
THE PRIVATE COMPETITION ENFORCEMENT REVIEW

TENTH EDITION

EDITOR
ILENE KNABLE GOTTS

LAW BUSINESS RESEARCH

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For further information please email
Nick.Barette@thelawreviews.com

THE PRIVATE
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ENFORCEMENT
REVIEW

Tenth Edition

Editor
ILENE KNABLE GOTTS

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PUBLISHER
Gideon Robertson

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Nick Barette

BUSINESS DEVELOPMENT MANAGERS
Felicity Bown, Thomas Lee

SENIOR ACCOUNT MANAGER
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Anne Borthwick

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EDITOR'S PREFACE

Private competition litigation can be an important complement to public enforcement in the achievement of compliance with the competition laws. For example, antitrust litigation has been a key component of the antitrust regime for decades in the United States. The US litigation system is highly developed – using extensive discovery, pleadings and motions, use of experts, and, in a small number of matters, trials, to resolve the rights of the parties. The process imposes high litigation costs (both in terms of time and money) on all participants, but promises great rewards for prevailing plaintiffs. The usual rule that each party bears its own attorneys' fees is amended for private antitrust cases such that a prevailing plaintiff is entitled to its fees as well as treble damages. The costs and potential rewards to plaintiffs create an environment in which a large percentage of cases settle on the eve of trial. Arbitration and mediation are still rare, but not unheard of, in antitrust disputes. Congress and the US Supreme Court have attempted to curtail some of the more frivolous litigation and class actions by adopting tougher standards and ensuring that follow-on litigation exposure does not discourage wrongdoers from seeking amnesty. Although these initiatives may, on the margin, decrease the volume of private antitrust litigation in the United States, the environment remains ripe for high levels of litigation activity, particularly involving intellectual property rights and cartels.

Until the last decade or so, the United States was one of the few outliers in providing an antitrust regime that encouraged private enforcement of the antitrust laws. Only Australia had been more receptive than the United States to suits being filed by a broad range of plaintiffs – including class-action representatives and indirect purchasers – and to increased access for litigants to information and materials submitted to the antitrust authorities in a cartel investigation. Brazil provided another, albeit more limited, example: Brazil has had private litigation arise involving non-compete clauses since the beginning of the 20th century, and monopoly or market closure claims since the 1950s. In the last decade, we have seen other regimes begin to provide for private competition litigation in their courts, typically, as discussed below, only after (i.e., as a 'follow on' to) public enforcement. In some jurisdictions (e.g., Argentina, Lithuania, Mexico, Romania, Switzerland and Venezuela), however, private actions remain very rare, or non-existent (e.g., Nigeria) and there is little, if any, precedent

establishing the basis for compensatory damages or discovery, much less for arbitration or mediation. Also, other jurisdictions (e.g., Switzerland) still have very rigid requirements for 'standing', which limit the types of cases that can be initiated.

The tide is clearly turning, however, with important legislation either recently having been adopted or currently pending in many jurisdictions throughout the world to provide a greater role for private enforcement. In Australia, for example, the government is undertaking a comprehensive review and is now considering the implementation of significant changes to its private enforcement law. The most significant developments, though, are in Europe as the EU Member States prepare legislative changes to implement the EU's directive on private enforcement into their national laws. The most significant areas to be standardised in most EU jurisdictions involve access to the competition authority's file, the tolling of the statute of limitations period, and privilege. Member States are likely to continue to differ on issues relating to the evidentiary effect of an EU judgment and whether fines should be factored into damages calculations. Even without this directive, many of the Member States throughout the European Union have increased their private antitrust enforcement rights.

The development of case law in jurisdictions also has an impact on the number of private enforcement cases that are brought. In China, for instance, the number of published decisions has increased and the use of private litigation is growing rapidly, particularly in cutting-edge industries such as telecommunications, the internet and standard essential patents. In Korea, private actions have been brought against an alleged oil refinery cartel, sugar cartel, school uniform cartel and credit card VAN cartel. In addition, the court awarded damages to a local confectionery company against a cartel of wheat flour companies. In contrast, in Japan, over a decade passed from the adoption of private rights legislation until a private plaintiff prevailed in an injunction case for the first time; also it is only recently that a derivative shareholder action has been filed. Moreover, in many other jurisdictions as well, there remain very limited litigated cases. For example, there have been a growing number of private antitrust class actions commenced in Canada; none of them have proceeded to a trial on the merits.

The English and German courts are emerging as major venues for private enforcement actions. The Netherlands has also become a 'preferred' jurisdiction for commencing private competition claims. Collective actions are now recognised in Sweden, Finland and Denmark. Italy also recently approved legislation allowing for collective damages actions and providing standing to sue to representative consumers and consumer associations, and France and England have also taken steps to facilitate collective action or class-action legislation. In addition, in France, third-party funding of class actions is permissible and becoming more common. In China, consumer associations are likely to become more active in the future in bringing actions to serve the 'public interest'.

Differences will continue to exist from jurisdiction to jurisdiction regarding whether claimants must 'opt out' of collective redress proposals to have their claims survive a settlement (as in the UK), or instead must 'opt in' to share in the settlement benefits. Even in the absence of class action procedures, the trend in Europe is towards the creation and use of consumer collective redress mechanisms. For instance, the Netherlands permits claim vehicles to aggregate into one court case the claims of multiple parties. Similarly, in one recent case in Austria, several parties filed a claim by assigning it to a collective plaintiff. Some jurisdictions have not to date had any private damages awarded in antitrust cases, but changes to their competition legislation could favourably affect the bringing of private antitrust litigation seeking damages. Most jurisdictions impose a limitation period for

bringing actions that commences only when the plaintiff knows of the wrongdoing and its participants; a few, however, apply shorter, more rigid time frames without a tolling period for the commencement of damages (e.g., Brazil, Canada and Switzerland, although Switzerland has legislation pending to toll the period) or injunctive litigation. Some jurisdictions base the statute of limitations upon the point at which a final determination of the competition authorities is rendered (e.g., India, Romania, South Africa and Austria) or from when the agency investigation commences (e.g., Hungary). In other jurisdictions such as Australia and Chile, it is not as clear when the statutory period will be tolled. In a few jurisdictions, it is only after the competition authority acts that a private action will be decided by the court. Of course, in the UK – an EU jurisdiction which has been one of the most active and private-enforcement friendly fora – it will take time to determine what impact, if any, Brexit will have.

