The International Handbook on Private Enforcement of Competition Law

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Introduction

Private antitrust damages litigation has been rare in Spain thus far. However, recent developments on the legislative front, along with concerted efforts by the European and Spanish authorities, are expected to increase the number of private damages actions in years to come.

a. The 1989 Competition Act

Spain, led by the EU modernization effort,[2] has recently adopted legislation that facilitates claims for antitrust damages. The legislation includes Law 15/2007 (Competition Act), which was approved on July 3, 2007 and became law on September 1, 2007. The Competition Act abrogated Law 16/1989 (1989 Competition Act), which had been approved on July 17, 1989. The Competition Act brings Spanish competition law in line with EU competition law after the passing of Regulation 1/2003.[3]

The question of private antitrust damages, like the question of private litigation in general, may be approached from two perspectives, each determining the law applicable

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[2] It is worthwhile citing as key elements in this EU law driven push the case law of the European Court of Justice (ECJ), notably in the Judgments of the ECJ of September 20, 2001, *Courage v. Crehan*, case C–453/99 and of July 13, 2006, and *Manfredi v. Lloyd Adriatico Assicurazioni SpA*, case C–295/04; the Commission Green Paper on Damages actions for breach of the EC antitrust rules (SEC(2005)1732)/* COM(2005)0672 final. More recently, see also the White Paper on Damages Actions for Breach of the EC antitrust rules, COM(2008)165, April 2, 2008. Although not directly focused on antitrust damages claims, it is also worthwhile mentioning EC Regulation 1/2003, of December 16, 2002, on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, cited, and the regulatory package accompanying Regulation 1/2003. The direct effect of Articles 81(1), 81(2) and 82 EC Treaty has long been a well established principle (*e.g.*, Judgments of the ECJ of January 30, 1974, *BRT/SABAM*, case C–127/73 and of March 18, 1997, *Guérin Automobiles v. Commission*, case C–282/95 P). But the more recent decentralization in the application of Article 81(3) (previously the monopoly of the European Commission) has given an important push to the application of European competition law by national courts and the bringing of cases before them by private parties. Ultimately, this should doubtless lead to an increase in the number of antitrust damages cases brought before national courts and more effective handling by those courts. On December 1, 2009, the Treaty of Lisbon came into effect, amending the Treaty Establishing the European Community (EC Treaty) that is now called the Treaty on the Functioning of the European Union (TFEU). Therefore, all references to Articles 81 and 82 of the EC Treaty now reference Articles 101 and 102 TFEU.

[3] Regulation 1/2003, of December 16, 2002, on the implementation of the rules on competition laid down in Articles 81 and 82 of the EC Treaty, O.J. L 1, January 2003, pp. 1–25.

to the underlying conduct. First, there is business conduct that does not affect trade between Member States and is therefore governed exclusively by Spanish law. Second, there is conduct that does affect trade between Member States and is governed concurrently by both Spanish law and EC law (the Treaty of Rome[4] or EC Treaty, and derivative legislation).

Under the 1989 Competition Act, legal actions for damages arising out of violations could take place only after a final decision (i.e., a decision by the Competition Authority which, if it is appealed, is confirmed by the highest possible judicial authority available in the case), holding that a breach of the antitrust rules has occurred.[5] This requirement, however, only applied to conduct in violation of the 1989 Competition Act, and not to conduct which violated Article 81 or 82 of the EC Treaty. In other words, under the 1989 Competition Act, a final declaration of illegality by the highest available judicial authority in the case was necessary to initiate a private claim for antitrust damages, as long as the alleged violations occurred under Spanish law (i.e., the violation did not impact trade between Member States).

In practice, the above meant that stand-alone actions were not possible for infringements of the 1989 Competition Act.[6] Follow-on actions were available, but extremely difficult because administrative decisions by the Spanish Competition Authority (SCA) had to be reviewed by courts first. Given that court proceedings can take several years, particularly if judicial decisions in the first judicial instance are appealed, private actions for antitrust damages often had to wait for many years until the appeal system was exhausted (usually until the Supreme Court had made a decision). This helps explain the scarcity of judicial decisions adjudicating antitrust damages claims under the 1989 Competition Act.

Some scholars suggested that a proper interpretation of Article 13(2) of the 1989 Competition Act, considering its goal of protecting the right to a defence and effective redress (including effective compensation for damages) would weigh in favor of admitting private actions for antitrust damages prior to a final finding of illegality.[7] This interpretation, however, has been rejected by the courts. The scarce case law in the field of private antitrust damages under the 1989 Competition Act has clearly confirmed that an exhaustion of possible appeals available in court was a *conditio sine qua non* for a private damages action.

An example of this is the ruling in *Antena 3 v. National Professional Football League*.[8] The *Antena 3* case was a rare decision under the 1989 Competition Act. It awarded

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[4] Treaty establishing the European Community, OJ C329, 24 December 2002.

[5] Article 13(2), 1989 Competition Act.

[6] Stand-alone actions under Article 81 or 82 EC Treaty may in theory have been possible given that national courts had acknowledged already under the 1989 Competition Act the direct effect of those Community provisions. In practice, however, there are no reported stand-alone damages decisions for breach of Articles 81, 82 EC Treaty under the 1989 Competition Act.

