

IN-DEPTH

Cartels And Leniency

SPAIN



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Contributing Editors

Romina Polley and **Julian Alexander Sanner**

Cleary Gottlieb Steen & Hamilton LLP

In-Depth: Cartels and Leniency (formerly The Cartels and Leniency Review) provides a practical overview of the laws and policies aimed at combating cartel activity across key jurisdictions worldwide. It addresses major emerging and unsettled issues surrounding unlawful agreements with competitors, and analyses recent enforcement trends and regulatory changes – offering valuable insights to practitioners and corporates alike.

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Alfonso Gutiérrez and Jokin Beltrán

Uría Menéndez

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Introduction

Spanish law prohibits cartels as part of the general prohibition of anticompetitive agreements. Administrative investigations of cartels are common and, in fact, the National Markets and Competition Commission (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.^[2] The CNMC continues to pursue cartel investigations: in 2023, the CNMC issued three decisions sanctioning cartels,^[3] with two other decisions in 2022 and as many as six cartel infringement decisions issued in 2021.^[4]

Spain's leniency programme, which provides exemptions and reductions in the fines for companies that self-report cartels, 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 53 cases since its adoption in Spain in 2008.^[5]

Spanish law allows cartels victims to seek damages in civil court from cartelists, although opportunities for collective redress remain limited. While, traditionally, public enforcement of cartels made up the bulk of practitioners' work in Spain, certain changes in the law (like the implementation of the Damages Directive) and the development of a claimants' bar have brought an explosion of private litigation seeking redress for the damages caused by cartels.

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Year in review

The Spanish government introduced certain changes to the Competition Act in 2023, including an extension of the legal limit for the CNMC to reach a decision in cartel proceedings (from 18 months to 24 months). However, other changes that were expected (such as the introduction of a settlement system, based on the EU model, or the increase of fines for executives from €60,000 to €400,000) were not included in this legal modification.

The CNMC increased the number of inspections compared to the past year and issued three cartel decisions in 2023.^[6] In 2023, the CNMC carried out eight inspections (not all related to cartel conduct).^[7] Additionally, in response to increased levels of cartel civil litigation (that impact the cost-benefit analysis of prospective leniency applicants), the CNMC continues to intensify its efforts in *ex officio* cartel detection (e.g., by analysing bid-rigging conduct through an intelligence unit dedicated to identifying indicia of such conduct based on the analysis of data regarding offers submitted in public tenders or by training officials working in public procurement).

Private litigation continues to increase year after year, with new claims going beyond the *Trucks* case (that has attracted, by far, the largest number of claims). In the *Trucks* case, the Supreme Court finally handed down, in June 2023, 15 judgments in response to the initial rounds appeals, with the following main conclusions:

1. actions arising from the EC Decision were not time-barred under the statute of limitations;
2. the specific and significant characteristics of this cartel allowed the provincial courts to presume the existence of damage; and
3. the judicial estimate of the damage of 5 per cent made by the first instance courts was reasonable.

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Enforcement policies and guidance

The legislation regulating cartel conduct in Spain is the Competition Act.^[8] The Defence of Competition Regulation^[9] implements specific sections of the Competition Act, including, among other things, 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.^[10]

Competition rules in Spain are enforced by the CNMC.^[11] Certain regions also have authority to enforce the Competition Act in their respective jurisdictions.^[12]

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 result in, 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.^[13] Furthermore, the prohibitions under Article 1 of the Competition Act do not apply to agreements resulting from the application of a law.^[14]

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:

[A]n 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.^[15]

The Spanish competition authority has stated that the mere exchange of sensitive commercial information between competitors can constitute a cartel, and this view has been confirmed by the Supreme Court.^[16]

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 to 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.

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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:

1. providing for the mutual exchange of information on new cases and expected enforcement decisions;
2. coordinating investigations where necessary;
3. providing for mutual assistance on investigations;
4. exchanging evidence and other information; and
5. discussing issues of common interest.^[17]

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 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 inform the marker if an application of immunity has been 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 cooperates 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).^[18]

In relation to extradition, because Spanish regulations do not provide for criminal sanctions for competition infringements,^[19] 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 the law provides for a mechanism that allows claimants to access relevant documents to substantiate a claim, this mechanism should not be understood as creating a discovery system similar to that of Anglo-Saxon systems. Thus, no mechanisms for extraterritorial discovery are available.