The greatest impetus for private competition cases is the follow-up litigation potential after the competition authority has discovered – and challenged – cartel activity. In India, for instance, as the competition commission becomes more active in enforcement investigations involving e-commerce and other high-technology areas, the groundwork is being laid for future private antitrust cases. The interface between leniency programmes (and cartel investigations) and private litigation is still evolving in many jurisdictions, and in some jurisdictions it remains unclear what weight to give competition agency decisions in follow-on litigation private cases and whether documents in the hands of the competition agency are discoverable (see, for example, Germany and Sweden). Some jurisdictions, such as Hungary, seek to provide a strong incentive for utilisation of their leniency programmes by providing full immunity from private damages claims for participants. In contrast, other jurisdictions, such as the Netherlands, do not bestow any benefit or immunity in a follow-on damages action. These issues are unlikely to be completely resolved in many jurisdictions in the near term.

There is one point on which there is almost universal agreement among jurisdictions: almost all have adopted an extraterritorial approach premised on 'effects' within their borders. Canadian courts may also decline jurisdiction for a foreign defendant based on the doctrine of *forum non conveniens* as well as comity considerations. A few jurisdictions, such as the UK, however, are prepared to allow claims in their jurisdictions when there is a relatively limited connection, such as when only one of a large number of defendants is located there. In contrast, in South Africa, the courts will also consider 'spill-over effects' from antitrust cartel conduct as providing a sufficient jurisdictional basis.

The litigation system in each jurisdiction to some extent reflects the respective perceptions of what private rights should protect. Most of the jurisdictions view private antitrust rights as an extension of tort law (e.g., Austria, Canada, France, Hungary, Israel, Japan, Korea, Norway, the Netherlands and the UK), with liability arising for participants who negligently or knowingly engage in conduct that injures another party. Turkey, while allocating liability on the basis of tort law, will in certain circumstances award treble damages as a punitive sanction. Some jurisdictions treat antitrust concerns as a defence for breaching a contract (e.g., Norway and the Netherlands); others (e.g., Australia) value the deterrent aspect of private actions to augment public enforcement, with some (e.g., Russia) focusing on the potential for 'unjust enrichment' by the defendant. In Brazil, there is a mechanism by which a court can assess a fine to be paid by the defendant to the Fund for the Defence of Collective Rights if the court determines the amount claimed as damages is too low compared with the estimated size and gravity of the antitrust violation. Still others are concerned that

private antitrust litigation might thwart public enforcement and may require what is in essence consent of the regulators before allowing the litigation or permitting the enforcement officials to participate in the case (e.g., in Brazil, as well in Germany, where the competition authorities may act as *amicus curiae*).

Some jurisdictions believe that private litigation should only be available to victims of conduct that the antitrust authorities have already penalised (e.g., Chile, India, Turkey and Venezuela). Interestingly, no other jurisdiction has chosen to replicate the United States' system of routinely awarding treble damages for competition claims; instead, the overwhelming majority of jurisdictions take the position that damages awards should be compensatory rather than punitive (Canada does, however, recognise the potential for punitive damages for common law conspiracy and tort claims, as does Turkey). In Venezuela, however, the plaintiff can get unforeseen damages if the defendant has engaged in gross negligence or wilful misconduct. And in Israel a court recently recognised the right to obtain additional damages on the basis of 'unjust enrichment' law. Finally, in almost all jurisdictions, the prevailing party has some or all of its costs compensated by the losing party, discouraging frivolous litigation.

Cultural views also clearly affect litigation models. Outside the EU and North America, the availability of group or class actions varies extensively. A growing minority of jurisdictions embrace the use of class actions, particularly following a cartel ruling by the competition authority (e.g., Israel). Some jurisdictions (e.g., Turkey) permit group actions by associations and other legal entities for injunctive (rather than damages) relief. Jurisdictions such as Germany and Korea generally do not permit representative or class actions but instead have as a founding principle the use of courts for pursuing individual claims. In some jurisdictions (e.g., China, Korea and Switzerland) several claimants may lodge a collective suit against the same defendant if the claims are based on similar facts or a similar legal basis, or even permit courts to join similar lawsuits (e.g., Romania and Switzerland). In Japan, class actions were not available except to organisations formed to represent consumer members; however, a new class action law came into effect in 2016. In contrast, in Switzerland, consumers and consumer organisations do not currently have legal standing and cannot recuperate damages they have incurred as a result of an infringement of the Competition Act. In Poland, only entrepreneurs, not individuals, have standing to bring claims under the Unfair Competition Act, but the Group Claims Act is available if no administrative procedure has been undertaken concerning the same case.

Jurisdictions that are receptive to arbitration and mediation as an alternative to litigation (e.g., Germany, Hungary, Japan, Korea, the Netherlands, Switzerland and Spain), also encourage alternative dispute mechanisms in private antitrust matters. Some courts prefer the use of experts and statements to discovery (e.g., in Chile; in France, where the appointment of independent experts is common; in Japan, which does not have mandatory production or discovery except in narrowly prescribed circumstances; and in Germany, which even allows the use of statements in lieu of documents). In Korea, economic experts are mainly used for assessment of damages rather than to establish violations. In Norway, the Civil Procedure Act allows for the appointment of expert judges and advisory opinions of the EFTA Court. Other jurisdictions believe that discovery is necessary to reach the correct outcome (e.g., Canada, which provides for broad discovery, and Israel, which believes that 'laying your cards on the table' and broad discovery are important). Views towards protecting certain documents and information on privilege grounds also cut consistently across antitrust and non-antitrust grounds (e.g., no attorney–client, attorney work product or joint work

product privileges in Japan; pre-existing documents are not protected in Portugal; limited recognition of privilege in Germany; and extensive legal advice, litigation and common interest privilege in the UK and Norway), with the exception that some jurisdictions have left open the possibility of the privilege being preserved for otherwise privileged materials submitted to the antitrust authorities in cartel investigations. Interestingly, Portugal, which expressly recognises legal privilege for both external and in-house counsel, nonetheless provides for broad access to documents by the Portuguese Competition Authority. Some jurisdictions view settlement as a private matter (e.g., France, Japan and the Netherlands); others view it as subject to judicial intervention (e.g., Israel and Switzerland). The culture in some jurisdictions, such as Germany, so strongly favours settlement that judges will require parties to attend hearings, and even propose settlement terms. In Canada, the law has imposed consequences for failure to accept a reasonable offer to settle and, in some jurisdictions, a pretrial settlement conference is mandatory.