[7] See e.g., R. E. CÁCERES (2004), 'El Resarcimiento de Daños y Perjuicios derivado de ilícitos antitrust: problemática que plantea y posibles soluciones.' Gaceta Jurídica 230, pp 63–76. See also I. R. DIAZ (2003), 'El ilícito antitrust como ilícito desleal. El resarcimiento de daños y perjuicios.' Gaceta Jurídica 228, pp 32–51.

[8] Decision of the Court of first instance n. 4 of Madrid, of June 7, 2005, *Antena 3 v. National Professional Football League*.

damages totalling €25.5 million to the plaintiffs. The case originated in a dispute over broadcasting rights for football events, an important business sector in Spain and one where antitrust concerns are at the forefront. In brief, the Spanish professional football league association (LNFP) entered into agreements with all regional broadcasting stations and with Canal Plus, a pay-TV operator, to share the broadcasting rights for premium events for eight consecutive years for Spain, excluding other entities (*i.e.*, open-TV stations Antena 3 and Telecinco) from the deal. These agreements were the basis of two successive complaints by each of Antena 3 and Telecinco before the SCA. The SCA found that the agreements in question constituted abusive conduct and violated the rules on anticompetitive agreements.[9] This declaration by the SCA was later confirmed by the courts on review until a *final* decision was reached by the Supreme Court.[10] Hence, the antitrust infringement that served as a basis for a claim for private antitrust damages had been declared illegal first by an administrative decision and then confirmed on review by all the available appellate judicial resources up to the Supreme Court.[11] Consequently the Court of first instance dealing with the private antitrust damages claim by Antena 3 had no trouble acknowledging that the requirement set out in Article 13(2) of the 1989 Competition Act had been satisfied and the court awarded damages of €25.5 million.[12]

Another rare example of antitrust damages granted as a result of a breach of the 1989 Competition Act is the damages award in the *Sugar Producers* cartel.[13] In this case, the existence of a cartel had also been declared by the Competition Authority and by all the courts on review up to the Supreme Court. The Court expressly acknowledged the possibility for a defendant in an antitrust damages case to rely on the 'passing-on' defense. The expert economic evidence was also considered key to deciding the case. The case was entirely decided on the basis of the claimant's expert evidence because the expert evidence of the defendant, stating that no damage was caused, was considered as not credible.

The situation regarding private damages claims for breaches of Articles 81 and 82 of the EC Treaty under the 1989 Competition Act was, at least in theory, more favorable

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[9] It was found that using the market power in the upstream market of football broadcasting rights by the Football League, by granting long-term licenses, disrupted competition in the open-TV market, blocking access to the image rights to Telecinco and Antena 3 (Article 6 of the 1989 Competition Act); also, the long-term exclusivity clauses (8 years) contained in licensing agreements preventing Telecinco and Antena 3 from gaining access violated the rules on anticompetitive agreements (Article 1 of the 1989 Competition Act).

[10] Decision of the Supreme Court 2003/6409 of June 9.

[11] The principle was also admitted in *obiter dicta* of some relevant Court of first instance cases (Order of May 18, 2006, *Euskaltel v. AVS and Sogecable*). Incidentally, the Order of May 18, 2006, cited, limited the prior declaration principle *ex* Article 13(2) 1989 Competition Act to actions for damages, while holding that commercial courts, and not just the Competition Authority, were also competent to declare infringements of the 1989 Competition Act in cases brought before them (a principle that would later be codified in the laws of procedure under the Competition Act, see below).

[12] The antitrust damages Decision of June 7, 2005, cited, was later reversed by a higher court on appeal (Decision of December 18, 2006, of the *Audiencia Provincial de Madrid*). The latter Decision is currently pending review by the Supreme Court.

[13] Decision of October 9, 2009 of the *Audiencia Provincial*, on damages in the *Sugar Producers* cartel.

than the situation regarding private damages claims for breach of substantive provisions of the 1989 Competition Act. The requirements for a final decision for intra-State violations under Article 13(2) of the 1989 Competition Act did not apply to damages claims for breach of Articles 81 and 82 EC Treaty. Also, Spanish courts had accepted the direct effect of Articles 81 and 82 of the EC Treaty[14] (this direct effect, although well established under EC law, required some time for national courts to accept expressly[15]). Hence, the courts should have had no trouble in dealing with antitrust damages claims under the 1989 Competition Act for breaches of Articles 81 or 82 of the EC Treaty. Again, however, there are very few precedents on how the matter was dealt with prior to the current Competition Act. There is a reported case where Conduit, an Irish telecommunications provider, claimed damages against Spanish telecommunications incumbent Telefónica, which had denied Conduit access to data necessary to compete in the directories services market.[16] The infringement of Article 82 of the EC Treaty was claimed, but only indirectly. The primary legal basis relied on in that case was Article 15(2) of the Spanish Unfair Trade Act,[17] which characterizes as unfair the reliance on an advantage in the market procured by violating laws or trade regulations. In this case the plaintiff argued breach of the Unfair Trade Act for reliance on a market advantage procured by a violation of Article 82 EC Treaty. The claim for damages was partially successful (only a fraction of the claimed amount was obtained) and Telefónica was ordered to pay damages amounting to €639,000 under the Unfair Trade Act. It is a good example of damages for breach of Article 82 EC Treaty (certainly the best one available under the 1989 Competition Act), even if the direct legal basis was a breach of the Unfair Trade Act. The use of the Unfair Trade Act may have been an attempt by the plaintiff to prevent a judge in a court of first instance from rejecting the case for failure to use a specific legal basis to claim damages, in the absence of a final declaration by the Supreme Court pursuant to the rule *ex* Article 13(2) 1989 Competition Act already explained. In our view, it should have been possible to rely directly on a breach of Article 82 EC Treaty (by invoking the case law and principles stemming from EC law), but the plaintiff might have thought that the Unfair Trade Act, which contains a specific provision for damages awards, provided a more straightforward basis for the claim under the national law then in force.