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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-established European case law, if a company is wholly owned by its parent company, there exists a rebuttable presumption that the parent company dictates the economic behaviour of its subsidiary.^[20] The CNMC repeatedly cites this European case law in cartel cases^[21] to extend the liability of cartel members to their parent companies.^[22] 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.^[23]

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.^[24] 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 generally be allowed to initiate actions before the Spanish courts.^[25]

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Leniency programmes

The leniency programme was introduced in Spain in February 2008.^[26] 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.^[27] 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 to 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:

1. full, continuous and diligent cooperation with the CNMC throughout the investigation;
2. putting an end to the infringement, unless the CNMC considers participation necessary to preserve the effectiveness of an investigation;
3. no evidence relating to the cartel has been destroyed;
4. no direct or indirect disclosure of the leniency application has been made to third parties, other than the competition authorities; and
5. no measures have been adopted to coerce other undertakings to participate in the infringement (this final obligation is only required for full leniency applicants).

Full cooperation with the CNMC during the proceedings is the leniency beneficiary's main obligation. Full cooperation implies that applicants must:

1. provide the CNMC, without delay, with all relevant information and evidence relating to the alleged cartel that is either in the applicant's possession or available to the applicant;
2. remain available to the CNMC to respond, without delay, to all requests that could contribute to establish the facts under investigation;
3. facilitate interviews with the company's employees and current executives and, if applicable, former executives;
4. refrain from destroying, falsifying or concealing relevant information or evidence in relation to the alleged cartel; and
5. abstain from disclosing the filing or content of the leniency application before the statement of objections is issued (or any other 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 because they had not complied with their collaboration obligations under the programme.^[28] 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.^[29]

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 to 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 contents of the leniency application. Spanish legislation allows leniency applicants who also plan to submit an application to the EC to file a marker or a 'short' leniency application. In addition, the CNMC may grant 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.^[30]

At the request of the applicant, oral applications for leniency may be accepted. To do so, a meeting must 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.^[31] Interested parties will then have access to that information,^[32] 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 created as part of the leniency application.^[33] 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.^[34]

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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.^[35]

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 13 decisions.^[36] The fines imposed ranged between €1,000 and €60,000.^[37]

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

Fines imposed on undertakings can be up to 10 per cent of the violator's total turnover in the year preceding the imposition of the sanction. On the basis of the proportionality principle, the Supreme Court has held that 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 must 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. This percentage must be calculated over a company's total annual turnover, including sales of products not affected by the infringement.

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

1. the size and characteristics of the market affected by the infringement;
2. the market shares of the undertakings;
3. the scope of the infringement;
4. the infringement's duration;
5. the effect of the infringement on the rights and legitimate interests of consumers or on other economic operators;
6. the illicit benefits obtained from the infringement; and
7. aggravating and mitigating circumstances in relation to each undertaking.

In response, the CNMC adopted a new methodology to calculate the fine values. 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-tiered 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. (A recent legal 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.)

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 could 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,^[38] and even in cases in which the CNC concluded that the undertaking had not complied with its collaboration obligations under the leniency programme.^[39]

Finally, as from 22 October 2015,^[40] 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 now regularly finds that the conditions set in the law for the application of this ban are met a priori in most fining decisions.^[41] The Public Procurement Consultation Board, under the Treasury Ministry, decides the scope of the ban (i.e., the period and material scope). In June 2023, the CNMC published a Communication setting out the criteria for applying the public procurement ban.^[42] 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.^[43]

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.^[35]

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 13 decisions.^[36] The fines imposed ranged between €1,000 and €60,000.^[37]

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

Fines imposed on undertakings can be up to 10 per cent of the violator's total turnover in the year preceding the imposition of the sanction. On the basis of the proportionality principle, the Supreme Court has held that 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 must 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. This percentage must be calculated over a company's total annual turnover, including sales of products not affected by the infringement.

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

1. the size and characteristics of the market affected by the infringement;
2. the market shares of the undertakings;
3. the scope of the infringement;
4. the infringement's duration;
5. the effect of the infringement on the rights and legitimate interests of consumers or on other economic operators;
6. the illicit benefits obtained from the infringement; and
7. aggravating and mitigating circumstances in relation to each undertaking.