As suggested above, private antitrust litigation is largely a work in progress in many parts of the world. Change occurs slowly in some jurisdictions, but clearly the direction is favourable to the recognition that private antitrust enforcement has a role to play. Many of the issues raised in this book, such as the pass-on defence and the standing of indirect purchasers, remain unresolved by the courts in many countries and our authors have provided their views regarding how these issues are likely to be clarified. Also unresolved in some jurisdictions is the availability of information obtained by the competition authorities during a cartel investigation, both from a leniency recipient and a party convicted of the offence. Other issues, such as privilege, are subject to change both through proposed legislative changes as well as court determinations. The one constant across almost all jurisdictions is the upward trend in cartel enforcement activity, which is likely to be a continuous source for private litigation in the future.

Ilene Knable Gotts

Wachtell, Lipton, Rosen & Katz

New York

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Chapter 22

SPAIN

Alfonso Gutiérrez and Tomás Arranz¹

I OVERVIEW OF RECENT PRIVATE ANTITRUST LITIGATION ACTIVITY

In the past 12 months, antitrust litigation has dealt with contractual disputes in which parties invoke EU or Spanish competition rules to request a declaration from the courts invalidating the restrictive contractual clause and certain stand-alone claims in relation to alleged abuses of dominant position. Follow-on cases still remain exceptional.

In January 2016, the Provincial Appeals Court of Murcia² overturned a previous judgment of the Commercial Court that had confirmed that an electricity distributor (Iberdrola Distribución) abused its dominant position. The abuse consisted of the refusal or delay to reduce the power capacity contracted by customers. The service provided by the claimant (ERLE) to its customers consisted of analysing the effective consumption of electricity in order to adapt the capacity contracted with the electricity provider, which resulted in a reduction of costs for the customer. In particular, it claimed that Iberdrola Distribución delayed the effectiveness of the reduction of power capacities and that this caused harm. ERLE requested compensation for the damages suffered of more than €500,000 due to the loss of earnings.

The Commercial Court considered that Iberdrola Distribución abused its dominant position and ruled that it had to make effective quickly the requests for capacity reductions. Damages, however, were not awarded to ERLE since the Commercial Court found the claim time-barred. In contrast, the Provincial Appeals Court of Murcia found that the Commercial Court had not proven that Iberdrola Distribución had a dominant position in the region of Murcia. The existence of a dominant position was based on a decision of the former

1 Alfonso Gutiérrez is a partner and Tomás Arranz is a senior associate at Uría Menéndez Abogados, SLP.

2 See judgment of the Provincial Court of Murcia, of 8 January 2016, in *ERLE v. Iberdrola Distribución Eléctrica*.

Spanish Competition Authority, which referred to the wholesale market for electricity, while the conduct that allegedly caused harm occurred in the retail market. The Provincial Appeals Court of Murcia criticised the Commercial Court for failing to identify the relevant market or obtain evidence of the position of Iberdrola Distribución. In addition, the Court reminded that the abuse has to be sufficiently evidenced and that the burden of proof is on the claimant.

The Provincial Appeals Court of Madrid also determined that the obligation to establish the existence of a dominant position rests with the claimant in its judgment in *EAPC v. Jansen-Cilag S.A.*³ This judgment relates to the claim filed by an association of wholesale distributors of pharmaceutical products against a major laboratory that decided (1) to significantly reduce the number of distributors in Spain and (2) to automatically replace its ordinary free prices for regulated prices when products subsidised by the national healthcare system were sold to pharmacies and dispensed in Spain. The claimant considered that such conduct was incompatible with Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU).

The Court first stated that the claimant was not able to evidence the existence of a dominant position. It is not sufficient to invoke the existence of patents and other industrial property rights; rather the claimant should have analysed whether other products could be used for the same applications. In addition, the reduction in the number of distributors was not considered by the Court as an abuse of the hypothetical dominant position since it was necessary and proportionate. The laboratory was able to prove that such reorganisation was based on objective and rational reasons and was recommended by a consultancy firm.

In relation to the pricing mechanism, the Court clarified that the laboratory is free to determine the pricing of its products and that the fact that the price of the products subsidised by the national healthcare system is determined by the authorities should be considered as an exception to the general rule. Therefore, the laboratory cannot be obliged to offer its products at such regulated price when they are not subsidised by the healthcare system or they are intended to be sold outside the national territory.

During the past 12 months, the Spanish Supreme Court has also ruled on the claims filed by several petrol stations alleging the contracts with their suppliers (oil companies) to be null and void mainly because of the duration of their exclusivity clauses (generally, between 25 and 30 years). In all cases,⁴ the Supreme Court considered that the contractual clauses fell within the category of agreements of minor importance and thus did not appreciably restrict competition under Article 101 TFEU. Despite the fact the market shares of the parties were below the thresholds established by the European Commission in its De Minimis Notice, the Supreme Court, following a preliminary ruling of the European Court of Justice, also analysed the duration of the agreements based on the economic context and the market practice. Since the duration of the exclusivity clauses was in line with market standards, the Supreme Court considered that Article 101 TFEU was not applicable.

As to legislative changes, the Ministry of Justice published the draft Implementation Act of Directive 2014/104/EU on certain rules governing actions for damages under national

3 See judgment of the Provincial Appeals Court of Madrid, of 7 December 2015, in *EAPC v. Jansen-Cilag, S.A.*

4 See judgments of the Supreme Court, of 10 October 2015, in *Pozuelo 4 v. Galp Energía*, of 16 December 2015, in *Lubricantes y Carburantes Galaicos v. Petrogal*, and, of 17 December 2015, in *Estació de Servei Indústria v. Total*.

law for infringements of the competition law provisions of the Member States and of the European Union (the Directive on antitrust damages actions) in January 2016. However, the draft has not been confirmed by the Parliament, which was mostly inactive during 2016 due to the lack of a government and the need to repeat legislative elections.

The draft Implementation Act includes a new Title VI to the Spanish Competition Act and a new Section within Chapter V of Title I of the Spanish Civil Procedure Law. The main changes introduced by the draft Implementation Act to make damages litigation more attractive consist of (1) increasing the limitation period from one to five years; (2) the presumption of harm in cartel cases both to direct and indirect purchasers; (3) Spanish courts being bound by the decisions of the national competition authorities of any EU Member State; (4) parental liability being extended to damages litigation; and (5) the rules on damages litigations also becoming applicable to acts of unfair competition if they have an effect on public interest.