In summary, the procedural limitations under the 1989 Competition Act were the following:

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[14] The Supreme Court had accepted this principle in decisions such as those of June 2, 2000, *DISA*, 540/2000; March 15, 2001, *Petronor*, 232/2001; and March 2, 2001, *Mercedes Benz*, 202/2001. Regarding abuse of a dominant position, see the *Euskaltel* case, cited, an interesting precedent from a lower court.

[15] A provision of Community law is said to have direct effect when that provision meets the requirements to be invoked by individuals before national courts. A Community law provision has direct effect if it is drafted in a clear and unambiguous way, it is unconditional and its operation is not dependent on any further action being taken by Community or national authorities (Decision of the ECJ of February 5, 1962, *Van Gend en Loos*, case C–26/62, [1963] ECR 1).

[16] Decision of the Commercial Court of first instance n. 5 of Madrid of November 11, 2005, 85/2005, *Conduit v. Telefónica*, confirmed by Decision of the Audiencia Provincial of Madrid of May 25, 2006, 73/2006.

[17] Law 3/1991, of January 10, on Unfair Trade.

- Damages claims for breach of the 1989 Competition Act met with a high procedural barrier under Article 13(2) of the 1989 Competition Act, *i.e.*, the requirement that a final decision by the ultimate court available to review the case (normally the Supreme Court) confirm the antitrust infringement prior to initiating a private claim for damages. This made private antitrust damages claims very difficult and extremely rare.
- The requirement under Article 13(2) of the 1989 Competition Act did not apply to damages claims for breach of the EC competition rules. In some instances, private damages claims were attempted using the Unfair Trade Act, which contained a specific legal basis for damages awards. This succeeded in at least one case (*Conduit*).

The current Competition Act has put an end to the old procedural rule by eliminating the requirement for a final decision under Article 13(2) 1989 Competition Act, thereby making private antitrust damages claims easier. Numerous other procedural improvements have also been enacted and are expected to make damages claims more attractive and feasible.

b. The current Competition Act

The Competition Act and the creation of specialist commercial courts (by Law 22/2003, on July 9, 2003), have brought with them important innovations. The Competition Act became enforceable on September 1, 2007 and there have been no reported judicial decisions adjudicating on damages claims under the Competition Act thus far. The description below details the requirements for private antitrust damages litigation in Spain and reflects the current status of the Competition Act and its applicable procedural rules. It is likely that these requirements will evolve as a body of relevant case law develops.

Substantive rules regarding determination of liability and calculation of damages remained largely the same following the introduction of the Competition Act. The general rules on contractual and non-contractual liability stem from principles of Roman law.

As set out above, the Competition Act has eliminated the procedural rule, established under Article 13(2) of the 1989 Competition Act, which required a final decision (and exhausted appeals) in a public enforcement proceeding before a private civil claim for antitrust damages could be initiated. The transitional rules for application of the Competition Act state that any proceedings initiated under the 1989 Competition Act, subsequent to the implementation of the procedural rules contained in the Competition Act, should, nonetheless, follow the rules of procedure of the 1989 Competition Act.[18] This rule should in our view be interpreted as not applying to private damages claims, *i.e.*, private damages claims introduced subsequent to the implementation of the Competition Act for breaches of the substantive law provisions of the 1989 Competition Act should not be governed by the procedural rules contained in Article 13(2) of the 1989 Competition Act. This interpretation is based, first, on the literal wording of the first

[18] First transitional rule of the Competition Act.

transitional rule, which refers to 'penalty proceedings'[19] (i.e., punishing administrative proceedings), whereas damages claims are always brought as civil actions in Spain. For the same reason, a claim for damages should be considered as a 'new' action, so that it is possible to construe the statutory language under the Competition Act to understand that an action that is started anew under the Competition Act is not bound by Article 13(2) of the 1989 Competition Act, even if the underlying facts occurred prior to the Competition Act taking effect.

Consequently, it appears logical to conclude that no civil action brought in Spain claiming damages for anticompetitive conduct should henceforward be required to comply with the burdensome rule *ex* Article 13(2) 1989 Competition Act. This development alone should facilitate antitrust damages claims generally.

