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Cartels & Leniency 2021

A practical cross-border insight into cartels & leniency

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Featuring contributions from:

ABNR Counsellors at Law
Bán, S. Szabó & Partners
Bär & Karrer Ltd.
Callol, Coca & Asociados
Cassels Brock & Blackwell LLP
Cyril Amarchand Mangaldas
DeHeng Law Offices
Drew & Napier LLC
ELIG Gürkaynak Attorneys-at-Law
Morais Leitão, Galvão Teles, Soares da Silva & Associados
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URBAN STEINECKER GAŠPEREC BOŠANSKÝ
Zdolšek Attorneys at law

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Spain


Pedro Callol


Enrique Fayos

Callol, Coca & Asociados

1 The Legislative Framework of the Cartel Prohibition

1.1 What is the legal basis and general nature of the cartel prohibition, e.g. is it civil and/or criminal?

The Spanish Competition Act (Law 15/2007, of 3 July, on the Defence of Competition or **SCA**) modernised competition law and optimised the institutional framework of competition enforcement in Spain. The SCA reflected the changes introduced at the time at EU level, particularly Regulation 1/2003, which decentralised the enforcement of EU competition law, fostering the role of National Competition Authorities (**NCAs**) in its application and enforcement. In addition, Royal Decree 2295/2004 was enacted to implement all the amendments made at EU level to competition law provisions. Later, Law 3/2013 provided for the creation of a new authority in charge of both competition and regulatory matters, the *Comisión Nacional de los Mercados y la Competencia* (National Markets and Competition Commission or **CNMC**).

Likewise, the Spanish Government adopted Royal Decree 261/2008 for the implementation of the Competition Act (**RD 261/2008**), which came into force on 28 February 2008 and develops substantive and procedural matters enshrined in the SCA, such as the leniency programme, *de minimis* conduct, functions of the CNMC with regard to the promotion of competition, and collaboration mechanisms with Regional Competition Authorities, the European Commission or other NCAs, etc. Furthermore, the CNMC is entitled to apply Article 101 of the Treaty on the Functioning of the European Union (**TFEU**) in cases in which restrictive practices undertaken in Spain potentially affect trade between EU Member States.

In addition, Spain has implemented (belatedly, by a few months) Directive 2014/104/EU of 26 November 2014 on Antitrust Damages Actions (**Damages Directive**) by means of Royal Decree-Law 9/2017 of 26 May (**RDL 9/2017**), which amends the SCA and the Civil Procedure Act.

Last but not least, last July the Ministry of Economic Affairs and Digital Transformation published a draft bill for the amendment of the SCA (**Draft** or **Draft law**). While transposing Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 (**ECN+ Directive**), the Draft introduces relevant changes to the Spanish competition law regime. For instance, at the enforcement level, the Draft raises penalties for individual managers from a maximum of €60,000, provided for in the current law, to €400,000. Additionally, the vast majority of infringements provided for by the law will be considered as "very serious", which means that in all those cases fines of up to 10% of the turnover may be imposed.

The Draft also strengthens the CNMC's powers of inspection and investigation. Thus, in addition to the inspections in both investigated companies and in the homes of their employees, the Draft provides for access to any other places, including the headquarters or offices of third parties, where relevant information of the investigated company may be found. Among the amendments that do not derive from the transposition of the ECN+ Directive, the introduction of the settlement procedure (modelled on the European Commission's) stands out, through which the parties to a sanctioning procedure may recognise their responsibility in the unlawful conduct in exchange for a reduction in the amount of the fine of up to 15%.

The CNMC often resorts to soft law by adopting non-binding guidelines to clarify the interpretation of competition law provisions based on case law and its own decisional practice:

- A communication on the calculation of fines, which was published in February 2009. However, the Supreme Court quashed this communication by a number of judgments in 2015.
- In June 2013, the former *Comisión Nacional de la Competencia* (**CNC**) published its Communication on the Leniency Programme, which replaced the former provisional guidelines relating to the handling of applications for exemptions and reductions of fines published in February 2008. Said guidelines aimed to explain the practical aspects of leniency applications while increasing transparency.
- Since October 2015, natural and legal persons sanctioned for serious infringements that distort competition can be banned from contracting with public bodies for up to three years pursuant to Article 71.1.b) of the Public Sector Contracts Law (*Ley de Contratos del Sector Público*). The aforesaid prohibition was applied by the CNMC for the first time in 2019.
- In July 2016, the CNMC issued a communication on inspections where it summarised: (i) the legal framework; (ii) the powers of investigation of the CNMC; (iii) the procedure with which investigations are carried out; (iv) a detailed description of the duties of the companies under investigation; and (v) lastly, a list of conducts that may be considered obstructions to dawn raids.
- In October 2018, the CNMC published provisional indications on the determination of sanctions under Articles 1, 2 and 3 SCA and 101 and 102 TFEU.
- More recently, in June 2020, the CNMC published Antitrust Compliance Program Guidelines as a way of fostering the use of compliance programmes by businesses in Spain. The document offers assistance to companies in their efforts to implement and develop compliance programmes that can be effective in preventing or mitigating anti-competitive conduct. For that purpose, the CNMC lays down the

basic criteria that it deems relevant to making a compliance programme effective. Similarly, the Guidelines introduce incentives to encourage companies to make such efforts, as well as to enhance collaboration between companies and the CNMC through the use of this tool, particularly with regard to leniency applications. The CNMC also published guidelines on confidentiality claims in antitrust proceedings, seeking to provide greater legal certainty to parties in connection with confidentiality claims and clarifying the criteria used by the CNMC based on its past decisional practice.