II GENERAL INTRODUCTION TO THE LEGISLATIVE FRAMEWORK FOR PRIVATE ANTITRUST ENFORCEMENT

i Jurisdiction

Commercial courts are specialised civil courts that are directly entrusted with the application of competition rules, both national⁵ and EU.⁶ Therefore direct antitrust claims (whether or not seeking damages), under which a plaintiff seeks a declaration that a contractual clause or a commercial conduct is null for being contrary to competition rules, should be filed before these courts.

The situation may be different for indirect antitrust claims, when a defendant invokes competition rules to oppose a plaintiff's request (e.g., honouring of a contractual obligation). In this scenario, the competent court will typically be an ordinary civil court rather than a commercial court. Practice by the judiciary shows that the ordinary civil courts tend not to reject these indirect antitrust claims (due to a possible lack of jurisdiction), but rather take into account the relevant competition law for ruling on the case.⁷

Judicial procedure also supports follow-on actions being lodged before the ordinary civil courts, since they are limited to seeking damages (and do not extend to the interpretation and application of competition rules), and are therefore not distinct from any other civil compensatory claim.⁸

5 As per the first additional provision of the Spanish Competition Act.

6 As per Article 86-ter 2(f) of the Judiciary Act.

7 An important exception applies: ordinary civil courts must reject the defendant's antitrust argument when this amounts to a genuine counterclaim or *reconvencción* (i.e., a separate claim lodged against the original plaintiff). According to Article 406 of the Civil Procedure Act, a civil court may not accept a counterclaim when it lacks jurisdiction on the main claim. In such a case, the counterclaim amounts to a direct antitrust claim and should be filed with a commercial court.

8 Nonetheless, commercial courts remain fully competent to hear follow-on cases. See judgment of 20 January 2011 by Commercial Court No. 2 of Barcelona in *Céntrica v. Endesa Distribución Eléctrica*.

ii Legal basis

Direct antitrust claims may be based upon EU law⁹ if trade between EU Member States is affected by the agreement or practice, or upon Spanish competition law.¹⁰ Invalidation of anticompetitive agreements or conduct may be based on the competition rules themselves (i.e., Article 101.2 TFEU or Article 1.2 of the Spanish Competition Act) or on the Spanish Civil Code (Article 6.3). Regarding the economic consequences of an antitrust breach, two scenarios may be differentiated:

- a* In cases of contracts contravening competition rules – and hence being null and void – parties should reciprocally restore their economic contributions under Article 1303 of the Civil Code, with the important limitation contained in Article 1306 (*turpis causa* and prohibition of unjust enrichment).
- b* Article 1902 of the Civil Code is the general legal basis for claiming damages under Spanish law (‘any person who by action or omission causes damage to another by fault or negligence is obliged to repair the damage caused’) and is generally invoked by claiming compensatory damages caused by an antitrust infringement, either as a follow-on action or otherwise. However, specific provisions relating to damages caused by antitrust infringements are expected to be introduced in the Spanish Competition Act by the Implementation Act of the Directive on antitrust damages actions.

Finally, a violation of the antitrust rules could in certain circumstances be regarded as an unfair commercial practice caught by Article 15 of the Unfair Competition Act and in such a case, Article 18 thereof provides an autonomous legal basis for claiming damages before civil courts. The new provisions to be introduced by the Implementation Act of the Directive on antitrust damages actions will also apply to unfair competition acts if they affect public interest.

iii Limitation periods

A claim for invalidation of a contract (e.g., for breach of antitrust rules) is limited to four years under Article 1301 of the Civil Code. Claims for damages are limited to one year (Civil Code, Article 1968) from the day the plaintiff was aware of the damage. However, this limitation period will be extended to five years according to the Directive on antitrust damages actions. Under well-settled case law, in a case of damage caused by continuous or successive illegal acts, the limitation period only begins when the harm is definitely caused. In follow-on actions, the date of the decision by the Competition Authority declaring the antitrust infringement does not normally coincide with the moment in which the plaintiff was aware of the harm. The limitation period is interrupted by any claim (judicial or extrajudicial) made by the harmed person (Civil Code, Article 1973).

9 Articles 101 and 102 TFEU.

10 Articles 1 and 2 of the Spanish Competition Act.

III EXTRATERRITORIALITY

No special rules exist regarding extraterritoriality. Spanish competition rules apply to acts or conducts that have as their object, produce or may produce the effect of prevention, restriction or distortion of competition in all or part of the Spanish national market; it is immaterial whether the author of the conduct is foreign or not.

Under EU Council Regulation 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, however, persons domiciled in an EU Member State must be sued in the courts of that Member State. This means that a party residing in an EU Member State that breaches Spanish competition rules and causes damages in Spain should not be sued in the Spanish courts, but in the courts of its state of residence (however, certain exceptions may apply). The reverse also holds true: the Spanish civil courts may accept a claim against a person domiciled in Spain, even if the damage has been caused in another Member State. Similar rules apply under the Lugano Convention as to the relations between EU Member States and the countries of the European Free Trade Association.

IV STANDING

Under Spanish tort law, standing to bring a damages claim lies with the party that has suffered the damage or, in the case of consumers, also with consumers' associations that are mandated to protect their interests. If one party contributing to any damage has compensated the victim in full, it has standing to start proceedings against the other contributing parties to recover the part of the damages that has been paid on their behalf.

However, the Directive on antitrust damages actions and the draft Implementation Act state that immunity recipients are jointly and severally liable to their direct or indirect purchasers or providers and to other injured parties only where full compensation cannot be obtained from the other undertakings that were involved in the same infringement.

Regarding standing as a defendant, actions for damages should be brought against the individual or company participating in the damage. Indirect purchasers that have suffered damages as a result of anticompetitive behaviour (such as a cartel in an upstream market) are also entitled to claim damages. There is always a possibility that in these cases the plaintiff may have to jointly sue both the seller and the seller's supplier.

V THE PROCESS OF DISCOVERY

Discovery in Spain is rather limited and is generally only available to the parties once judicial proceedings have commenced. The Civil Procedure Law does not include any mechanism for pretrial discovery;¹¹ however, the draft Implementation Act of the Directive on antitrust damages actions establishes that disclosure requests may also take place before the initiation of proceedings.

11 Although the Civil Procedure Law provides for certain mechanisms that can be used by the future plaintiff to obtain information from the defendant, or even secure the future production of evidence, these mechanisms would have a very limited application in competition law claims. Under Article 256 of the Civil Procedure Law a future plaintiff may

Discovery may be mainly achieved through Article 328 of the Civil Procedure Law, which provides that a party to the proceedings may request that the other party submit to the court documents that are not (and cannot be) available to it (such as the defendant's internal documents) and are related to the object of the proceedings and of evidentiary importance. The draft Implementation Act of the Directive on antitrust damages actions also establishes several provisions to make it easier for claimants to access evidence.