The elimination of the rule under Article 13(2) of the 1989 Competition Act is an additional incentive for private enforcement of the Spanish antitrust rules, because a company or person harmed by anticompetitive conduct is now allowed simultaneously to request *(i)* a declaration of violation of competition law and *(ii)* a claim for damages.[20]

1. Jurisdiction requirements

The rules regarding international jurisdiction are complex and, particularly in the case of international cartels, would require detailed analysis on a case-by-case basis. Generally speaking, under the Spanish rules on jurisdiction, Spanish courts will have jurisdiction over antitrust damages claims in the following cases:[21]

- When the defendant is domiciled in Spain.
- When the parties have expressly or implicitly submitted themselves to the jurisdiction of the court. This could happen, for instance, when there is a prior arrangement between the parties to resolve disputes between them before the Spanish courts or when the defendant does not contest the jurisdiction of the court once it has been served with a lawsuit.
- It is likely that some claims related to agreements under Article 81 of the EC Treaty and/or Article 1 of the Competition Act must be decided as contractual disputes. In that case, Spanish courts have jurisdiction over the claims if the contract was entered into in Spain or must be performed in Spain.
- In cases of non-contractual liability, typically harm is alleged by parties injured in abuse of dominance cases and cartel cases by the infringer. Spanish courts have jurisdiction when the alleged anticompetitive conduct took place in Spain or when both the infringing party and the aggrieved party are domiciled in Spain.

2. Competent courts

Once it has been decided that Spanish courts have jurisdiction over a given damages claim, it is necessary to ascertain which courts within the Spanish system will provide the

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[19] '*Procedimientos sancionadores*'.

[20] On the other hand, an interpretation of the Competition Act which strictly preserves legitimate expectations acquired under the 1989 Competition Act would favour the opposite outcome. It will be for the courts to decide on this point.

[21] Article 22 of Organic Law 6/1985, governing the judicial branch.

appropriate forum. In 2003, a reform of the law governing the judicial branch created the commercial courts of first instance.[22] This reform granted such courts jurisdiction over all matters related to competition. In the future, as discussed, it appears more likely that private parties may decide to sue in court, requesting simultaneously the finding of a breach of antitrust provisions (under the Competition Act and/or under the rules of the EC Treaty) and damages as a result of the breach. The commercial courts of first instance are empowered to adjudicate both claims. However, a recent Order by an appellate court on jurisdiction matters has decided that civil courts (as opposed to commercial courts) can also be competent to adjudicate on damages claims if the damages claim is filed on the basis of a prior finding of an antitrust infringement.[23] This suggests that commercial courts are competent to grant damages when the damages claim is joined together with the claim requesting a finding that an antitrust infringement has taken place. If the damages claim is a separate claim as a result of a previous finding of the infringement, then civil courts have jurisdiction under the mentioned case law.[24]

Decisions on damages claims by the courts of first instance may be appealed before the appellate courts (*Audiencias Provinciales*, which are the appellate courts in Spain). Ultimately, decisions may be reviewable on points of law before the Supreme Court, subject to the appropriate procedural conditions and limitations.

3. Standing to sue

In Spain, parties that hold a right or an interest in the subject matter of a legal action generally have standing to sue.[25] Thus parties who have suffered harm as a result of anticompetitive conduct may initiate court proceedings seeking redress. Direct purchasers and, generally, parties directly harmed by anticompetitive conduct of any kind (*e.g.*, a company suffering a refusal to supply) are allowed to sue for damages. Spanish law does not contain any rule barring or limiting indirect purchasers' capacity to appear as claimants in damages cases. In this regard, Spanish law is consistent with the case law of the European Courts in *Crehan* and *Manfredi*.[26] However, the possibilities of success on the merits of damages claims brought by indirect purchasers may depend on the application of the substantive requirements, particularly on issues such as causation. These are discussed below.

As for the possibility of class actions in Spain, there is no Spanish law specifically allowing them. However, the law on civil procedure provides a number of devices that, in some circumstances, may bridge the gap.

First, the civil procedure rules enable a group of consumers or users affected by harmful conduct (*e.g.*, antitrust infringement) to band together as plaintiffs in a civil proceeding whenever that group of consumers is determined or can be easily determined.

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[22] *Juzgados de lo mercantil*. Reform introduced by Organic Law 8/2003 of 9 July, inserting Article 86 *ter* into Organic Law 6/1985, cited.

[23] Court Order of the Audiencia Provincial de Madrid of April 10, 2008, *Vodafone*, 83/2008.

[24] The same applies to follow-on actions subsequent to findings of an infringement under the Unfair Trade Act (Court Order of February 4, 2008, *Nestlé*, 67/2008).

[25] Article 10 of Law 1/2000, of January, 7 on Civil Procedure: '*serán considerados partes legítimas quienes comparezcan y actúen en juicio como titulares de la relación jurídica u objeto litigioso*.'

[26] Judgements of the ECJ in the *Courage* and *Manfredi* cases, cited.

Also, the law requires that the majority of the affected persons join together to file the lawsuit.[27] Consumers or users who did not initially join the group filing the damages claim may subsequently do so provided that they can prove a direct and legitimate interest in the subject matter of the lawsuit.[28] This should not be problematic, given that those users or consumers should find themselves in an identical position to those constituting the group that initially filed the claim. The system in Spain is an opt-in system, meaning that those who do not expressly opt in are not deemed represented.