The SCA has a public and a private sphere. With regard to the public sphere, Spanish competition law aims to regulate market conduct by enforcing free competition, a role which is administrative in nature.

On the other hand, competition law has a commercial dimension as it affects commerce and commercial enterprises. Similarly, the commercial courts are responsible for the private enforcement of Spanish competition law. One of the main pillars of private enforcement of competition law is damages claims lodged by third parties affected by anti-competitive conduct. Actions for damages are becoming increasingly important in cartel infringements, and may lead to important sums in compensation for the victims of the cartel.

Cartel infringements are punishable by fines if the penalty is imposed by the National or Regional Competition Authorities, or by an order for compensation for damages if the penalty is imposed by the commercial courts. Additionally, the Spanish Criminal Code provides a few exceptions whereby cartel conduct is punishable by imprisonment, although these are rarely applied (please see question 2.1).

1.2 What are the specific substantive provisions for the cartel prohibition?

The prohibition of anti-competitive agreements is contained in Article 1 SCA, which is broadly similar to Article 101 TFEU, though without the reference to the effect on inter-State trade and expressly including parallel conduct as potentially illegal conduct. Article 1 SCA prohibits any kind of agreement, decision or collective recommendation or any concerted or consciously parallel practice which has as its object or effect the prevention, restriction or distortion of competition in all or part of the Spanish market, and in particular those that:

- directly or indirectly fix prices or any other commercial or service terms;
- limit or control production, distribution, technical development or investments;
- share markets or sources of supply;
- apply dissimilar conditions to equivalent transactions in commercial or service relations, thereby placing some competitors at a competitive disadvantage; and
- make the conclusion of contracts subject to the acceptance of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

It also defines a cartel as "*a secret agreement between two or more competitors which has as its object fixing prices, production or sales quotas, sharing markets including bid-rigging or restricting imports or exports*".

Furthermore, apart from the fines which can be imposed by antitrust authorities (please see the section below on fines), agreements or any other conduct falling under the scope of Article 1 SCA are illegal and void.

However, such agreements, decisions or concerted practices may benefit from an exemption if they improve the production or distribution of goods or promote technical or economic progress, subject to specific requirements established in Article 1.3 SCA. In addition, the prohibitions under Article 1 SCA do not apply to agreements resulting from the application of a law (Article 4) (please see question 1.5).

In addition, Article 101 TFEU can be directly applied by the CNMC or regional antitrust authorities and takes precedence over Spanish law. Under the system of parallel competences established by EU Regulation 1/2003, the CNMC or regional antitrust authorities can simultaneously apply Article 101 TFEU and Article 1 SCA to any competition infringement. Also under EU Regulation 1/2003, the European Commission has exclusive jurisdiction to review a particular count of conduct once it opens antitrust proceedings.

Finally, although Spanish criminal cartel prosecutions are rare, the Spanish Criminal Code provides a limited number of provisions regarding unlawful competitive conduct. For instance: (i) Article 284, which refers to the alteration of prices resulting from free competition, providing a term of six months to two years of imprisonment and fines for one to two years; (ii) Article 262, which refers to bid-rigging in auctions and public tenders, providing a term of one to three years of imprisonment and daily fines for one to two years and a ban on participating in public bids; and (iii) Article 281, which prohibits the withdrawal of raw materials or essential goods from the market in order to limit supplies or distort prices, providing a term of one to five years of imprisonment and fines for one to two years.

1.3 Who enforces the cartel prohibition?

The SCA is enforced by the CNMC. In its Action Plan for 2020, the CNMC declared that "*We will continue to strengthen the tools for the detection of anti-competitive behaviour, in particular cartels as the most harmful behaviour*". Since the adoption of the current SCA in 2007, more than 60 cartels have been discovered and subjected to fines in Spain, with total fines in excess of €1 billion. According to its 2019 Annual Report, the CNMC issued two decisions punishing cartels in 2019, with fines amounting to €172.6 million.

The CNMC is an autonomous authority, organically and functionally independent from the Government. The CNMC consists of a chairman, a Council and four different Directorates of investigation (**DI**): a specific Directorate for Competition (**DC**); and three further Directorates for Telecommunications and the Audiovisual sector, for Energy, and for Transport and the Postal sector.