In response, the CNMC adopted a new methodology to calculate the fine values. 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-tiered 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. (A recent legal 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.)

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 could submit observations about it.

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'Day one' response

CNMC officials have broad legal powers to carry out unannounced inspections of companies' premises. Under Spanish law, consent to access premises must be obtained from either the occupants or a court by way of a warrant.^[44] 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 refuse the CNMC 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.^[45] 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).^[46] Personal and privileged documents must be identified

during the inspection.^[47] Some CNMC inspections have been annulled by the Supreme Court because it found that officials had exceeded the original scope of the inspection orders, thus breaching the fundamental right to inviolability of domicile.^[48]

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.^[49]

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.^[50]

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Private enforcement

Damages claims resulting from antitrust infringements in Spain continue to grow year after year. While most cases refer to the *Trucks* EC decision of 2016, judgments have been handed down in other cartel cases, such as the Spanish *Envelopes* case, the EC *EIRD* case, the *Car dealers* and *Car manufacturers* cases.^[51] 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.

RDL 9/2017 introduced significant changes in the Spanish regime, the main ones being:

1. increasing the limitation period from one to five years. This period is suspended between the point at which a competition authority initiates proceedings until at least one year after a final decision on an alleged infringement is made;
2. 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 justify 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. Applying this, some Spanish courts are reducing the burden imposed on claimants by requiring that they only need to 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;
3. 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, 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. 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;^[52]
4. 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 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, in addition to 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;

5. 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;
6. extending the liability of parent companies for damage caused by their subsidiaries to civil proceedings;
7. 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
8. 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.^[53] Moreover, although class actions are not technically recognised under Spanish law, Article 11 of the Civil Procedure Act includes some provisions in relation to collective legal standing in cases that are limited to the defence of the interests of 'consumers and final users'. Consumers' associations have standing to protect not only the interests of their associates but also the general interests of all consumers and final users. This could be applicable to antitrust cases, particularly those involving the declaration of antitrust infringements or injunctions.

When a consumers' association initiates a collective action under Article 11(2) to Article 11(3), the admission of the claim will be made public.^[54]

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Outlook and conclusions

In 2023, the CNMC increased the number of inspections compared to 2022, and we expect that an aggressive policy of pursuing cartels will continue in 2024. The ability to keep on this aggressive policy, however, will depend on two factors. First, it remains to be seen whether leniency applicants continue to come forward (in spite of the widely held view that the leniency programme is less beneficial given the certainty of private litigation, with damages awards and legal costs easily exceeding any reduction in the fine). Second, it is also uncertain if the CNMC's efforts to identify cartels outside of the leniency programme (e.g., with the market intelligence unit) will bear fruit.

In private litigation, the increased number of claims continue to develop a specialised antitrust claimants' bar and increased familiarity with these types of claims by the courts. We also continue to see an active intervention from third-party funders and more sophisticated economic reports submitted by claimants. With the recent judgments of the Supreme Court in the Trucks cases based on less sophisticated economic reports (which led courts to estimate damages awards based on a judicial estimate grounded on general percentages of damages), claimants and defendants will continue to await for guidance from the Supreme Court in cases where the parties present more sophisticated econometric reports, as it is now common.

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Endnotes

- 1 Alfonso Gutiérrez is a partner and Jokin Beltrán de Lubiano is a senior associate at Uría Menéndez. [^ Back to section](#)
- 2 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. [^ Back to section](#)
- 3 CNMC decision of 8 February 2023 in Case SAMUR/02/22, *Radio Taxi Murcia*, CNMC decision of 4 July 2023 in Case S/0002/21, *Business databases* and CNMC decision of 19 July 2023 in Case S/0008/21, *Military Equipment*. [^ Back to section](#)
- 4 CNMC decision of 4 March 2022 in Case S/0012/19, *Scrap and steel* and CNMC decision of 5 July 2022 in Case S/0021/20, *Civil Works 2*. [^ Back to section](#)
- 5 See the press release published by the CNMC on 11 July 2023 regarding a questionnaire to evaluate the leniency programme. [^ Back to section](#)
- 6 CNMC decision of 8 February 2023 in Case SAMUR/02/22, *Radio Taxi Murcia*, CNMC decision of 4 July 2023 in Case S/0002/21, *Business databases* and CNMC decision of 19 July 2023 in Case S/0008/21, *Military Equipment*. [^ Back to section](#)
- 7 In 2023, inspections were carried out in the following industries: travel agencies, haircare products, low-voltage electricity networks and trading, agricultural machinery, rail transport, pharmaceutical digital logistics, electricity and gas and drugs and medication. [^ Back to section](#)
- 8 Law 15/2007 of 3 July 2007 on the Defence of Competition. [^ Back to section](#)