Second, the law on civil procedure confers a distinct and privileged role on consumers' associations incorporated with a view to defending the collective interests of their members. When those injured by a harmful event are a group of consumers or users whose identity is determined or can be easily determined, the standing to sue to uphold the interests of those affected is vested either in a relevant consumers' association, or in the affected individuals themselves. However, if it is not easy to determine the group of affected consumers or users, the standing to sue is entrusted exclusively to a relevant consumers' association representing those individuals.[29] Once a complaint has been certified, it is publicized in order to enable any users or consumers not yet parties to the case to join in defence of their interests. In cases where the individuals affected are determined or are easy to determine, those affected may intervene at any stage after the aforementioned publicity, but they may only participate in the stage of the proceedings then reached. Thus if a third party joins at the final stage of the proceeding, it is entitled to act in court only within the part of the procedure still remaining prior to the judgement. In contrast, if the individuals affected are not easily identifiable, then the civil proceedings may be stayed for up to two months and, after such period, those individuals who have not intervened and joined may no longer participate in the process.[30]

Consumers' associations having standing to sue on behalf of consumers must be founded in compliance with the rules contained in the Consumer Protection Act.[31] In particular the association must be independent to be recognized as a lawful consumers' association. Independence means that the association may not have as members any companies acting for profit, nor may it receive any aid or financial support from companies that supply goods or services to users or consumers. Legally recognized consumers' associations may not issue any communications or publicity promoting consumer goods and may not sponsor or provide their images or names to any corporate communications related to the promotion or advertising of consumer goods or services. Generally, they may not engage in any activities unrelated to consumer protection, except in some limited fields such as training and education. On the other hand, consumers' associations may be shareholders of companies, but only in those whose corporate purpose is limited to activities that are instrumental and/or related to the purposes of consumers' associations

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[27] Article 6.7 of the Law on Civil Procedure, cited.
[28] Article 13 of the Law on Civil Procedure, cited.
[29] Article 11 of the Law on Civil Procedure, cited.
[30] Article 13 of the Law on Civil Procedure, cited.
[31] The rules are contained on Royal Decree 1/2007, of November 16, approving the text of the Act for the defence of consumers and users and other complementary laws (*Real Decreto Legislativo 1/2007, de 16 de noviembre, por el que se aprueba el texto refundido de la Ley General para la Defensa de los Consumidores y Usuarios y otras leyes complementarias*).

(*e.g.*, companies devoted to the education and training of users and consumers or to the defence of the interests of users and consumers).[32]

4. Rules of evidence

All available evidence (documents of all types, experts, witnesses, etc.) which supports proving the facts is generally acceptable under Spanish law provided it has been lawfully obtained. In the case of expert evidence, the standard rule is that an expert must sign a written report and submit it as an addendum to the main complaint filed in court.[33]

The possibilities for discovery (as understood under US law) are scarce under Spanish law. There are some limited rules which may enable a plaintiff to prepare a legal action by asking questions of the counterparty or requesting that the judge solicit evidence from it, provided there is some circumstantial or initial evidence that warrants such a petition. These rules are interpreted restrictively though and thus there are few possibilities of getting useful evidence through these procedures.[34]

A question that may arise is whether it is possible to use evidence collected during administrative antitrust proceedings for private litigation cases. In principle one would expect that this type of evidence should be accepted in court. Documents regarded as confidential in the antitrust proceedings will not be released to the other parties in accordance with the rules of confidentiality in the file.[35] However once a document is treated as non-confidential and is therefore open to other parties through the administrative file, then it may be produced before a court in a damages claim. The same principle applies to leniency applications which will ultimately be accessible in the administrative file as well, subject to any applicable confidentiality rules. Verbal leniency applications or corporate statements may be viewed by parties other than the leniency applicants in administrative antitrust proceedings, but they may not be reproduced. Therefore it is less obvious whether subsequent court proceedings could rely on them. At a minimum a claimant could resort to including a witness who viewed and/or took notes of the evidence accompanying the leniency application.[36] There is, however, no case law yet on these questions, so it remains to be seen what the courts' stance will be.

Finally, attorney–client communications are privileged under Spanish law provided they contain advice which is given for the purpose of representing or defending the client. Generally speaking, this has been accepted by the Spanish Competition Authority[37] relying on authority coming from the European Courts. Privileged documents should not appear in any administrative file. That being said, the law on privilege and particularly how the presence of privileged documents affects the Competition Authority's

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[32] Articles 27 and 28 of Royal Decree 1/2007, cited.

[33] Articles 335 and following of the Civil Procedure Act.

[34] Articles 256 and 328 Civil Procedure Act. These rules are devised with a view to intellectual property cases (counterfeiting cases), more than other types of cases such as damages claims.

[35] Article 42 Competition Act.

[36] See Articles 65 and 66 of the Competition Act, Article 51 of Royal Decree 261/2008, of February 22, implementing the Competition Act and paragraphs 28 and following of the NCC Guidelines for leniency applications (www.cncompetencia.es/Portals/0/PDFs/indicaciones%20 2%20programa%20clemencia%20_8_.pdf).