These petitions for disclosure normally affect only the parties to the proceedings, but the court may also require a third party to produce documentary evidence if it is deemed essential for the final decision.¹² Unjustified failure to produce the evidence requested will lead the court to make its decision on the basis of the evidence available, including possible non-authenticated copies or a description of the contents of the requested document, submitted by the party interested in the disclosure. In these cases, the court is also empowered to issue a formal request to the party in default if the circumstances dictate.

Under this instrument, the court may order one party to submit documents related to administrative proceedings, including leniency applications.¹³ However, the Implementation of the Directive on antitrust damages actions is likely to entail certain amendments in relation to the access to leniency documents. In particular, according to the draft Implementation Act, national courts cannot at any time order a party or a third party to disclose leniency statements or settlement submissions for the purposes of actions for damages.

The plaintiff may also try to obtain documents under Article 328 of the Civil Procedure Law by seeking interim protection from the court (even before submitting the claim). However, the approval of these measures by the courts requires the plaintiff to show that the arguments for the potential claim are, *prima facie*, well founded, and that there is some urgency in the need to obtain the documents. The courts will normally refuse to grant interim protection aimed at allowing the plaintiff to have access to the information necessary for preparing the substantive part of its claim.

ask the court to order a number of measures aimed at obtaining information that is necessary to prepare the claim. However, the law establishes very limited types of information that can be obtained (basically data on the legal standing and capacity of the defendant, production of the elements on which the procedure is going to decide, production of certain documents such as wills, annual accounts, insurance policies, medical records or IP rights).

Article 297 of the Civil Procedure Law also foresees measures for securing the future production of evidence. This instrument could in theory be helpful to identify documents that can be part of the claim and whose production can be requested under Article 328 of the Civil Procedure Law. However, and from a practical perspective, these measures will usually not entail the production of documents for preparing the claim.

12 See Article 330 of the Civil Procedure Law.

13 The limits imposed in Article 15-bis of the Civil Procedure Law to the submission of leniency documents only affect the competition authorities, and not the private parties that prepared and submitted those documents (see Section XI, *infra*).

VI USE OF EXPERTS

The courts have no discretion on granting damages: under Spanish tort law, compensation in a damages case will only cover the damages that the plaintiff is able to prove in court. For this reason, expert reports quantifying the economic value of the damages are particularly important, as shown by precedents.¹⁴

Expert reports are generally permitted before civil courts under Article 299 of the Civil Procedure Law. In a claim for damages (either via direct antitrust claims or follow-on actions), the plaintiff must produce a written expert report and attach it to the claim (or to the response in the case of the defendant) in which the expert provides a reasonable and founded hypothesis. The plaintiff may also ask the court to appoint an independent expert under Article 335 of the Civil Procedure Law.

Article 25(c) of the Competition Act empowers the Spanish Competition Authority to assist courts in determining the basis of the indemnification due to the harmed party.

VII CLASS ACTIONS

The Civil Procedure Law states that there are different ways in which several parties may submit a collective action.

The simplest collective action would be the consolidation of the claims of different plaintiffs, provided that there is a link between all the actions due to the same object or the same petition.¹⁵ To this effect, the court would presume that such link exists when the actions are based on the same facts.

Moreover, although there are no class actions as such under Spanish law, Article 11 of the Civil Procedure Law includes some provisions relating to collective legal standing in cases involving only the defence of the interests of ‘consumers and final users’.¹⁶ Consumers’ associations can 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.¹⁷ When a consumers’ association initiates a collective action under Paragraphs (2) and (3) of Article 11, the admission of the claim will be made public.¹⁸

14 See judgment of the Commercial Court No. 12 of Madrid in *Musaat v. Asefa et al. op cit.*, judgment of the Supreme Court of 20 March 2013 in *Ms. Juana v. Endesa*, the Supreme Court judgment of 30 November 2012 in *Proubal v. Repsol*, and judgment of 20 January 2011 of Commercial Court No. 2 of Barcelona in *Céntrica v. Endesa Distribución*, which illustrate the importance of the expert reports.

15 See Articles 12 and 72 of the Civil Procedure Law.

16 To this effect, the definition of ‘consumers and final users’ is broad, including any individual or company that acquires, employs or enjoys, as final user, moveable and immoveable goods, products, services, activities or functions that are manufactured, provided, supplied or delivered by any private or public entity.

17 Article 11(1) of the Civil Procedure Law.

18 Article 15 of the Civil Procedure Law expressly foresees the publication of the admission of the claim in the media.

Collective actions in defence of the interest of consumers and end-users can be of two types, depending on the degree of certainty regarding 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, then the *locus standi* for defending the interests of that group would fall with consumers' associations and the groups of affected consumers.¹⁹ Here, consumers or users whose interests may be affected must be informed by the plaintiff so that all potentially affected consumers may intervene in the civil proceedings at any time (opt-in clause).

Second, if anticompetitive behaviour damages the interests of a group of consumers or users that cannot be easily identified, then the only entities with the capacity to represent those interests in court would be the consumers' associations that are 'widely representative'.²⁰ For this purpose, the courts will acknowledge that a consumer association is 'widely representative' if it is part of the Consumers and Users Council.²¹ Here, publication would be considered sufficient for all the interested consumers to identify themselves. The law provides a two-month term after which the proceedings will resume. Affected consumers or users who do not identify themselves before the court within that term will not be able to join the action, notwithstanding the possibility of benefiting from the final outcome of the case. In such a case, the judgment will be binding on all affected consumers and users, not only on those who have appeared in the proceedings.

VIII CALCULATING DAMAGES

Spanish tort law has a purely compensatory nature. Any party causing harm to another party (material or emotional) must redress the affected party so as to restore the situation to what it was prior to causing the harm.²² Therefore, damages awarded by the Spanish courts are monetary sums equivalent to the harm caused to the plaintiff. Other kinds of damages, such as punitive or exemplary damages, are alien to the Spanish legal system.²³

The Spanish courts have acknowledged the possibility of claiming two kinds of damages: economic or material damages, including all the damages affecting the assets and estate of a person or company, and non-economic damages, including damages that affect the emotional well-being of a person.

