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# THE PRIVATE COMPETITION ENFORCEMENT REVIEW

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NINTH EDITION

EDITOR  
ILENE KNABLE GOTTS

LAW BUSINESS RESEARCH

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THE PRIVATE  
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ENFORCEMENT  
REVIEW

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# EDITOR'S PREFACE

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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 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 has 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 calculation. 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 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 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.

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 jurisdictions 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 have not been available except to organisations formed to represent consumer members; a new class action law will come into effect by 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; 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 to 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

February 2016

## Chapter 24

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# SPAIN

*Evelyne Ameye*<sup>1</sup>

### I OVERVIEW OF RECENT PRIVATE ANTITRUST LITIGATION ACTIVITY

In February 2015, a Special Commission was set up under the auspices of the Ministry of Justice in order to transpose Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union (Directive 2014/104/EU) into Spanish law by 27 December 2016.<sup>2</sup> At the time of writing, the draft Transposition Act of the Special Commission had not yet been published.

The transposition will trigger three legislative changes: (1) a Transposition Act that will contain private antitrust principles and definitions; (2) a new Chapter (VI) will be added to Competition Act 15/2007 of 3 July 2007 (CA) to transpose matters of substance; and (3) a new Chapter (V) will be added to Title I of Book II of Act 1/2000 of 7 January on Civil Procedure (CP) to amend civil procedure matters. We will briefly tackle the expected changes in each of the sections below (the expected 2014/104/EU transposition). We note that these changes are expected changes and that definitive legislative changes will only be known at the end of the full legislative process.

In the course of 2015, antitrust enforcement has mainly been driven by hybrid follow-on or stand-alone damages claims, namely cases that do not technically qualify as follow-on cases because the facts at issue are essentially different, but where the parties heavily rely upon previous decisions of the Spanish Competition Authority (NCA) – or,

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1 Evelyne Ameye is the founding partner of Evelyne Ameye Legal Services.

2 Sección Especial de la Comisión General de Codificación del Ministerio de Justicia, composed of law professors (A Bercovitz Rodríguez-Cano, R Alonso Soto, A Calvo Caravaca, I Díez-Picazo and F Gascón Inchausti), an official of the Ministry of Justice acting as secretary and an official of the Ministry of Economy.

less frequently, of the European Commission (EC) – which seemingly have played a decisive role in triggering their action. The vast majority of these cases are damages claims by petrol stations alleging that the exclusive supply agreements with their petrol suppliers are null and void due to anti-competitive clauses (essentially price resale maintenance and excessively long non-compete commitments). These petrol stations, moreover, commonly allege discrimination and invoke other petrol stations' purchase prices as a benchmark to quantify their damages. In these hybrid stand-alone cases, appeal courts do not consider themselves bound by previous NCA decisions, hammering on the distinction between the decision-making powers of judges and administrative bodies (NCA, EC)<sup>3</sup> in antitrust stand-alone cases that possibly entail retroactive contractual nullity. While the NCA may rule that contracts are null and void from a competition law perspective, it essentially rules as an economic watchdog, whereas judges duly apply the principles of legal certainty, good faith and conservation of contracts,<sup>4</sup> (e.g., they consider the often vexatious nature of such claims, such as when damages are claimed two years before the expiry of a 25-year supply contract after 23 years of due contractual implementation<sup>5</sup>).

After years of consistently rejecting damages to petrol stations – so far, petrol station cases represent around half of all private antitrust enforcement cases in Spain (see Section II, *infra*) – the Supreme Court's recent case law makes a U-turn by awarding damages in such hybrid cases. In doing so, it stresses that anti-competitive clauses in a single contract may negatively affect the validity of the entire contractual package between petrol stations and petrol providers and that damages therefore have to provide an economically well-balanced redress to both parties, not only taking into account the overcharge paid by the petrol station but also the investments made by the petrol supplier.<sup>6</sup>

The Supreme Court also clarifies that the causal link for successful private antitrust enforcement claims requires a conduct to be indispensable to cause damages (*conditio sine qua non*). If various conducts concur, the causal link of each of them needs to be equally assessed, taking into account the protection that the law aims to achieve and the reason why an infringement of the law renders a conduct illegal.<sup>7</sup> It also sets out that the defendant bears the full burden of proof to demonstrate that the claimant broke this causal link by failing to contain the damages<sup>8</sup> (see Section VIII, *infra*).