[37] Decision of July 22, 2002, *Pepsi-Cola v. Coca-Cola*, exp. R508/02.

discovery powers in the course of dawn raids is developing law. One would expect that Spanish courts should uphold the principle, rooted in Article 24 of the Constitution, that attorney–client communications are privileged. A recent landmark judgment of September 30, 2009 has decided, for the first time under the new Competition Act, on the issue of legally privileged documents in the context of surprise 'dawn raids'.

The judgment of the High Court (*Audiencia Nacional*) of September 30, 2009 expressly acknowledges the existence of the client–attorney privilege in Spain. However, the High Court, faced with the petition to quash the entire surprise inspection in view of the fact that privileged documents had been seized, rejected the petition. The High Court stated that the client–attorney privilege is embedded in the fundamental rights of legal defence but it also said (more or less explicitly) that even if privileged documents are seized, as long as they are not used, this should not impinge upon the fundamental rights of defence.

In our view, this ruling encroaches upon the case law of the Court of First Instance of the EU (see, in particular, the *AKZO* case).[38]

In the *AKZO* case, the Court concluded, building on previous case law, that a company may refuse to allow Commission officials to take even a 'cursory look' at one or more specific documents which it claims to be covered by legal professional privilege, provided the company concerned considers that such a cursory look is impossible without revealing the content of those documents and that it gives the inspectors appropriate reasons for its view.[39]

In the event of disagreement between the inspectors and the inspected company regarding whether or not a given document should be deemed confidential, the CFI in the *AKZO* case establishes the following procedure: in such a case the document at stake should be placed in a sealed envelope and later remove it with a view to a subsequent resolution of the dispute.[40]

The High Court in the *Stanpa dawn raids* case has apparently ignored the reasoning stemming from the *AKZO* case, since it has upheld the seizure of all documents provided they are not 'used' and, therefore, cannot cause a harm to the rights of defence.

5. *Substantive rules applicable to antitrust damages claims*

a. Distinction between contractual and non-contractual liability In cases where the anticompetitive conduct causing the harm is based on an agreement in violation of Article 81(1) of the EC Treaty or Article 1.1 of the Competition Act, the consequence under both Article 81(2) of the EC Treaty and Article 1.2 of the Competition Act is to nullify the contract or agreement. In that case, the rule under Spanish law is *restitutio in integrum* or restitution of things to the status they were in, as if there had never been a contract.[41]

In all other cases, where no contractual relationship binds the company responsible

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[38] Judgement of the CFI of September 17, 2007, *AKZO v. Commission*, Joined Cases T–125/03 and T–253/03, [2007] ECR II-3523.

[39] ¶82, *AKZO* case, cited.

[40] ¶83, *AKZO* case, cited.

[41] Articles 1300 and following of the Civil Code.

for the anticompetitive conduct and the party suffering the harm, the applicable rules are those of non-contractual liability. Non-contractual liability is governed in Spain by the law on torts contained in Article 1902 of the Civil Code, the origins of which are traced back to the *Lex aquiliana* under Roman law. There is a large body of legal doctrine and case law applying Article 1902 of the Civil Code, which is one of the legal provisions most relied upon under Spanish civil law.[42] Below we attempt to briefly outline the requirements for a finding of liability under Article 1902 of the Civil Code by referring to both the general legal doctrine and the case law, with specific reference to the *Antena 3* antitrust damages case, cited, which was decided on the basis of both Articles 13(2) of the 1989 Competition Act and Article 1902 of the Civil Code.

The requirements for a finding of liability under Article 1902 of the Civil Code are:

I. ACTION OR OMISSION BY THE ALLEGEDLY LIABLE PARTY The anticompetitive conduct must result from an illegal agreement or an illegal unilateral practice. A defendant may argue that the anticompetitive conduct is the result of an omission of a duty of care (e.g. a sophisticated form of abuse declared anticompetitive which the defendant claims he could not foresee). However this is irrelevant for the application of Article 1902 of the Civil Code because it covers both actions and omissions.

II. ILLEGALITY OF THE CAUSE OF HARM This will normally be established by the finding of the antitrust infringement.

III. HARM AND MITIGATION Actual harm must be proved. In antitrust cases this will largely be a matter of evidence, but there must be harm that is capable of being compensated so that liability can be attached. Also, the aggrieved party must take reasonable steps to mitigate the harm. A defense that the harm has been passed on (called the passing-on defense) is available under the principles governing Article 1902 of the Civil Code. The burden of proof that the harm has been passed on rests with the party asserting it. As indicated above, all types of evidence generally accepted in other jurisdictions are acceptable under Spanish law, along with numerous statutory restrictions on subjects such as impartiality, witness age and sanity, and the validity of document collection methods among others. Witnesses can be cross-examined. However the US discovery mechanism is not available in Spain.[43]

IV. NEGLIGENCE OR WILFUL INTENT Traditionally, negligence or wilful misconduct is required for a finding of liability. The party found responsible for an infringement of the antitrust laws must be found to have negligently or intentionally infringed the antitrust laws. Another issue is whether the party claiming damages may be, to an extent, responsible for the damage incurred. This discussion is related to the issue of mitigation.