Material damages are calculated as the financial or economic equivalent of the loss caused to the plaintiff. In this regard, the Spanish courts require the damage to be real and certain.²⁴ Following the provision for contractual damages of Article 1106 of the Civil Code, and in line with the idea of complete compensation, case law has differentiated between

19 Article 11(2) of the Civil Procedure Law.

20 Article 11(3) of the Civil Procedure Law.

21 See Article 24 of the Royal Legislative-Decree 1/2007 of 16 November 2007.

22 This rule applies even in the case of damages arising from criminal offences (civil liability *ex delicto*).

23 Compensable damage must be certain (not merely potential or hypothetical), although it can occur in the future.

24 See, for instance, judgments of the Supreme Court of 16 November 2009 and of 25 February 2009.

two kinds of material damages:²⁵ *damnum emergens* (i.e., the cost of repairing the damage, including not only the damage itself but all the expenses reasonably necessary for such reparation) and *lucrum cessans* (i.e., the loss of profit resulting from the defendant's conduct). In both cases, the courts only grant damages under either of the two categories if the harm to the plaintiff's interests is certain and can be demonstrated. In this regard, actual damage is considerably easier to prove than the loss of profit. The Spanish Supreme Court has confirmed that, given the difficulty of establishing counterfactual scenarios, judges have great flexibility in calculating damages (mainly as to loss of profits).²⁶

Non-economic damages are more difficult to measure and value and, therefore, are more difficult to redress. Although in principle an antitrust offence would only entail material damages, moral damages cannot be excluded. Thus, any psychological stress caused by anticompetitive conduct or harm to the plaintiff's reputation or good name may be included in the claim.

In terms of legal fees and costs, the general principle under Spanish law is that litigation costs are paid by the losing party, unless the court finds that the case raises serious legal or factual doubts in view of the circumstances and the case law.²⁷ If the claim is partially rejected, each party will bear its own costs and the common costs will be shared equally. In addition, there is a limit to the costs that the losing party must bear: one-third of the value of the action.²⁸ These limits do not apply if the court finds that the claimant (or the counterclaimant, as appropriate) has acted recklessly.

IX PASS-ON DEFENCES

In principle, Spanish tort law does not contain an express provision regarding the possibility of a defendant arguing that the damages allegedly suffered by the plaintiff have been transferred to a third party. This situation is especially relevant in competition law cases where a distributor sues its supplier for damages and the supplier may reply that no damages have been suffered by the plaintiff insofar as they have been passed on to the plaintiff's customers.

Although this defence has only been discussed by Spanish courts in a few cases,²⁹ it seems that they should take it into account in examining a defendant's position. The Spanish Supreme Court definitely accepted the application of passing-on defences in its judgment of 7 November 2013 in *Nestlé España et al. v. Ebro Puleva, SA*. In this case the burden of proof of the passing on rested with the defendant, which is in line with Article 13 of the Directive on antitrust damages actions.

Spanish tort law provides that compensation must be equivalent to the damages effectively suffered by the claimant. It follows that damages subject to compensation must be reduced with the profit or advantage that the harmed person has gained through the

25 See, for instance, judgment of the Supreme Court of 3 October 1997.

26 See judgment of the Supreme Court of 25 February 2014 in *Estació de Servei Cornellà/Cepsa*.

27 See Article 394 of the Civil Procedure Law.

28 See Article 394(3) of the Civil Procedure Law.

29 See judgment of the Supreme Court in *Nestlé España et al. v. Ebro Puleva, SA op cit.*, judgment of 6 November 2012 of the Supreme Court in *Canals i Fills SL y Zero Set SA v. Petrocat*, judgment of 8 June 2012 by the Supreme Court in *Acor v. Nestlé et al.*, judgment of 20 February 2009 by Civil Court No. 11 of Valladolid in *Gullón et al. v. Acor*.

actions causing the harm (*compensatio lucri cum damno*).³⁰ However, this rule would only apply where (1) the claimant's profit is real and quantifiable and (2) a causal relationship exists between the behaviour that caused the damage and the claimant's profit.

The civil courts have seldom acknowledged the existence of these two requirements, particularly the causal relationship. It follows that, although some practical difficulties derive from the causality link requirement, a defendant in a cartel case could successfully argue before a civil court that the plaintiff has not suffered damages (or that such damages are of a lower amount) insofar as it has been able to transfer the alleged damages (or a part of them) to a third party, provided that it produces evidence to substantiate this fact.³¹ In fact, a successful passing-on defence requires the defendant to prove that the claimant has not merely been able to transfer to a third party the overcharge, but that the complete economic detriment has been passed on.

In any case, the draft Implementation Act of the Directive on antitrust damages actions includes certain amendments as to ensure that the defendant in an action for damages can invoke a passing-on defence.

X FOLLOW-ON LITIGATION

Follow-up litigation was, until recently, the only way of seeking damages in antitrust matters in Spain. The old Spanish Competition Act of 1989 stated that parties harmed by antitrust offences could only seek compensation in court for damages caused once an administrative decision of the Competition Authority declaring the breach had been adopted and become final (i.e., not appealed against or confirmed by judicial review). The current 2007 Competition Act has removed this condition, and harmed persons may access the courts directly to claim for compensation of damages caused by anticompetitive conduct, without the need to wait for a prior administrative decision.

Certainly, follow-on claims remain possible;³² however, claimants are advised to take into account the one-year limitation period for filing the compensation claim that – as previously discussed – does not necessarily run from the date on which the administrative decision is taken. In fact, in a recent non-reported case, a follow-on action was declared to be time-barred by an ordinary civil court for this reason.

Currently, decisions adopted by the Spanish Competition Authority have no binding effects on national courts. However, as already indicated, the draft Implementation Act of the Directive on antitrust damages actions establishes that an infringement found by a final decision of a national competition authority of any EU Member State is deemed to be irrefutably established for the purposes of actions for damages (either under Article 101 or 102 TFEU or under national competition law). Decisions of the European Commission are binding to national courts according to the provisions of Regulation (EC) No. 1/2003.