The Council is composed of two chambers: a chamber dealing with competition-related matters; and a chamber dealing with regulatory matters. The chamber for competition matters is chaired by the President and comprises four additional members. The President holds managerial and representation duties. Last June, some of the positions of the Council were renewed and the presidency was given to a highly reputed competition law professional.

The DC is responsible for conducting investigations on cases and preparing files as well as analysis and reports. However, the Council has the final decision-making power.

Since the enactment of Law 1/2002, reflecting the decentralised administrative structure of Spain, the enforcement of Spanish competition law is shared with the Regional Competition Authorities (except for merger control). Competition law can be applied by regional authorities provided that the conduct in question is regional in scope. To date, most of the Spanish regions have enacted rules but not all of them have established *ad hoc* authorities. The SCA establishes that the CNMC is required to obtain a non-binding report from the Regional Competition Authority in connection with competition law matters which have a significant impact on the regional territory.

The SCA expressly recognises the private enforcement of its Articles 1 (prohibition of anti-competitive agreements) and 2 (abuse of dominance). It also recognises the standing of commercial courts to hear any actions or claims lodged in relation to the application of these provisions. Furthermore, the commercial courts are competent to award damages based on the SCA without requiring a prior administrative decision finding an infringement (stand-alone claim). The SCA also provides for an *amicus curiae* system inspired by Regulation 1/2003, under which the CNMC and the antitrust regional bodies may submit observations regarding the application of the SCA (please see section 8 below).

For instance, in March 2014 the CNMC issued a report at the request of a commercial court in the context of an ordinary lawsuit brought by a service station against an oil company with regard to clauses in an exclusive supply contract that allegedly infringed the SCA. As further described in question 8.6, the *amicus curiae* provided by the SCA is increasingly used by Spanish courts.

1.4 What are the basic procedural steps between the opening of an investigation and the imposition of sanctions?

The SCA establishes a two-phase procedure: an investigation is opened and carried out by the DI; and the decision is taken by the Council's Competition Chamber.

Proceedings are initiated by the DI either *ex officio*, at the request of the Council or as a result of a non-binding third-party complaint. Prior to the initiation of formal sanctioning proceedings, the DI opens a preliminary and initial investigation phase (*información reservada*). During this preliminary phase, the DI may carry out inspections and submit formal information requests. This preliminary phase is not subject to formal deadlines or time constraints for the DI, which can investigate in principle for as long as it wants without any formal indictment.

Once proceedings have been formally initiated (*incoación*) because the DI has obtained *prima facie* evidence of an infringement being committed, the companies under investigation are heard, and may submit allegations to the statement of objections (*Pliego de Concreción de Hechos*). The DI can resort to various investigatory powers: to carry out inspections in the homes of directors, managers and other staff members; to seal any business premises; and to make copies of and seize original documents, etc. – please see section 2 below.

The Council can adopt interim measures at any time during the course of the proceedings. Once the DI has finished its investigation, it adopts a decision proposal (*Propuesta de Resolución*), granting the parties the opportunity to submit allegations in their defence once again. Thereafter, the DI will refer its decision together with the allegations submitted by the undertakings (*Informe de Propuesta de Resolución*) to the Council, which will assess the case and adopt a final decision on the infringement and the imposition of fines.

The SCA provides that the maximum time limit for a procedure is 18 months (although under certain circumstances this deadline can be extended). The Draft increases said time limit to 24 months. RD 261/2008 establishes the time limit of the investigation phase: 12 months (the final decision must be issued in the remaining six months). The expiration of the 12-month term of the investigation phase does not have any relevant legal consequence for the companies under investigation, as determined by the National High Court's judgments of 25 February 2013 and 9 July 2013. In turn, the lapse of the 18-month maximum time limit may entail that the administrative procedure lapses. As a result, the CNMC may once again initiate the proceedings, but has to do so in the five-year limitation period (the limitation period was increased from one to five years as a result of the Damages Directive).

In these cases of the suspension of the 18-month maximum period, once the suspension has been lifted, the final day of the period will be set by adding to the end of the initial period the calendar days during which the period has been suspended.

1.5 Are there any sector-specific offences or exemptions?

One of the most important aspects of the SCA was the replacement of the individual authorisation system of restrictive practices with a more flexible system of self-evaluation and legal exemptions, in line with EU regulation. Therefore, the prohibitions contained in the SCA will not automatically be applicable, provided that the criteria in Article 101.3 TFEU are fulfilled. Furthermore, the EU Block Exemptions will also be applicable to those agreements even if they do not affect trade between Member States. The Spanish Government can also adopt block exemptions. For instance, under the 1989 Competition Act, the Government implemented Royal Decree 602/2006, which established a block exemption on information exchange agreements relating to late payments.

In Article 6 SCA, there is a similar provision to Article 10 of Regulation 1/2003, which permits findings of inapplicability.

In addition, an exemption may be granted for certain agreements, decisions or concerted practices if they improve the production or distribution of goods or promote technical or economic progress, subject to specific requirements set out in Article 1.3 SCA.

