purposes.

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

Fines of up to 5 per cent of the total turnover of the previous year can be imposed on a company that by any means obstructs the inspection tasks of the CNMC. The former CNC imposed fines on several companies for breaching the duty to collaborate with the information request by submitting misleading or fake information.⁴⁷

VII PRIVATE ENFORCEMENT

Recent years have seen a substantial increase in damages claims resulting from antitrust infringements in Spain. Most cases refer to the *Trucks* EC decision of 2016, but judgments have been handed down in the Spanish *Envelopes* case, the EC EIRD case, the *Car dealers* and *Car manufacturers* cases.⁴⁸ There are numerous claims currently being dealt with by the Spanish civil courts, and a substantial number of other claims have been announced. The Supreme Court issued a judgment regarding cartel damages in 2013 in the Spanish *Sugar* cartel case, and this has been used as a leading judgment for all cases in respect of the parties' burden of proof for damages quantification. The Supreme Court has recently accepted a number of appeals in the *Trucks* case, and these upcoming judgments are expected to settle many outstanding questions of law in this field.

- RDL 9/2017 introduced significant changes in the Spanish regime, the main ones being:
- a increasing the limitation period from one to five years. This period is suspended from 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. As a general rule under Spanish law, to apply for damages, claimants are required to prove the causation of harm and its amount. RDL 9/2017 sets out a presumption of harm in cartel cases and allows courts to estimate the amount thereof if it is not possible to calculate the damages. In this area, some Spanish courts are reducing the burden imposed on claimants and require that they only provide a hypothetical but reasonable counterfactual alternative to quantify the damage, even in cases where RDL 9/2017 does not apply and where Article 22 of the Damages Directive expressly states that the provision regarding the presumption of harm in cartel cases could not be retroactively applied. It is still uncertain whether this expansive interpretation will be upheld by the Spanish Supreme Court;
 - 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 RDL 9/2017, this rule is reversed, introducing a presumption of harm in favour of indirect purchasers.

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

48 CNMC decision of 25 March 2013 in Case S/DC/0316/10, *Envelopes*; Case AT.39914, *Euro interest rate derivatives*; CNMC decision of 23 July 2013 in Case S/0482/13, *Car manufacturers*.

It is relevant to mention here that Spanish courts have recognised the passing-on defence when considering a defendant's position in damages claims involving cartel infringements;⁴⁹

- d* introducing specific mechanisms to facilitate claimants' access to relevant documents before substantiating the claim. The pretrial disclosure process in Spain is rather limited and courts have been reluctant to award broad disclosures of documents to claimants. RDL 9/2017 modifies this regime and makes it easier for claimants to access evidence that is required to substantiate the claim. However, claimants must justify the request and provide reasonable available evidence to support a damages claim. They will also need to identify specific items of evidence or, at least, relevant categories of evidence. Thus, RDL 9/2017 does not introduce a discovery system in Spain. Moreover, the party that requests access is expected to provide a monetary guarantee to cover the expenses incurred by the defendant as well as any potential damage they may suffer as a result of the misuse of the information obtained. Specific protection for leniency statements and settlement submissions is guaranteed, as it has been until now, and specific mechanisms are foreseen to ensure the confidentiality of business secrets of entities called to reveal documentary evidence;
- e* making CNMC's final decisions declaring infringements of competition law binding on Spanish courts. A final decision made by any other Member State's national competition authority creates a presumption that a competition law infringement exists;
- f* extending the liability of parent companies for damage caused by their subsidiaries to civil proceedings;
- g* declaring the joint and several liability of all co-infringers in relation to damages caused as a result of anticompetitive behaviour. This principle of joint liability is exempted in cases involving small and medium-sized enterprises that meet certain requirements and beneficiaries of immunity; and
- h* declaring the effective compensation of the damages caused before the adoption of a decision by the CNMC as a mitigating factor for the purposes of setting the amount of the antitrust fines.

RDL 9/2017 has clearly fostered awareness among claimants and it has incentivised them to bring damages actions for antitrust infringements in Spain. In addition, recent judgments from the European Court of Justice with origin in Spanish courts (*Sumal*, *Volvo and DAF Trucks*, *Paccar*, etc.) have settled questions of law favourably to claimants.

Law 1/2000 of 7 January 2000 on Civil Procedure (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 through the same object or the same petition.⁵⁰ 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

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

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

standing to protect not only the interests of their associates but also the general interests of all consumers and final users. This could be applicable to antitrust cases, particularly those involving the declaration of antitrust infringements or injunctions.

When a consumers' association initiates a collective action under Article 11(2) to 11(3), the admission of the claim will be made public.⁵¹

VIII CURRENT DEVELOPMENTS

As part of the parliamentary procedure following the transposition of the EU ECN+ Directive, Parliament is considering certain further reforms to the Competition Act, including, inter alia, a new settlement procedure roughly mirroring the EU procedure enabling companies to benefit from a significant reduction in the fines imposed, if they admit to the existence of an infringement. These reforms however have not progressed materially in the parliamentary process in the past year.

The most recent CNMC decisions have seen an increase in the level of fines, reaching the higher end of the legal limit, even in cases of comparatively less serious infringements, which may foretell a more aggressive fining policy from the competition authority; however, the extent to which this will be accepted by the courts has yet to be seen. In addition, the CNMC is focused on *ex officio* detection of cartels via its 'market intelligence' unit (especially in public procurement).

In private litigation, the increased number of claims have led to the development of an specialised antitrust claimants' Bar, with active intervention from competition economic experts and more advance litigation financing arrangements, such as contingency fee agreements and litigation finance funds. The effect that this bustling private litigation activity may have on future leniency applications remains to be seen.

51 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. 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 rest with consumers' associations and the groups of affected consumers. In these cases, consumers or users whose interests may be affected must be informed by the plaintiff so that all potentially affected consumers may defend their interests in the civil proceedings at any time (opt-in clause). Second, if anticompetitive behaviour compromises the interests of a group of consumers or users that cannot easily be 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 these cases, publication would be considered sufficient for all interested consumers to identify themselves. Spanish law establishes that the proceedings will resume after two months. 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 who have appeared in the proceedings.

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