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[42] CASTAN, Derecho civil español, común y foral, Tomo 4, p. 940.

[43] Article 328 of the Law on Civil Procedure, cited, provides for a right of parties to request documents from the other party. But the parties must show which document they are seeking and what the contents are. It is more a means of verification of the existence of given documents; therefore it is not discovery in the common law sense.

Courts are willing to find that the negligence or intention causing the harm may not be attributed to one party alone, and that it should be shared between the parties.

This raises the question of whether joint and several liability exists when various parties are held to be responsible for an antitrust infringement (e.g., a cartel case). Under Spanish law joint and several liability would enable the party harmed by a cartel to claim the total amount of the damages award against one of the parties responsible for the antitrust breach. The party to whom the claim is addressed may later claim back its respective shares against the remaining entities liable for the harm.[44]

The general principle under Spanish civil law is that joint and several liability cannot be presumed, but rather must be expressly established.[45] Using the example of a cartel, joint and several liability is not expressly established regarding the cartel members. Nonetheless, the courts have developed a doctrine that if anticompetitive harm is caused by joint conduct of multiple parties (e.g., multiple parties agreeing to set prices) and it is not possible to discern the actual degree of causality that can be attributed to the conduct of each party, then the parties can be declared by the judge jointly and severally liable.[46] In our view, this doctrine is applicable to antitrust damages cases. Notably, in the case of cartels, members of the cartel may be regarded as jointly and severally responsible under the case law discussed.

V. A CAUSAL LINK BETWEEN THE ANTICOMPETITIVE CONDUCT AND THE HARM In the very few antitrust damages claims adjudicated by Spanish courts, this requirement was not given much attention. The courts have found it self-evident in those cases and presumed that the harm was caused by the anticompetitive conduct.

b. What damages can be claimed under Spanish law The Court of first instance in the *Antena 3* case reminds us that, under general tort law, the claimant can assert both harm suffered as a result of the anticompetitive conduct (*damnum emergens*) as well as loss of profit (*lucrum cessans*).[47]

The key issue is the evaluation of both the actual harm and the loss of profit. To this end, Spanish courts rely on expert economic evaluations, which must be introduced by the parties. The *Antena 3* case shows that these evaluations are absolutely essential, from the judge's standpoint, to the success of damages claims in the antitrust field. A judge values their discussion of whether harm exists and, if so, how great that harm is. In the *Antena 3* case, the higher court reversed the damages award by the court of first instance because the economic evaluation submitted by the plaintiff was untenable and unrealistic. The quality of the economic evidence in this type of case is a key factor before Spanish courts. The *Antena 3* case indicates that Spanish courts will show great reluctance in relying on estimations that are not based on provable facts.

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[44] Articles 1137 and following of the Civil Code.

[45] Article 1137 of the Civil Code.

[46] See, for instance, Decisions of the Supreme Court 276/2006, of 17 March and 413/2004, of 24 May.

[47] That is the principle codified by Article 1106 of the Civil Code.

c. Statute of limitations

I. NON-CONTRACTUAL DAMAGES CLAIMS In the absence of Community rules governing statutory limitations on antitrust damages actions, Member States are responsible for establishing the limitation periods, subject to the principles of equivalence and effectiveness.[48]

According to the Spanish Civil Code, the limitation period for a non-contractual damages action is one year.[49] Pursuant to the Civil Code, the one year limitation period starts to run once the victim has knowledge of the harm suffered.[50]

The question may arise over what happens in cases where the victim has knowledge of the alleged antitrust infringement and the possible harm but, at the same time, the relevant Competition Authority (be it the SCA or the European Commission) is in the process of reviewing the alleged cartel (or abuse of dominance).[51] The answer to this question may be found in the case law. The Spanish Supreme Court has developed the so-called 'accomplishment theory', which states that the limitation period of a damages action only starts to run when the action is capable of being successful, *i.e.* the victim who has knowledge of the harm should have a viable basis for claiming damages before the court in the form of an official antitrust decision.[52] Under this theory, it can be argued that an action for damages, at least in complex cases, would only be viable once the illegality of harmful antitrust infringements has been found by the relevant Competition Authority.

In a recent damages case[53] that reached the Spanish Supreme Court, the claimant filed an action for damages after a finding by the European Commission that certain dumping measures in the pharmaceutical industry were illegal. It was the same claimant who filed the administrative anti-dumping proceedings before the European Commission, more

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[48] See *Manfredi* case, cited, paragraphs 77–82.
'As was pointed out in paragraph 62 of this judgment, in the absence of Community rules governing the matter, it is for the domestic legal system of each Member State to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive directly from Community law, provided that such rules observe the principles of equivalence and effectiveness.' (¶77).
'A national rule under which the limitation period begins to run from the day on which the agreement or concerted practice was adopted could make it practically impossible to exercise the right to seek compensation for the harm caused by that prohibited agreement or practice, particularly if that national rule also imposes a short limitation period which is not capable of being suspended.' (¶78).

[49] Article 1968, second paragraph, of the Civil Code, in connection with article 1902 of the same Code.