Moreover, Article 4 SCA establishes that the prohibition in Article 1 is not applicable to conduct arising from the application of law (Act of Parliament). Naturally, this exception on applying Spanish competition rules shall not apply when EU competition law provisions are also applicable.

Similarly, the prohibition is not applicable to conduct of minor importance that qualifies as *de minimis*, according to the criteria established in Article 3.1 of RD 261/2008. The former CNC used this provision for the first time in the *Corral de Las Flamencas* case on 3 December 2009 (file S 0105/08). By a judgment on 24 June 2013, the National High Court also used the *de minimis* exemption to annul the fine imposed by the former CNC in the *Productos Hortofrutículas* case, with regard to agreements reached within a small farmers' association from the south of Spain. The National High Court annulled the CNC's reasoning in relation to an alleged price fixing agreement between competitors, since it concluded that it was not strictly speaking a horizontal price fixing agreement, but rather the defence of the interests of small producers within the framework of a trade union organisation, which had a positive effect on competition since it increased their bargaining power *vis-à-vis* trading companies whose market power was greater.

The *de minimis* provision has been invoked by the CNMC itself in past decisions to justify not initiating sanctioning proceedings (Decision of 15 December 2016, *Laboratorios Martí Tors*, file S/DC/0592/16).

At the height of the COVID-19 outbreak, some Competition Authorities such as those of the UK and Norway published transitional sector exemptions to competition rules in order to allow collaboration in particular sectors which were considered strategic amidst the global pandemic (*i.e.*, transport, pharmaceuticals or food retail). Conversely, the CNMC announced that it had heightened its scrutiny of competition rules to counter abuses that might be committed by companies throughout the

public health crisis to raise prices or interfere with the supply of products required to protect people's health (*i.e.*, excessive pricing cases or refusals to supply), and also launched a mailbox for citizens to report practices of this kind.

1.6 Is cartel conduct outside your jurisdiction covered by the prohibition?

Since Article 1 prohibits any conduct "*which has as its object or effect the prevention, restriction or distortion of competition in all or part of the Spanish market*", any cartel conduct happening outside Spain which has or may have an impact on all or part of the Spanish market may fall under the cartel prohibition. Moreover, according to the SCA, any conduct which restricts imports or exports is regarded as a cartel (please see question 1.2). For instance, in the *Refrigerated Transport* case (S/0454/12), the restrictive practices related to products which originated in the Spanish market and were to be exported to the European market (primarily to Germany, France, Italy, the United Kingdom and the Netherlands).

The 2009 CNMC's guidelines (deemed illegal by a number of Supreme Court judgments) on the calculation of fines established that when an infringement has effects beyond the borders of Spain, only the turnover realised in the European Economic Area is taken into account for the fine calculation. The implementation of the ECN+ Directive, which aims to (i) empower the NCAs of the Member States to be more effective enforcers, and (ii) ensure the proper functioning of the internal market, will necessarily modify the aforesaid geographic interpretation of turnover which the CNMC uses in its calculation of fines, since it expressly makes reference to the worldwide turnover of the sanctioned company. Member States have until February 2021 to adapt their competition rules to the Directive.

In connection with private claims, on the other hand, EU Regulation 1215/2012 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (**Regulation 1215/2012**) establishes that persons domiciled in a Member State must, as a general rule, be sued in the courts of that Member State. On the other hand, Article 8 of Regulation 1215/2012 establishes that when there are several defendants, a person may also be sued in the courts of the place where any one of them is domiciled, provided that the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings in different Member States. This provision may be applicable in cartel cases in which the infringing undertakings are domiciled in several different Member States, enabling the claimant to initiate actions against several defendants in Spain if any of them is domiciled there.

Additionally, Article 7.2 of Regulation 1215/2012 provides an exception for the aforesaid general rule in matters related to tort, enabling a claimant to sue a person domiciled in one Member State in the courts of another Member State where the harmful event occurred. The European Court of Justice (**ECJ**) has decided that victims of cartel infringements have the choice of bringing an action for damages against several companies that have participated in the infringement, either before the courts of the place where the cartel itself was established, or where the cartel was reached, or before the courts of the place where the loss was incurred. Said forum is only valid for each injured party individually and is generally located in the domicile of the injured party. Hence, a claimant residing in Spain would be able to bring an action before Spanish courts on said matter.

The abovementioned questions have been clarified in Spain through various first instance court judgments rendered in damages claims regarding the *Truck Cartel* case. Even if none of the companies addressed in the European Commission's decision were domiciled in Spain, Spanish courts have affirmed jurisdiction. The Supreme Court shed light on this matter in its Order of 26 February 2019, appeal number 262/2019. The Supreme Court concluded that Article 52.1.12º of the Law on Civil Procedure was applicable, which deals with jurisdiction in unfair competition claims. According to the said provision, the courts having jurisdiction to hear unfair competition claims in Spanish territory are those located in either: (i) the place where the defendant has its domicile; (ii) if it has no domicile in Spain, its place of residence; or (iii) the place of occurrence of the tort or where its effects are deployed.