Finally, in the hybrid stand-alone or follow-on cases, the Supreme Court stresses the absence of an equivalent provision to Article 16.1 of Regulation (EC) 1/2003

3 Madrid Provincial Appeals Court Case 314/2014, *Hernández Tejada v. CEPSA*, 11 November 2014; Madrid Provincial Appeals Court Case 19/2015 *Eulalio v. Repsol*, 26 January 2015.

4 *Hernández Tejada v. CEPSA*; *Eulalio v. Repsol*; Madrid Provincial Appeals Court Case 116/2015 *Área de Servicios Francés v. Repsol*, 27 April 2015.

5 Madrid Provincial Appeals Court Case 106/2015 *Hugo & Proubal v. Repsol*, 10 April 2015.

6 Supreme Court Case 763/2014 *Repsol v. Ribeira Baixa and Ribera Alta*, 12 January 2015; Supreme Court Case 102/2015 *Repsol v. Vinholan*, 10 March 2015; Supreme Court Case 162/2015 *Servei Pineda y Olma v. Repsol*, 31 March 2015.

7 Supreme Court Case 260/2014 *Centrica(Energya) v. Endesa*, 4 June 2014.

8 Supreme Court Case 123/2015 *Hidrocarbónico v. Iberdrola*, 18 February 2015.

(rendering EC decisions binding on courts) regarding NCA decisions and reiterates the general principle that civil and commercial courts are not bound by NCA decisions, even though the latter constitute highly valued pieces of evidence.<sup>9</sup> In 2013, in the sugar cartel case,<sup>10</sup> the Supreme Court ruled that final NCA decisions (*res judicata*, once judicial review has been exhausted) were binding upon courts in follow-on actions as regards their facts. The appeal courts' 2015 case law merely highlights that this does not apply to stand-alone cases.<sup>11</sup>

## II GENERAL INTRODUCTION TO THE LEGISLATIVE FRAMEWORK FOR PRIVATE ANTITRUST ENFORCEMENT

To date, the majority of antitrust damages claims have been stand-alone actions, as opposed to follow-on actions (see Section X, *infra*). Claims have generally been unsuccessful, even though the success rate has been higher for the relatively small number of follow-on actions.

### i Competent courts

In Spain, damages claims can be brought before civil courts or commercial courts.<sup>12</sup> Their judgments are appealed before provincial appeal courts and, in last instance, before the Supreme Court.

Commercial courts are competent to directly apply both Spanish competition law (Article 1 and 2 CA) and EU competition law (when trade between EU Member States is affected, Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU)), irrespective of whether damages are claimed or not. Hence, stand-alone cases – where claimants ask judges to decide upon competition law infringements and to grant damages – are brought before commercial courts, whereas follow-on cases – where claimants solely seek damages on the basis of a prior NCA or EC decision – are generally brought before civil courts<sup>13</sup> (even though commercial courts are equally competent to hear follow-on cases<sup>14</sup>).

9 Supreme Court Case 420/2013 *EC Copecelt v. Cepsa*, 28 June 2013; *Repsol v. Ribeira Baixa and Ribera Alta*; *Eulalio v. Repsol*.

10 Supreme Court Case 651/2013 *Nestlé & Others v. Ebro Foods*, 7 November 2013.

11 *Hugo & Prourbal v. Repsol*; *Área de Servicio Francés v. Repsol*.

12 Since 2004, according to Article 86ter2(f) of Act 6/1985, of 1 July.

13 However, defendants sometimes invoke competition rules to oppose a plaintiff's request before a civil court, which will generally not refuse to hear such claim, unless it amounts to a genuine antitrust counterclaim (in the latter case, the civil court lacks jurisdiction (Article 406 CP) and a direct antitrust claim has to be filed before a commercial court).

14 E.g., Barcelona Commercial Court Nr. 2 Case 45/2010 *Centrica(Energya) v. Endesa*, 20 January 2011, appealed in first instance before the Barcelona Provincial Appeals Court and further appealed before the Supreme Court (Supreme Court Case 260/2014 *Centrica(Energya) v. Endesa*, 4 June 2014).

## ii Tort liability

Damages claims usually qualify as tort liability.<sup>15</sup>

Tort claims are governed by Article 1902 of the Civil Code (CC): ‘Any person who by action or omission causes damage to another by fault or negligence is obliged to repair the damage caused.’

If a claim exceptionally qualifies as contractual liability because of the contractual entanglement prevailing in the antitrust infringement, it is governed by Article 1303 CC et seq., setting a principle of reciprocal redress in case of nullity, with the exceptions of *turpis causa* and unjust enrichment.