- 9 Royal Decree 261/2008 of 22 February 2008, approving the Defence of Competition Regulation. [^ Back to section](#)
- 10 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). [^ Back to section](#)
- 11 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. [^ Back to section](#)
- 12 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. [^ Back to section](#)
- 13 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. [^ Back to section](#)
- 14 Article 4 of the Competition Act. [^ Back to section](#)
- 15 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. [^ Back to section](#)
- 16 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*. [^ Back to section](#)
- 17 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. [^ Back to section](#)

- 18** 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. [^ Back to section](#)
- 19** See footnote 32. [^ Back to section](#)
- 20** 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. [^ Back to section](#)
- 21** 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*. [^ Back to section](#)
- 22** 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, among other things, 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. [^ Back to section](#)
- 23** Supreme Court judgment No. 674/2019 of 23 May 2019. [^ Back to section](#)
- 24** 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). [^ Back to section](#)
- 25** 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). [^ Back to section](#)

- 26** 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). [^ Back to section](#)
- 27** 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. [^ Back to section](#)
- 28** 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*. [^ Back to section](#)
- 29** 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. [^ Back to section](#)
- 30** Article 46(5) of the Defence of Competition Regulation. [^ Back to section](#)
- 31** Article 51 of the Defence of Competition Regulation. [^ Back to section](#)
- 32** 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. [^ Back to section](#)
- 33** Article 15 bis of Law 1/2000 of 7 January 2000 on Civil Procedure (the Civil Procedure Act). [^ Back to section](#)
- 34** Article 283 bis (j) of the Civil Procedure Act. [^ Back to section](#)
- 35** Nevertheless, some practices, such as bid rigging, may constitute a criminal offence if they relate to public tenders. [^ Back to section](#)
- 36** 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*. [^ Back to section](#)

- 37** 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*. [^ Back to section](#)
- 38** 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*. [^ Back to section](#)
- 39** 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*. [^ Back to section](#)
- 40** Act 40/2015 of 1 October 2015 on the Public Sector. [^ Back to section](#)
- 41** 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*. [^ Back to section](#)
- 42** Communication 1/2023 of 13 June 2023, published in Spain's Official State Journal (BOE) on 30 June 2023. [^ Back to section](#)
- 43** 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. [^ Back to section](#)
- 44** Information contained in the investigation order prepared by the Competition Directorate for investigation or the warrant of the court must include the following information: the date of the inspection; the names of the CNMC officials who will be in charge of the inspection; the identification of the undertaking and the address of the premises subject to inspection; and the object of the inspection. It is important to verify this information is correct before allowing the inspection to be carried out. 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. [^ Back to section](#)
- 45** Judgment of the Supreme Court of 15 June 2015, Appeal No. 1407/2014. [^ Back to section](#)

- 46** 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, but the General Statute of the Bar states that in-house lawyers are also subject to legal professional privilege. [^ Back to section](#)
- 47** 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*). [^ Back to section](#)
- 48** Judgment of 16 June 2015, Appeal No. 2717/2015. [^ Back to section](#)
- 49** The CNMC usually requests access to employees' webmail by asking for their passwords, to confirm whether email addresses have been used for professional purposes. [^ Back to section](#)
- 50** See CNC decisions of 31 July 2012 in Case SNC/26/12, *Mediapro*; and 31 May 2012 in Case SNC/19/12, CPV. [^ Back to section](#)
- 51** 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*. [^ Back to section](#)
- 52** 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-VMGestión de Energía*. [^ Back to section](#)
- 53** The court would presume that such a link exists if the actions are based on the same underlying facts. [^ Back to section](#)

54 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. [^ Back to section](#)

URÍA
MENÉNDEZ

Alfonso Gutiérrez
Jokin Beltrán

alfonso.gutierrez@uria.com
jokin.beltrandelubiano@uria.com

Uría Menéndez

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