Nevertheless, this issue has been recently brought to the attention of the ECJ through a request for a preliminary ruling lodged by the Barcelona Provincial Court (case C-882/19), in connection with the issue of liability of subsidiary companies in a group. In essence, the court sought clarification on which legal entities within an undertaking are liable for damages stemming from an infringement of Article 101 TFEU. The court of first instance had previously dismissed the action against the Spanish subsidiary of Mercedes Benz because the company lacked standing to be sued. The court considered that only legal entities that were addressed in the Decision may be held liable for damages.

Moreover, foreign companies are subject to sanctions under the SCA for antitrust infringements committed by their subsidiaries. Specifically, under Article 61(2) SCA, the actions of an undertaking are also attributable to the undertakings or natural persons that control it, unless its economic behaviour is not directed by any such persons. If a parent company owns directly or indirectly 100% of the shares of its subsidiary and the latter infringed antitrust provisions, it is understood that the parent company was able to exercise decisive influence over the conduct of its subsidiary. Hence, there is a rebuttable presumption (*iuris tantum*) that the parent company exercised such decisive influence over its subsidiary. The CNMC repeatedly cites the aforesaid EU law principle to extend liability of cartel members to their parent companies (for instance, Judgment of the Supreme Court of 19 July 2018, appeal number 2773/2016).

The CNMC cooperates with the European Commission and other national EU Competition Authorities throughout the European Competition Network (**ECN**). Similarly, the CNMC collaborates with other NCAs outside of the EU. For instance, on 6 November 2017, the CNMC entered into a memorandum of understanding with the Chinese Ministry of Commerce. The Draft contains several provisions aiming at increasing cooperation and coordination between the CNMC and other NCAs or the European Commission in terms of merger control (Article 3), mutual assistance (Second Final Provision) and limitation periods (Article 29).

It is not clear that Spanish courts would enforce extradition requests from foreign jurisdictions on this matter, as penalties are limited to fines and antitrust conduct can only be criminal in the narrow circumstances of the Criminal Code (see above).

2 Investigative Powers

2.1 Please provide a summary of the general investigatory powers in your jurisdiction.

The DC is the authority in charge of investigations, while the Council has the ultimate decision-making power. The DC does not have any powers in connection with criminal investigations, which are rare in Spain except for narrow and unlikely circumstances (see above).

Table of General Investigatory Powers

Investigatory Power	Civil / administrative	Criminal
Order the production of specific documents or information	Yes	No
Carry out compulsory interviews with individuals	Yes	No
Carry out an unannounced search of business premises	Yes*	No
Carry out an unannounced search of residential premises	Yes*	No
■ Right to collect digital/ forensic evidence	Yes	No
■ Right to make copies and seize original documents	Yes	No
■ Right to require an explanation of documents or information supplied	Yes	No
■ Right to seal premises	Yes*	No

Please Note: * According to the SCA, if the parties give consent for the CNMC to access their business premises, an inspection order by the CNMC's Director of Investigation suffices. On the contrary, if there is opposition from the parties, CNMC officials can enter the premises by force if necessary provided they carry a court warrant. In practice, the CNMC usually requests judicial authorisation before taking action in order to avoid delays and/or denials.

2.2 Please list any specific or unusual features of the investigatory powers in your jurisdiction.

The inspection powers vested in the CNMC enable its authorised staff to enter not only any business premises of the undertakings under investigation, but also all land and means of transport owned by them.

They can enter not only the private homes of entrepreneurs, but also those of managers and other members of staff of the undertakings concerned. The Draft reinforces those powers even further by, for instance, including the power to inspect headquarters or offices of third parties, where relevant information of the investigated company may exist, or conduct interviews with any representative of a company or association of companies, or natural persons, when they may be in possession of relevant data and information. Thus far, surprise inspections in private homes have been rare (*Wooden Pallets* cartel), and one such inspection occurred only because the trade association under investigation was headquartered in the private residence of one of its managers. Interviews taking place during inspections with representatives and staff of the companies under investigation will also be regulated under the Draft law.

Under Spanish law, all inspections carried out by Competition Authorities in the business premises of an undertaking are viewed as encroaching upon the fundamental right of inviolability of domicile. This is the reason why they are subject to strict legal and procedural requirements. In particular, as mentioned in question 2.1, access to premises requires the express consent of the affected party or, failing that, a court warrant. Access to premises is only mandatory if authorised by a court through a warrant. In the absence of a court warrant, undertakings are entitled to deny access to their premises. In practice, the CNMC usually requests a warrant in advance to secure access to premises. The Supreme Court nullified a decision of the CNC that had dismissed Repsol's administrative appeal against a dawn raid, declaring the inspection invalid as well as ordering the return of the seized documents (Judgment of the Supreme Court of 17 September 2018, appeal number 2922/2016). The Supreme Court found that the inspection of Repsol's business premises was illegal because the inspectors did not reveal that a court had rejected the CNMC's application for a warrant, even while questioned by the company in this regard, and, therefore, the company's consent to the inspection was considered flawed.