## iii Time bar

There is a short, one-year tort law time bar (Article 1,968(2) CC) which starts as soon as the victim is fully aware of all damages.<sup>16</sup> As of that moment, victims only have a single year to prepare often complex damage quantifications. The starting point is the moment when the claimant becomes fully aware of all suffered damages, which does not necessarily coincide with the NCA or EC decision. There are precedents of follow-on claims where courts ruled that the one-year time bar started prior to the NCA decision. In the *Centrica v. Iberdrola* case,<sup>17</sup> in which Iberdrola was condemned for abusing its dominant position because it had denied essential information to allow Centrica to operate in the retail electricity market,<sup>18</sup> the Supreme Court ruled that the one-year time bar started on 2 June 2008, when Centrica accessed the information and became aware of its damages.

The time bar is neither suspended by NCA proceedings nor by ensuing judicial review. Importantly, the one-year period is interrupted by any judicial or extrajudicial claim by the claimant or acknowledgment by the defendant (Article 1,973 CC). This explains why victims considering damages claims frequently send out official correspondence to the infringing company in order to suspend the one-year time bar and keep potential damages claims alive.

According to the CA, NCA decisions need not be final (*res judicata*) for claimants to claim damages. In practice, however, claimants frequently wait until the decision is final before bringing damages claims.

If a claim exceptionally qualifies as contractual liability, Article 1,964 CC provides for a five-year time bar to bring a claim (recently decreased from 15 years to five years<sup>19</sup>).

15 See sugar cartel case, *Nestlé & Others v. Ebro Foods* and Supreme Court Case 344/2012 *Acor v. Galletas Gullón, SA, Mazapanes Donaire, SL, Nestlé España, SA, Zabor, SA, Galletas Coral, SA, Productos Alimenticios la Bella Easo, SA, Lacasa, SAU, Chocolates del Norte, SA and Bombonera Vallisoletana*, 8 June 2012.

16 See Supreme Court Case 528/2013 *Centrica(Energya) v. Iberdrola*, 4 September 2013.

17 *Centrica(Energya) v. Iberdrola*.

18 By NCA Decision of 2 April 2009.

19 Act 42/2015, of 5 October 2015, modifying Civil Procedural Act 1/2000, of 7 January.

iv **Legal fees and costs**

Except when litigation is vexatious, court and lawyers' fees in first instance are borne by the losing party (with a cap of one-third of total value of the action), unless the judge identifies legal or factual complexities (Article 394 CP). If a damages claim is only partially awarded, then each party bears its own costs and common costs are shared fifty-fifty.

v **Expected 2014/104/EU transposition**

The main change is the time bar, which will be increased to five years from the date on which the victim is aware of the conduct, the damages and the infringer. This time bar will be suspended during NCA proceedings and ensuing judicial review.

### III EXTRATERRITORIALITY

There are no special rules on extraterritoriality. Spanish antitrust law applies to conduct on Spanish territory, irrespective of the nationality of the infringer.

The determination of the competent court to hear private antitrust enforcement claims when the antitrust infringement involves parties of different nationalities in the EU is governed by the Brussels Regulation (BR).<sup>20</sup> Under this regulation, by default, any defendant may be sued in the court of his or her domicile (Article 4(1) BR). In addition, given the tortious character of antitrust damages, claims may also be brought in a jurisdiction where the harmful event occurred (Article 7(2) BR), that is, either the place of the event giving rise to the damage or the place where the damage occurred.<sup>21</sup> In the third instance, the court of closely connected claims is also competent (Article 8(1) BR): this allows for a potential consolidation of claims against members of a cartel in the domicile of one of the defendants (conferring jurisdiction under Article 4(1) BR). This defendant is then referred to as the 'anchor defendant' in legal jargon: he or she acts as the 'anchor' pulling the entire 'damages boat' before a single court. Under Article 8(1) BR, claimants can pull various defendants into the court of the 'anchor defendant' if claims are closely connected.

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20 Council Regulation (EC) 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 12, 16 January 2001, as amended by Regulation (EC) 1791/2006, Regulation (EC) 1103/2008 and Regulation (EC) 1215/2012 (applicable since 10 January 2015 except Articles 75 and 76, which have been applicable since 10 January 2014). Even though the Brussels Regulation is not directly applicable to Denmark, it has effectively been extended to Denmark by a separate EU-Denmark agreement in force since 1 July 2007. Furthermore, although Denmark did not participate in the reform process, it notified the European Commission in 2012 of its decision to implement Regulation (EU) 1215/2012.