30 See judgments of the Supreme Court of 8 May 2008 and of 15 December 1981.

31 See judgment of the Audience of Madrid of 3 October 2011 (*Nestlé España et al. v. Ebro Puleva, SA*).

32 See judgments of 2 January 2012 by Commercial No. 4 of Madrid in *Céntrica v. Unión Fenosa Distribución* and 20 January 2011 by Commercial Court No. 2 of Barcelona in *Céntrica v. Endesa Distribución Eléctrica, op. cit.*

XI PRIVILEGES

The Spanish Constitutional Court has generally recognised the obligation of lawyers to observe professional confidentiality, and therefore they cannot be forced to report advice given to a client or other information provided by the client for the purposes of obtaining such legal advice. The Spanish Competition Authority has further recognised the other side of the lawyer's confidentiality obligation, which is the client's right not to disclose any information submitted to an attorney in a competition case in order to seek legal advice. However, it is unclear whether this would be also accepted in private litigation.

As a general rule, all documents contained in civil proceedings are fully accessible to the parties. The only reason for the courts to restrict access to information is if it is deemed necessary for the protection of public policy, national security or protection of any other rights and liberties.³³

A specific set of problems arises in follow-on cases, which presupposes a previous administrative file with the Competition Authority, typically containing documents (including leniency applications) that will be relevant to the damages claim. Nonetheless, the use of and access by parties to private litigation to such documents may be problematic for two reasons.

First, Article 43 of the Competition Law imposes a stern duty of secrecy on any person taking part in the administrative proceedings in relation to the facts of which they have become aware of during these proceedings. In fact, the Spanish Competition Authority has publicly warned parties of the consequences of breaching this duty of secrecy in several cases.³⁴ Arguably, this duty of secrecy could be jeopardised if a party intervening in the previous administrative proceedings were to use information obtained from the Authority's file in order to ground a subsequent private claim.

Second, a number of documents included in the administrative file will typically be declared confidential by the Competition Authority with regard to some of the interested parties. This will be the case for documents containing business secrets of any of the affected parties and, in particular, for leniency applicants. However – and as already noted – the general rule in civil proceedings is full documentary access for the litigating parties, with confidentiality limitations playing only a marginal role.

In follow-on cases, the civil court may request a copy of the administrative file from the Competition Authority, which could become subject to the full access principle. Article 15-bis of the Civil Procedure Law is the legal basis that empowers the civil court (*ex officio* or at the request of any of the parties) to request the Competition Authority to submit the relevant information to the judicial proceedings.

A special rule applies to leniency documents contained in the administrative file: as an exception to the general principle, Article 15-bis of the Civil Procedure Law states that competition authorities cannot be forced by civil courts to submit information obtained in the course of a leniency application. However, this special rule does not enjoin the civil court – typically at the request of a damage seeker – from requiring defendants to submit information prepared and filed in the context of the leniency application with the Competition Authority.

³³ See Article 140(3) of the Civil Procedure Law.

³⁴ See Spanish Competition Authority press releases of 28 December 2008, 21 January 2009 and 16 July 2009.

This is a natural consequence of the strictly private and compensatory nature of Spanish tort law: persons or companies injured by anticompetitive behaviour should not in principle be deprived of their compensation rights simply because the company causing the damage chose to cooperate with the Competition Authority in order to limit its own administrative liability. However, as indicated in Section V, *supra*, the draft Implementation Act of the Directive on antitrust damages establishes that national courts cannot at any time order a party or a third party to disclose leniency statements or settlement submissions for the purposes of actions for damages.

XII SETTLEMENT PROCEDURES

Under Spanish law, settlement of a competition case is possible either before the Competition Authority (administrative proceedings) or before a court (judicial proceedings). These types of settlement serve different purposes, however, and are not interchangeable; while a settlement before a civil court refers to civil liability, a settlement before the Competition Authority only affects the administrative liability of the parties involved, with the result that a party to a settled antitrust administrative proceeding could subsequently be sued for damages before a civil court.³⁵ Another difference is that judicial settlements will normally occur by means of a direct agreement between the parties (the judge simply certifying that agreement), while for administrative settlement to occur the parties must reach an agreement with the Competition Authority (which ensures that the terms of the settlement duly protect the public interest).

The legal basis for civil settlements under Spanish law is Article 1809 of the Civil Code, which contemplates agreements between private parties in order to avoid or terminate litigation. A distinction can be made between judicial and extrajudicial settlement, depending on whether it is submitted to the court for approval. Moreover, the courts should verify whether an agreement between the parties is possible at the beginning of the trial (Civil Procedure Law, Article 415) and once the subject matter of the proceedings has been defined (Civil Procedure Law, Article 428). If a settlement is reached, the court will assess whether there is any legal obstacle to it and, if not, it will officially approve the settlement. Once approved by the court, the settlement has the same effect as a judgment.³⁶

Extrajudicial settlement would have the value of a private agreement between the parties, but it may have an effect in the early termination of the judicial proceedings in any of the following ways: (1) waiver by the plaintiff, in which the proceedings will be totally or partly terminated when the plaintiff waives all or part of its claim or rights; (2) acquiescence to the claim by the defendant, where the proceedings can be ended if the defendant totally or partly accepts the plaintiff's claim; or (3) formal abandonment of the proceedings by the

35 Nonetheless, administrative settlements with the Competition Authority are typically construed as avoiding a declaration or admission of a competition breach by any of the parties. This will, of course, render more difficult a subsequent follow-on judicial claim, since no illegal anticompetitive behaviour has been declared by the Competition Authority.

36 Article 19(1) of the Civil Procedure Law provides that the parties to civil proceedings are entitled to waive their rights, abandon the proceedings, accept the claim or settle the dispute, unless the law prohibits any of these actions or limits them for general interest reasons or for the benefit of a third party.

plaintiff.³⁷ If the parties exercise their rights to dispose of the object of the civil proceedings, any extrajudicial satisfaction of the claim between the parties may lead to the closing of the proceedings due to lack of object. According to Article 22 of the Spanish Civil Procedure Law, when the object of the proceedings is removed the parties must notify this circumstance to the court. If there is no objection in the form of a subsisting interest, the court closes the case.

XIII ARBITRATION

Article 2 of Law 60/2003 of 23 December 2003 on Arbitration provides that private arbitration is allowed in relation to disputes on issues under the free control of the parties. This means that public policy matters cannot be submitted to arbitration. Following the European Court of Justice judgment in the *Eco Swiss* case,³⁸ arbitrators may apply competition rules in determining the civil validity of a contract or a commercial conduct, but not declare a breach of the rules or extract any administrative liability. Spanish courts have admitted that arbitrators have the possibility of examining the civil consequences of an antitrust infringement as a subsidiary issue.³⁹

In addition, Article 5(b) of Law 3/2013 of 4 June 2013 on the creation of the National Markets and Competition Commission provides that the parties can submit a dispute involving competition issues to the Competition Authority under the provisions of the Arbitration Law. Submission to arbitration before the Competition Authority may be carried out by means of an agreement between the parties or by an individual declaration signed by one party following commitments or conditions established in a decision ending antitrust proceedings.⁴⁰ The arbitration award must be notified to the parties within three months of the start of the proceedings.