During the inspection, CNMC officials are permitted to verify, seize (for a maximum period of 10 days) and make copies of all documents (whether physical or electronic) located at the company's premises (excluding private or legally privileged documents) and seal the books and other records relating to the business activity under investigation regardless of the medium on which such records are stored. Personal and privileged documents must be identified during the inspection. Inspections may be declared null and void by courts in cases in which the inspection orders are considered too wide in scope, constituting a breach of the fundamental right to the inviolability of the home (*Fishing Expeditions*). For instance, the Supreme Court overturned a decision of the CNMC after finding that the seizure of the evidence on which it was based had been mistakenly considered a "*chance discovery*" when in reality it had been unlawfully obtained during an inspection conducted with an inspection order defined too broadly (see the Supreme Court Judgment of 26 February 2019, appeal number 2539/2018).

Similarly, the CNMC has the right to conduct interviews with any representatives of a company or association of companies, or natural persons, when they may be in possession of relevant data and information (please see question 2.7). The Draft regulates said prerogative which has already been recognised by courts (Article 8). Employees are legally obliged to cooperate with the inspectors by providing them with all the information requested and answering all questions unless the questions posed directly incriminate the company or the individual.

Finally, it is worth noting that even though Article 40.2 provides a list of the investigative powers of the CNMC, this list is not exhaustive. Therefore, the DC is entitled to use other means of investigation to collect evidence, provided that the Spanish constitutional and jurisdictional rules are respected.

For instance, we are aware that in some of its inspections, CNMC officials have seized and explored the smartphones of persons involved in the infringing conduct and gathered information present in SMS and messaging applications such as WhatsApp (see Decision of the CNMC of 21 April 2020, *Transmediterránea*, file R/AJ/003/20).

2.3 Are there general surveillance powers (e.g. bugging)?

The SCA enables the CNMC to monitor undertakings' compliance with its decisions and the obligations provided for therein. There is a specialised Enforcement Unit which ensures proper compliance with antitrust decisions.

The SCA does not include any provision regarding bugging. Bugging is used in criminal investigations with a prior court mandate. To our knowledge, it is has not been used in CNMC investigations.

It is relevant to point out that the CNMC may exceptionally require a leniency applicant to continue participating in a cartel agreement in order to preserve the effectiveness of its inspections.

2.4 Are there any other significant powers of investigation?

Article 13.1 of RD 261/2008 establishes that CNMC staff may be accompanied by experts (*i.e.*, IT operatives) duly accredited by the Director of the investigation. Indeed, the CNMC is supported in its powers of investigation by the Information and Communications Technology Department, which is a specialised IT unit. The IT support unit works very closely with the DC during on-site inspections. The IT unit and the DC jointly compile a catalogue of search criteria to be used during inspections together with software tools specifically designed for that aim.

If the undertaking obstructs the inspection, CNMC officials may also contact the police. One example occurred during an investigation of a suspected bid-rigging cartel for road construction (S/0226/10). On 15 October 2009, when officials of the former CNC were conducting an inspection of the construction company Extraco, Extraco refused to open a safe box, and so the officials called the police in order to open it.

Finally, requests for information may be sent by the CNMC to the suspected undertakings or third parties. If these parties do not respond to the CNMC's requests or provide incomplete or misleading information to CNMC officials, they may be fined an amount of up to 1% of their total turnover. For instance, the CNMC fined Mediapro €200,000 on 31 July 2012 and Cementos Portland €1,285,649 on 31 May 2012. In April 2016, the CNMC also fined a company for providing a lower turnover figure than the figure in its annual accounts (Decision of the CNMC of 7 April 2016, *URBAN*, file SNC/DC/008/16).

2.5 Who will carry out searches of business and/or residential premises and will they wait for legal advisors to arrive?

Investigations in business and residential premises will be carried out by CNMC officials (or officials of the Regional Competition Authorities). They will have been duly authorised by the Director of Competition, with the corresponding judicial authorisation, should the affected party fail to provide its consent. See above comments regarding inspections in private domiciles.

In principle, CNMC staff do not have to wait for the arrival of legal advisors before beginning the search; but CNMC staff usually inform the investigated companies that they may be assisted by external or in-house legal representatives if they wish. CNMC officials usually wait a reasonable period of time for lawyers before starting the searches.

In line with EU Regulation 1/2003, RD 261/2008 provides that the CNMC is the competent authority to collaborate on inspections of the European Commission and the Competition Authorities of other Member States. Similarly, the officials of Regional Competition Authorities may collaborate on inspections carried out by the CNMC in their respective region.