21 ECJ Case 21/76, *Handelswerkerij GJ Bier BV v. Mines de Potasse d'Alsace SA*, 30 November 1976; ECJ Case 352/13, *Cartel Damage Claims (CDC) Hydrogen Peroxide SA v. Akzo Nobel NV and Others*, 21 May 2015.

In sum, Spanish claimants may claim damages against a non-Spanish, EU company breaching Spanish antitrust law before the court of that EU company's registered seat. Likewise, Spanish courts are competent to hear damages claims by non-Spanish, EU victims against antitrust infringers having their registered seat in Spain.

Additionally, the new version of the BR, which came into effect in 2015, harmonised the rules under which individuals, resident outside the EU, may be sued in EU courts.<sup>22</sup>

With regard to the expected 2014/104/EU transposition, extraterritoriality will not be tackled.

#### IV STANDING

Under Spanish tort law, a party who suffered damages has standing to claim damages. This can be a direct or indirect purchaser (see Section IX, *infra*).

In relation to the expected 2014/104/EU transposition, provisions on standing will be similar.

#### V THE PROCESS OF DISCOVERY

As a rule, pretrial discovery is not available under Spanish law. Discovery is only available during judicial proceedings.

Pretrial, future claimants can ask for some basic documents (e.g., information on legal standing, insurance policies, IP rights, etc.) under Article 256 CP. They can also request that certain measures be taken to preserve the future production of evidence under Article 297 CC. These pretrial rights are of a limited scope and only aimed at avoiding evidence no longer being available at a later stage.

Pending a trial, a party can ask the other party to disclose documents that refer to the object of the proceeding or the probative value of the evidence and are not readily available (Article 328 CP). The earliest possible moment for discovery is when interim proceedings are requested, assuming *prima facie* and *periculum in mora* tests are met. Pending a trial, a party can also request a third party to produce documentary evidence. Judges order such evidence to be produced by third parties when it is considered key for the ruling (Article 330 CP). Judges can also order public bodies to produce documents or issue certifications (Article 332 CP).

Importantly for antitrust matters, a party may be ordered by court to disclose documents relating to an NCA or EC decision. The general rule of full documentary access for litigating parties will apply. However, Article 15-bis CP prohibits the NCA or EC to disclose leniency statements.

In terms of the expected 2014/104/EU transposition, overall, discovery rules will be substantially modified. Moreover, special discovery rules will be introduced for competition issues, in a similar way as IP issues enjoy special discovery rules.

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22 Article 6 of Regulation (EU) 1215/2012.

Pretrial, at the time of filing or in the course of the proceedings, parties will be able to request the court to order disclosure of evidence by any other party, third parties or public authorities, to the extent that (1) the evidence is precisely and narrowly described, necessary, proportionate (considering the legitimate interests of all parties) and cannot possibly be obtained directly, and (2) the requesting party produces sufficient proof to justify its request. Any disclosure request will be notified to all parties, who will be heard, and a decision will be taken within five days. Necessary measures will be ordered to protect any confidential information. Disclosure costs will be borne by the requesting party. In case of failure to disclose, courts will be able to order the loss of claim, penalty payments and payment of legal costs.

Special antitrust discovery rules will establish that disclosure can be requested of:

- a* the identity and domicile of the infringers;
- b* the infringement;
- c* the volume of products and services involved;
- d* the identity and domicile of direct and indirect purchasers;
- e* price levels;
- f* the identity of the group of affected individuals or companies; and
- g* evidence of the NCA file after an NCA decision (not in the course of NCA proceedings), to the extent that it cannot be obtained from other parties or third parties, including:
  - information that was prepared specifically for the NCA proceedings;
  - information drawn up by the NCA and sent to the parties in the course of its proceedings; and
  - settlement submissions that have been withdrawn.

Parties will not be allowed to request the disclosure of leniency statements or settlement submissions.

## VI USE OF EXPERTS

Expert reports can be produced as evidence (Article 299 CP). Economic expert reports are key to quantifying damages. Independent experts may also be appointed by courts (Article 335 CP). The importance and value of expert reports has frequently been noted by the courts.<sup>23</sup>

According to the Supreme Court, a defendant needs to provide an alternative quantification of damages in order to question the accuracy of the claimant's expert report.<sup>24</sup>

With regard to the expected 2014/104/EU transposition, the use of expert reports will remain unaltered.