XIV INDEMNIFICATION AND CONTRIBUTION

The general rule in Spanish contract law is joint liability, while joint and several liability is the exception⁴¹ (see Articles 1137 and 1138 of the Civil Code). Regarding non-contractual liability, case law⁴² tends to consider that when a plurality of parties have commonly caused damage, such parties would be jointly and severally liable to the victim. In this regard, it is particularly important for supporting the existence of joint and several liabilities that the

37 The main difference with a waiver is that in the case of abandonment the plaintiff may restart the proceedings at a later stage.

38 See judgment of the Court of 1 June 1999, *Eco Swiss China Time Ltd v. Benetton International NV*, Case C-126/97 (Rec. 1999, pI-03055).

39 Judgment of the Court of Appeal of Madrid of 30 March 2007.

40 In this case, this declaration will not be effective until the other party has accepted the arbitration on the same conditions as the first party.

41 This means that the parties will respond jointly, but not severally, unless expressly agreed or imposed by a law.

42 In this regard, see judgments of the Spanish Supreme Court of 3 December 1998, 15 July 2000 and 27 June 2001.

particular intervention of each party in the damaging behaviour cannot be individualised. Thus, in principle, the Spanish courts may accept a claim of a party that has been injured by the action of a cartel against only one of its members.

However, and notwithstanding the common acceptance of this joint and several liability, the Spanish civil courts also recognise the theory of liability *in solidum*, under which a plurality of parties is jointly and severally liable but each individual party is assigned a liability share. Therefore, if the plaintiff has decided to bring actions against only one member of a cartel, the defendant may ask the court to bring the other members of the cartel to the proceedings in order to allocate the share of the responsibility that corresponds to each of them.⁴³

XV FUTURE DEVELOPMENTS AND OUTLOOK

The current 2007 Competition Act (which, *inter alia*, gave full competence to the civil courts for applying antitrust rules and introduced the leniency programme) is considered to be a sufficient legal framework for private enforcement to flourish. Indeed, a reasonably large number of cartel cases (some of them triggered by leniency applications) have been decided in the past year and will be decided in the near future; it is likely that follow-on actions will be initiated in many of them.

In any event, and in our view, some obstacles exist to stronger development of antitrust private enforcement in Spain:

- a* Uncertainty regarding the courts and proceedings: private competition enforcement is quite a recent innovation in the Spanish legal system and there are still a number of legal elements (such as the identification of the competent court in every case, the possibility of a suspension of the proceedings or the difficulties in providing adequate evidence) that are not quite clear yet and that may jeopardise, or at least delay, a more recurrent flow of cases.
- b* The absence of certain rules for antitrust damages: from a substantive perspective, Spanish general tort law has very stringent requirements that have been shaped by the case law of the Supreme Court for more than a century. These rules are based on a concept of civil liability rooted in fault and, therefore, they impose high standards of evidence for proving damages on plaintiffs. This is coupled with very limited pretrial discovery mechanisms, which appear to be particularly important in direct antitrust claims (as opposed to follow-on actions). Finally, uncertainties on the functioning of collective actions are capable of seriously undermining the effectiveness of damage compensation in large cartel cases.
- c* The cost of the proceedings in relation to the potential benefit: civil proceedings can be very expensive and lengthy in relation to the amount of the damages to be recovered, in particular in cases involving consumers. Therefore, the investment of financial resources and time required for these kinds of claims are a serious deterrent to potential plaintiffs.

The future of private antitrust enforcement largely depends on public awareness, in particular on the part of consumers. This is a task for the Competition Authority, which has among its

43 This procedure is expressly foreseen in Article 14 of the Civil Procedure Law.

functions an advocacy mission to create a 'competition culture' and encourage more intense and frequent application of antitrust rules. Increased participation of the Competition Authority as *amicus curiae* in private enforcement cases would undoubtedly be a relevant factor in this respect.

In addition, the Implementation Act of the Directive on antitrust damages is expected to introduce certain amendments in relation to the access to documents, limitation periods, binding effect of decisions or the admissibility of the passing-on defence, which may boost follow-on actions in the near future. Such amendments may significantly reduce the obstacles for a stronger private competition enforcement in Spain.

Appendix 1

ABOUT THE AUTHORS

ALFONSO GUTIÉRREZ

Uría Menéndez

Alfonso Gutiérrez is a lawyer in the Madrid office of Uría Menéndez. He joined the firm in 1999 and became a partner in January 2005. He is currently a member of the EU and competition law department of the firm.

His practice focuses on EU and Spanish competition law. He is regularly asked to advise on EU and Spanish mergers in many different sectors (such as banking, energy, telecommunications, aviation, industrial products and pharmaceuticals).

Mr Gutiérrez frequently acts in litigious matters concerning the individual or collective abuse of a dominant position and the conclusion of restrictive agreements between competitors or non-competitors. He also intervenes on a regular basis in proceedings for infringements of Articles 101 and 102 of the TFEU and Articles 1 and 2 of Spanish Law 15/2007 for the Defence of Competition. He also regularly represents clients before the European Commission in state aid cases.

He regularly lectures and writes on competition law matters and has repeatedly been nominated as a leading lawyer in competition and antitrust by specialist directories such as *Chambers Global*, *PLC Which Lawyer? Yearbook*, *Best Lawyers* and *The International Who's Who of Business Lawyers*.

TOMÁS ARRANZ

Uría Menéndez

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

He has been involved in a variety of national and international antitrust infringement cases before the Spanish and EU authorities, and is regularly asked to advise on mergers

(including the coordination of international multi-jurisdictional filings) and distribution agreements. He has also implemented antitrust compliance programmes and delivered training sessions for numerous clients.

Tomás represents companies from different sectors, such as banking and insurance, retail distribution, daily consumer goods, energy, waste management, automotive parts, building materials and pharmaceuticals. He is a regular lecturer in EU and competition law.

URÍA MENÉNDEZ ABOGADOS, SLP

Calle Príncipe de Vergara 187

Plaza de Rodrigo Uría

28002 Madrid

Spain

Tel: +34 91 586 04 66

Fax: +34 91 586 07 53

alfonso.gutierrez@uria.com

tomas.arranz@uria.com

www.uria.com