2.6 Is in-house legal advice protected by the rules of privilege?

Spanish law does not explicitly discuss whether in-house legal advice is protected by the principle of legal privilege. Nevertheless, there are no Spanish cases recognising legal privilege for in-house counsel. Quite the opposite, pursuant to a decision of 22 July 2002 of the former Spanish Competition Court and the judgments of the National High Court and Supreme Court related to inspections carried out by the DI in the *Stanpa*, *Salvat Logistica*, *Unesa* and *Consenur* cases, the current position is that only external legal advice is covered by legal privilege; and *sensu contrario*, that in-house legal advice would not be privileged. Likewise, in *Altadis* 2, the CNMC expressly stated that only communications with external lawyers are protected by legal privilege on the basis of national and EU case law (Decision of the CNMC of 21 December 2017, *Altadis 2*, case R/AJ/060/17). This would be in line with EU case law (*Akzo Nobel*, judgment of the ECJ of 14 September 2010).

2.7 Please list other material limitations of the investigatory powers to safeguard the rights of defence of companies and/or individuals under investigation.

For the CNMC to enter premises, private homes, land and means of transport, the affected party must provide its explicit prior consent or, failing this, the CNMC must obtain judicial authorisation. To avoid delays and/or denials, the CNMC, in practice, usually asks for judicial authorisation before taking action, as discussed above.

Moreover, in conducting their inspections, CNMC personnel are restricted to the scope of the investigation. The information found cannot be used for any other purposes. As mentioned in question 2.6, legal privilege covers documents written by external lawyers. In addition, personal documents shall be excluded from the inspection or redacted appropriately as the case may be.

On 4 December 2012, in the *Stanpa* case (a cartel of perfumes and cosmetics), a judgment of the Supreme Court decided that the former CNC was permitted to copy certain electronic documents on the basis of a key-word search, including personal communications and other documents unrelated to the investigation, but was obliged to return said documents once they had been identified. Likewise, the ECJ has recently decided that Competition Authorities are entitled to make copies of data without carrying out a meaningful examination of those documents beforehand and that said inspection prerogative is compatible with the companies' rights of defence (Judgment of the Court of Justice of 16 July 2020, *Nexans France and Nexans v Commission*, case C-606/18 P).

The former CNC's powers and practices of investigation have been confirmed by the National High Court, for example in the judgments of 21 July 2014 (*Renault* case) and 12 June 2014 (*BP* case), and the Supreme Court, in the judgments of 9 June 2012, May 2011 (*Unesa* case) and April 2010 (*Salvat Logistica* case).

However, the approach of the Supreme Court has been stringent when scrutinising search warrants. The Court strictly assesses whether the CNMC's inspections comply with the scope and aim of the search warrants (CNMC's orders of investigation and judicial authorisations). In this regard, the Supreme Court's judgments of 10 December 2014 (*UNESA*), 10 December 2014 (*Campezo*), 27 February 2015 (*Transmediterránea*) and 12 March 2019 (*Uder*) annulled the CNMC's respective orders of investigation. The Court ruled that said orders were too imprecise, did not clearly indicate the scope and aim of the investigation and were not consistent with the judicial authorisation. These annulments have led to further appeals on the merits, cancelling the fines imposed by the CNMC.

2.8 Are there sanctions for the obstruction of investigations? If so, have these ever been used? Has the authorities' approach to this changed, e.g. become stricter, recently?

According to the SCA, the following types of conduct, amongst others, are an obstruction of an investigation: (i) failing to

submit documents requested by the CNMC, or submitting incorrect, misleading or incomplete documents; (ii) refusing to answer the questions of CNMC officials, or providing incomplete, imprecise or misleading answers; and (iii) breaking the seals put in place by CNMC officials.

As these are considered minor infringements, they are punishable by a fine of up to 1% of the infringing undertaking's total turnover in the preceding year. If this calculation is not possible, the infringing undertaking will be subjected to a fine of between €100,000 and €500,000.

In the case discussed in question 2.4, on 6 May 2010, a fine of €300,000 was imposed on Extraco for obstructing the inspections of the former CNC, hiding documents and providing misleading information. However, in a judgment of February 2015, the Supreme Court decided that the fine should be adjusted to account for the circumstances of the case. The Court granted a reduction of the fine to €100,000.

Similarly, on 1 March 2011, the former CNC imposed a fine of €161,600 on the manufacturer of office supplies and stationery Grafoplas del Noroeste for obstructing the aforesaid authority's inspection of its business premises. This decision was confirmed by the National High Court (Judgment of 29 November 2016, appeal number 31/2013).

3 Sanctions on Companies and Individuals

3.1 What are the sanctions for companies?

In the SCA, there is a classification of infringements on the basis of their seriousness (minor, serious and very serious). For instance, cartels between competing undertakings are very serious infringements, anti-competitive vertical agreements are serious infringements, and obstructions of the CNMC's inspections are minor infringements.

The size of the fine varies depending on the seriousness of the infringement. The fines for very serious infringements are up to 10% of the total turnover of the infringing undertaking during the business year immediately prior to the year of the imposition of the fine. Serious infringements are fined by up to 5% of the turnover, and minor infringements by up to 1%. If it is not possible to calculate the turnover, the Council is permitted to set a fine of up to €10 million.