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23 *Centrica(Energy) v. Endesa*.

24 *Nestlé & Others v. Ebro Foods*.

## VII CLASS ACTIONS

Aside from the joinder or consolidation of individual claims,<sup>25</sup> associations or groups of claimants legally empowered to defend collective interests are allowed to litigate (Article 11 CP). If the victims of the antitrust infringement are directly affected and can easily be identified, claims may be brought by consumer associations, other legally authorised entities or by the affected group itself. If the victims of the antitrust infringement cannot easily be identified (e.g., their number is undetermined), only claims by legally authorised and recognised consumer associations are possible. In both cases, the law provides for notice or publication of the claim and an opt-in procedure to allow victims to join the collective claim (Article 15 CP).

Despite this framework enabling collective actions, the possibility has only been used once in private antitrust enforcement, namely in a case in which a consumer association – Asociación de Usuarios de Servicios Bancarios (AUSBANC) – started a collective action on behalf of all holders of ADSL lines in Spain for €458 million damages against Telefónica, following on from an EC decision fining Telefónica for price squeezing in the retail broadband services market. However, the case was withdrawn because AUSBANC was excluded from the registry of consumer associations and therefore lost its active legitimation to claim damages on behalf of consumers.<sup>26</sup>

As a noteworthy development in 2015, the main consumer association – Organización de Consumidores y Usuarios (OCU) – has created an online opt-in system available for claims following-on from the NCA's car dealer and manufacturer cartel decisions.<sup>27</sup>

The possibility of class actions will remain unchanged after the expected 2014/104/EU transposition.

## VIII CALCULATING DAMAGES

Claims can involve economic or material damages, on the one hand, and non-economic damages, on the other hand. Economic damages have to be real and certain (e.g., no punitive damages) and are calculated as the financial loss caused to the claimant (i.e., the actual damage (*damnum emergens*) and the loss of profit (*lucrum cessans*) plus interests). Non-economic damages include moral damages (e.g., harm to the claimant's reputation). Importantly, in all cases, damages are only awarded if they can be quantified and demonstrated. This is a burdensome task, in particular regarding the loss of profit and non-economic damages. Article 5.2(b) of Act 3/2013, of 4 June (the CNMC Act) empowers the NCA to assist courts in the quantification of damages. Article 15 of Regulation (EC) 1/2003 empowers the EC to assist courts.

25 Articles 12, 13 and 71 et seq. CP.

26 Appeals Court Case appeal nr. 582/2009 *Ausbanc v. Telefónica Móviles*, 31 October 2012.

27 [www.ocu.org/coches/coches/noticias/reclamacion-concesionarios](http://www.ocu.org/coches/coches/noticias/reclamacion-concesionarios).

## i Method

In the sugar cartel, the Supreme Court ruled that the difficulty in reproducing a counterfactual scenario should not preclude claimants from duly being awarded damages.<sup>28</sup> Rather, it suffices that the economic expert report provides a reasonable and technically well-founded hypothesis on the basis of contrasted and reliable data. In 2015, the Supreme Court ruled on the method to quantify damages in the petrol station cases. It determined that the nullity of a single clause in a petrol supply contract affects the validity of all intertwined contracts between the petrol station and the petrol supplier (supply contracts, property/land usufruct agreements and pledges, licensing agreements, machinery leases and sub-leases, etc.), and that damages have to restore an economic balance between both parties taking into account, on the one hand, the overcharge paid by the petrol station to the supplier as compared to the average supply price applicable in the station's region and, on the other hand, the fact that the petrol supplier had not yet recouped investments in the petrol station when the exclusive supply clause was declared void.<sup>29</sup>

## ii Mitigation

In the sugar cartel case, the Supreme Court held that it was entirely up to the defendant to prove that the claimant's negligent conduct (e.g., failure to contain damages) had actively contributed to the damages.<sup>30</sup> The Supreme Court reiterated this in the 2015 *Hidrocantábrico v. Iberdrola* case, when it confirmed the award of damages to Hidrocantábrico owing to Iberdrola's abusive failure to provide access to its electricity network, which compelled Hidrocantábrico to serve its clients through separate generators and hence triggered significant overcharge. The Supreme Court stressed that the burden of proof entirely lies with the defendant to demonstrate that the claimant's conduct had enhanced or worsened the damages.<sup>31</sup>

Following the expected 2014/104/EU transposition the law will introduce a presumption that cartels cause damages but will stress that the burden of proof to quantify damages lies with the claimant. When quantification is difficult to prove, courts will be entitled to rely upon estimates and to request, if necessary, the NCA's assistance.