[50] Article 1968, second paragraph, of the Civil Code.

[51] Note that, with regard to EC competition law infringements, the European Commission suggests, in such cases, that 'a new limitation period of at least two years should start once the infringement decision on which a follow-on claimant relies has become final'. See §2.7 *in fine* of the European Commission's White Paper on damages actions for breach of the EC competition, in connection with Chapter 8 of the Commission staff working paper on EC antitrust on EC antitrust damages actions.

[52] See e.g., Judgment of the Supreme Court of 8 June 2007, case 625/2007.

[53] See Judgment of the Supreme Court of October 2, 2008, case 870/2008.

than one year after the claimant had been aware of the alleged illegality. The defendant alleged the expiration of the one year limitation period. On appeal the Spanish Supreme Court, by applying the 'accomplishment theory,' ruled that the damages action was only possible after the illegality was determined by the European Commission and therefore the limitation period had not expired. This is good authority, particularly in complex cases, that the one year limitation period would start to run only when the relevant administrative body, *i.e.* the Competition Authority (or a commercial court in the case of a direct action) issues its decision finding the existence of an antitrust infringement. Only then would it be viable for the injured party to file a claim for damages.

6. Damages actions with contract relationships

Agreements in violation of EC or Spanish antitrust laws are void. Pursuant to the Civil Code, the legal consequence of the nullity of anticompetitive agreements is the restitution of the goods and amounts of money that were the subject matter of the contested agreement.[54] The limitation period for claiming damages is fifteen years from the day when the courts declare the relevant agreement null and void.[55]

7. Costs of antitrust damages claims in Spain

Contingency fees have been possible in Spain since 2008, when the Supreme Court held that a prohibition of contingency fees would be restrictive of competition.[56] Regarding legal costs, the principle in Spain is that the losing party is also ordered to pay the legal costs, which are reviewed by the judges to avoid abuse. This means that the losing party pays expenditures related to witnesses and experts, attorneys' fees, as well as other necessary expenses. However, judges step in to make sure the costs incurred are reasonable, which in practice means that a successful plaintiff may often not recover full costs.

It is possible under Spanish law to reach a settlement between the parties where the claimant agrees to abandon its damages action in exchange for a settlement payment.[57] There was a settlement reached between Jazztel and Telefónica according to which Jazztel would discontinue various claims against Telefónica in exchange for the latter paying EUR 10 million. Apparently there was a settlement between Gas Natural and Iberdrola as well.

8. The prospect of antitrust damages claims in Spain

At the time of writing this chapter, there are no reported judicial decisions on antitrust damages in Spain under the new Competition Act. The general expectation is that the abrogation of Article 13(2) of the 1989 Competition Act should facilitate antitrust damages claims: the length and costs of litigation are considerably reduced when it comes to establishing breaches of the national antitrust laws and there will be more incentive for private parties to litigate because now private parties can petition that the courts declare

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[54] Article 1303 Civil Code.

[55] Article 1964 Civil Code. It must be borne in mind, however, that if the plaintiff wants to have a contract to which he is party annulled, the limitation period for claiming annulment is four years (Article 1301 Civil Code).

[56] Decision of the Supreme Court of October 21, 2008, case 5837/2005.

[57] Articles 1809 and following of the Civil Code.

an infringement of the Competition Act and grant damages simultaneously. The creation of the commercial courts with jurisdiction on competition related matters should result (it is hoped) in a higher degree of specialization and therefore higher efficiency and reliability in dealing with antitrust damages claims.

The European Commission was preparing but withdrew a draft directive on rules governing damages actions for infringements of Articles 81 and 82 of the EC Treaty. Since a subsequent draft is widely anticipated, it may be useful to comment on the withdrawn draft in terms of its implications for Spain. The purpose of this directive was to harmonize a number of procedural rules across Member States with a view to facilitating damages claims in Europe. Bearing in mind the embryonic stage at which the directive stands, below is a short analysis of its main points.

First, most of the principles and requirements of the directive appear to have already been addressed by Spanish law. Spanish law provides for full compensation of actual loss and loss of profit (Article 1 draft directive); standing to sue, group actions and 'qualified entities' for standing-to-sue purposes (Articles 3, 4 and 5); and passing-on defenses (Article 12). The limitation period rule in the draft directive (Article 14) already seems to be addressed under Spanish law as well, even in non-contractual liability cases where the short statute of limitations (one year) has been generously interpreted by the courts to ensure feasibility of damages claims (see discussion on those topics above).

The issue of fault described under Article 11 of the draft directive should not be a burden to antitrust damages claimants under Spanish law because courts are likely to find the existence of intent (either intention or negligence) in an antitrust breach.

Other matters, such as the rules on discovery and on pending international litigation between different parties from those of the proceeding brought before the Spanish courts, may require further legislative action in Spain before they can be fully realized.

It may be concluded that the road to ensuring the viability of antitrust damages claims in Spain has been long and painful. However, a number of legal reforms and case law developments, although still in the making, have helped put in place the rules necessary to allow for the possibility of effective recovery in Spain.

The future now depends on the determination of affected parties to litigate as well as the responsiveness of the system to those claims. Both will be important and integral parts of competition enforcement.