## IX PASS-ON DEFENCES

Given the principle of unjust enrichment in civil law<sup>32</sup> and given that damages must be real and certain under Spanish tort law (see Section VIII, *supra*), passing on is taken into account. According to the Supreme Court's case law,<sup>33</sup> a defendant can successfully

28 *Nestlé & Others v. Ebro Foods*.

29 *Repsol v. Ribeira Baixa and Ribera Alta; Repsol v. Vinholan; Servei Pineda y Olma v. Repsol*.

30 *Nestlé & Others v. Ebro Foods*.

31 *Hidrocantábrico v. Iberdrola*.

32 Supreme Court Case 432/2010 *Don Octavio & Others v. Don Luis Pozas Osset & Others*, 29 July 2010.

33 *Nestlé & Others v. Ebro Foods*.

invoke a pass-on defence in a damages claim and adduce that claimants did not suffer damages insofar as they transferred them to third parties. Moreover, in cartel cases, direct purchasers do not only pass on the overcharge of the cartel price on their clients, but all economic damages (e.g., loss of business and competitiveness, commercial reputation, etc.).<sup>34</sup>

The burden of proof to demonstrate passing on lies with the defendant (Article 217 CP).

Importantly, the binding nature of an NCA decision in follow-on cases (see Section X, *infra*) only stretches to its facts and not to its legal findings (e.g., findings of passing on).<sup>35</sup>

The expected 2014/104/EU transposition will provide that the burden of proof to quantify passing-on defences lies with the defendant. Awarded damages will be limited to damages that have not been passed on.

## X FOLLOW-ON LITIGATION

Both follow-on actions and stand-alone actions for antitrust damages are permitted in Spain. Follow-on actions are linked to a prior NCA or EC infringement decision. Stand-alone actions are not linked to any prior infringement decision (i.e., claimants assume the full burden of proving a cartel or abuse together with the alleged loss). The key difference lies in the evidence. If victims have sufficient proof against the infringers, they will opt for a stand-alone action, as they will not only have to prove before the civil court that competition law was infringed, but also that they suffered loss as a result of that infringement. In follow-on actions, on the contrary, the infringement decision constitutes evidence of the competition law infringement and the action will focus on the loss deriving from it.

Even though there have been around 400 private antitrust damages actions to date in Spain, follow-on litigation has been scarce. The Supreme Court sugar cartel rulings are the landmark follow-on cases. They followed on from a 1999 NCA decision which found that sugar manufacturers had fixed sugar prices and shared the industrial sugar market in 1995 and 1996.<sup>36</sup>

In 2015, the Madrid Provincial Appeals Court clarified that damages claims only qualify as follow-on claims if (1) the conduct on which the claims are based is identical to the conduct dealt with by the NCA (i.e., identical parties in an identical antitrust infringement, identical in geographic scope, timing, etc.); and (2) damages can be demonstrated, as well as their causal link with the antitrust infringement.<sup>37</sup>

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34 Ibidem.

35 Ibidem.

36 34 *ibidem*.

37 *Área de Servicio Francés v. Repsol*.

### i Staying proceedings

An NCA decision need not be final for claimants to bring a follow-on suit for damages.<sup>38</sup> Claimants can initiate follow-on actions pending judicial review of NCA decisions; for example, in the property insurance cartel, a damages claim was brought before a commercial court even though the NCA decision had been appealed.<sup>39</sup> Yet in practice, victims usually wait until the NCA decision is final before bringing damages claims to avoid unnecessary costs. According to Article 434 CP, judges may suspend issuing their final ruling if there is a risk of conflicting decisions because an NCA or EC decision is under judicial review. Case law states that this suspension should not happen at the beginning of the case but just before reaching a final decision. Meanwhile, proceedings should follow their ordinary course of action and run in parallel.<sup>40</sup> Courts also enjoy a margin of discretion to decide whether to stay proceedings if a closely connected claim is pending before another EU court if there is a risk of conflicting judgments (Article 30 BR).

### ii Time bar

As set out in Section I, *supra*, the time bar and its starting point have been the main hurdles for follow-on actions to date because the one-year time bar does not necessarily start from the date of the NCA decision but when the claimant becomes fully aware of all damages.

### iii Binding nature of EC and NCA decisions

Whereas EC decisions are binding on national courts pursuant to Article 16(1) of Regulation (EC) 1/2003, there is no equivalent provision in Spanish law on the binding effect of final (*res judicata*) NCA decisions applying CA or TFEU competition rules. The Supreme Court expressly acknowledges this in its 2015 case law.<sup>41</sup> As a rule, NCA decisions constitute highly valued pieces of evidence but do not bind civil and commercial courts, even when the facts at issue are identical.<sup>42</sup>

38 The 2007 CA amended the former 1989 Competition Act to this end.

39 Madrid Commercial Court Case 88/2014 *Musaat v. Asefa/Caser/Scor* of 9 May 2014. However, the case was not a real follow-on case because the court was asked to rule upon facts that had not been ruled upon by the NCA. NCA decision S/0037/09 concerned a price-fixing cartel, whereas the court was asked to rule upon a collective boycott in the wake of the said cartel. The court considered this boycott as a separate infringement, distinct from the cartel.

40 Madrid Provincial Appeals Court Case 144/2009 *Ausbanc v. Telefónica*, 21 July 2009. This claim followed on from an EC decision against Telefónica due to the abuse of its dominant position through price squeezing, which was not final but had been appealed before EU courts.

41 *EC Copецelt v. Cepsa; Repsol v. Ribeira Baixa and Ribera Alta; Eulalio v. Repsol*.

42 See Calvo Caravaca A L and Suderow J, 'El Efecto Vinculante de las Resoluciones de las Autoridades Nacionales de Competencia en la Aplicación Privada del Derecho Anti-trust', *Cuadernos de Derecho Transnacional* (October 2015), Vol. 7 No. 2, p. 155.

However, in the sugar cartel case, the Supreme Court established that final (*res judicata*) NCA decisions bind courts in follow-on cases, but only as regards their factual account (as opposed to their legal assessment<sup>43</sup>) in follow-on cases.<sup>44</sup> The Madrid Provincial Appeals Court 2015 case law stresses that this applies to follow-on cases as opposed to stand-alone cases.<sup>45</sup>

As part of the expected 2014/104/EU transposition, the time bar for initiating claims will be expanded to five years as of when the claimant knows or can reasonably be expected to know of the antitrust infringement, the damages and the infringer. It shall not start before the antitrust infringement has ceased and will be suspended during NCA proceedings and ensuing judicial review. The finding of an antitrust infringement in final (*res judicata*) Spanish NCA decisions and court rulings will be irrefutably binding (*irrefutable*) upon courts in follow-on actions. The finding of an antitrust infringement in final (*res judicata*) NCA decisions and court rulings of other Member States will be binding as evidence (*vinculante*) upon courts in follow-on actions.

## XI PRIVILEGES

Despite the general rule of full documentary access (Article 140(3) CP), the Constitutional Court recognises that lawyers observe professional secrecy and should not disclose their legal advice. Moreover, the duty of secrecy imposed on parties to NCA proceedings (Article 43 CA) could be jeopardised if a party were to use information obtained from the NCA's file to substantiate a damages claim. In follow-on cases, the court can ask for a copy of the NCA file, to which the full access rule applies, but the NCA is under no obligation to produce leniency applications (Article 15 CP).

Rules on privilege will remain unaltered after the expected 2014/104/EU transposition.

## XII SETTLEMENT PROCEDURES

Article 1,809 CC allows private parties to settle disputes in order to avoid or terminate litigation, either in court (judicial settlement) or out of court (extrajudicial settlement). Courts check whether a settlement is possible at certain stages of the procedure.<sup>46</sup> When a settlement is reached and approved by court, it has the same effect as a judgment. Settlements reached out of court by parties have the effect of a private agreement between parties and trigger early termination of the judicial proceedings by means of waiver or abandonment of proceedings by the claimant or acquiescence by the defendant. If a settlement cancels the object of pending litigation, parties need to formally notify the court to allow the latter to close the case (Article 22 CP).

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43 By the NCA or upon judicial review.

44 *Nestlé & Others v. Ebro Foods; Acor v. Galletas Gullón & Others.*

45 *Hugo & Proubal v. Repsol; Área de Servicio Francés v. Repsol.*

46 Articles 415 and 428 CP.

After the expected 2014/104/EU transposition the time bar for bringing an action for damages will be suspended for the duration of any consensual dispute resolution process (for the parties involved in the process). The NCA may consider compensation paid as a result of a settlement and prior to its decision imposing a fine to be a mitigating factor.

### XIII ARBITRATION

Article 2 of the Arbitration Act 60/2003 of 23 December allows arbitration for private disputes of which parties can freely dispose, as opposed to public policy matters. The existence of public policy rules (e.g., competition law) does not impede claims to be freely disposed of by parties.<sup>47</sup> Arbitrators have to apply mandatory rules of EU or Spanish competition law.<sup>48</sup> If they fail to do so, parties may bring an action for annulment of the arbitral award before ordinary courts, which will mainly check whether the award is duly motivated and reasonable.<sup>49</sup> According to Article 5.1(b) of the CNMC Act, parties can submit disputes subject to arbitration to the NCA when they involve competition issues. The NCA's arbitral award will be of a private nature. The procedure is set out in Article 46 of Royal Decree 657/2013 of 30 August (the CNMC Functioning Decree) and either follows UNCITRAL or special NCA rules.

After the expected 2014/104/EU transposition the time bar for bringing an action for damages will be suspended for the duration of the arbitration process (for the parties involved in the process).

### XIV INDEMNIFICATION AND CONTRIBUTION

Articles 1,137 and 1,138 CC set joint liability as a general rule in case of a plurality of debtors, unless there is an express exception (e.g., an agreement or statute expressly foreseeing joint and several liability). Given that antitrust damages claims usually qualify as tort liability (see Section II, *supra*) and that the CC does not contain an express exception establishing joint and several liability for tort, the general rule applies (i.e., joint liability as opposed to joint and several liability).

Courts have nevertheless consistently interpreted the CC in a fashion that facilitates effective recovery by victims of damages caused by an illicit conduct. Following the Supreme Court's case law, tort liability is joint and several when it is not possible for a claimant to identify the liability level of each offender *ab initio*.<sup>50</sup> Based on this case law, courts will likely consider liability of co-cartelists to be joint and several, although there are no specific precedents to date.

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47 ECJ Case C-126/97 *Eco Swiss China Time v. Benetton*, 1 June 1999.

48 Madrid Provincial Appeals Court Case 147/2013, *Camimalaga v. Vehículos Industriales*, 18 October 2013.

49 Superior Court of Justice Case 2/2012, *Basque Region, France Telecom/Orange/Atlas v. Euskaltel*, 19 April 2012.

50 Supreme Court Case 646/2001 *Rosa&Julia v. ITT Ercos*, 27 June 2001.

By analogy, courts will likely apply the CC's contractual liability rules (Article 1,145 CC) to a plurality of co-cartelists: if a cartel member fully compensated a claimant, it will likely enjoy standing to start proceedings against its co-cartelists to proportionately recover paid damages (Article 14 CP).

The expected 2014/104/EU transposition will confirm that co-cartelists are jointly and severally liable (i.e., each of the cartel members will be bound to compensate for the harm in full and claimants will have the right to require full compensation from any of them). Exceptions are foreseen for small and medium-sized enterprises and immunity recipients.

## **XV FUTURE DEVELOPMENTS AND OUTLOOK**

To date, the lack of pretrial discovery and the one-year time bar linked to the victim's full awareness – not suspended by NCA proceedings or judicial review – have been the main hurdles for private antitrust enforcement actions in Spain.

By fundamentally modifying discovery rules and stretching the deadline to claim from one to five years – with a suspension during NCA proceedings and judicial review – the 2014/102/EU transposition will foster private antitrust enforcement in Spain, in particular follow-on actions, which so far have been lagging behind notwithstanding the high number of NCA infringement decisions and its considerable level of fines.

In addition, the Supreme Court's recent rulings in the hybrid stand-alone petrol station cases are likely to foster a new wave of stand-alone claims in that sector.

## Appendix 1

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Evelyne Ameye, LL.M. is the founding partner of Evelyne Ameye Legal Services, which she founded in 2014. She is a Spanish and EU competition expert, qualified at the Brussels and Madrid Bars. She worked at the European Commission, worked several years for well-known competition professor Jean-François Bellis in Van Bael & Bellis in Brussels and was soon hired by US law firm Mayer Brown. After working for many years for Mayer Brown in Brussels and Paris, she moved to Madrid, where she worked for Spanish law firm Gómez-Acebo & Pombo for 10 years before starting her own independent practice based in Madrid. She was ranked in *Chambers and Partners* in 2015 as a 'recognised figure on the Spanish market with experience in cartel cases and restrictive practices'. She lectures and publishes on antitrust law issues and acts as a non-governmental adviser to the Turkish Competition Authority.

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