As established in the SCA, during the calculation of the exact amount of the fine, the following criteria are considered: the scope and characteristics of the affected market; the market shares of infringing undertakings; the scope of the infringement; its duration; the effects of the infringement on consumers or other undertakings; and unlawful profit. A series of mitigating and aggravating factors is also provided in the SCA.

On 29 January 2015, the Supreme Court declared that the CNMC's method for the calculation of fines (a method similar to that of the European Commission) was contrary to Spanish law. As a result, the fining method applied by the CNMC had to be modified to comply with the proportionality principle and the CNMC adopted a new two-tier process methodology to calculate the amount of the fines, relying first on the infringement's seriousness and secondly on the particular circumstances of each fined company. The CNMC then calculates a percentage that is applied to each undertaking's overall turnover to determine the fine. When the undertaking benefits from a reduction through the application of the leniency programme, the reduction is applied to the final figure determined by application of these criteria.

The application of this methodology has not led to a reduction in the level of the fines imposed by the CNMC. Moreover, it has given rise to some legal uncertainty because undertakings cannot foresee the amount of the fine that they could be facing. Some summary indications on fines have been published by the CNMC, but they have not provided sufficient clarification for that purpose.

In the case of fines on trade associations, members can ultimately be liable, much in line with what happens under EU law. Subsidiaries may also be forced to pay for conduct carried out by their parent company.

On 12 November 2009, in the so-called *Decennial Insurance cartel* case (S/0037/08), the former CNC fined several insurance companies €120,728,000. The High Court overturned the fines for all the companies, but the Supreme Court in May and June 2015 confirmed the existence of anti-competitive conduct for four of the six companies. The Court referred those four cases to the CNMC in order to recalculate the fines according to the new method for the calculation of fines. The European Commission intervened *ex officio* as *amicus curiae* for the first time in Spain.

There are many examples of the CNMC imposing large fines, such as the fine in July 2015 on car distributors amounting to €171 million for cartel practices, the highest to date. Large fines have been issued in sectors such as ports, milk production and television advertising, to name but a few.

In Spain, public authorities have also been fined on occasion (6 October 2011 in the *Jerez Grape and Grape Juice* case), as well as professional associations which have often been in the radar.

There is currently no settlement procedure in Spanish antitrust law, though one is projected under the Draft. The CNMC sometimes grants reductions of fines on the basis of attenuating circumstances.

Natural and legal persons sanctioned for serious infringements that distort competition can be banned from contracting with public bodies for up to three years. This prohibition can be applied in addition to the penalties set out in the SCA. For the prohibition to be effective, the antitrust decision must be final. The CNMC made use of this prerogative for the first time in March 2019 in connection with tenders of railway infrastructure (case S/DC/0598/2016, *Electrificación y Electromecánicas Ferroviarias).*

3.2 What are the sanctions for individuals (e.g. criminal sanctions, director disqualification)?

Legal representatives or members of the management body of the infringing companies may be fined with up to €60,000.

Although the CNMC had not applied this provision strictly for a long time, in 2016 it resumed its practice in connection with this type of fine. For instance, in March 2019 the CNMC fined 15 companies and 14 managers for several cartels for the allocation of public tenders of railway infrastructure. The total amount imposed on the directors was of €666,000.

In April 2019, the Supreme Court decided that the CNMC can fine managers and, furthermore, publish their names in the decision without infringing the individual's fundamental right to honour or privacy. The Supreme Court has also made it clear that two cumulative requirements must be met under Article 63.2 SCA for an individual to be fined: (i) that the individual is a legal representative or member of the management body of the offending company, understood as one who could adopt decisions that "*mark, condition or direct*" the actions of the company; and (ii) that the individual has intervened in the anti-competitive agreements or decisions.

The Draft law foresees raising fines for individual directors to up to €400,000.

3.3 Can fines be reduced on the basis of 'financial hardship' or 'inability to pay' grounds? If so, by how much?

This is not expressly foreseen, though it is not impossible as the CNMC is bound by the proportionality principle.

Even in times of financial turmoil, the former CNC notably did not seem particularly keen to reduce fines following requests for reductions on the basis of financial hardship.

On the other hand, the CNMC has taken into consideration the situation of insolvency of companies in order to exclude their liability for anti-competitive practices when the turnover amounted to zero (see, for instance, Decision of the CNMC of 28 April 2016, *Concesionarios Chevrolet*, file S/DC/0505/14, p. 72).

3.4 What are the applicable limitation periods?

The limitation periods are four years for very serious infringements, two years for serious infringements and one year for mild or less serious infringements.

Regarding damages claims under the new regime following the implementation of the Damages Directive, anyone who has suffered harm caused by an infringement of competition rules has up to five years to claim full compensation for that harm in court.

3.5 Can a company pay the legal costs and/or financial penalties imposed on a former or current employee?

Yes, subject to the constraints that may arise in connection with good corporate governance.

3.6 Can an implicated employee be held liable by his/her employer for the legal costs and/or financial penalties imposed on the employer?

Yes, an implicated employee can be held liable by his/her employer.

3.7 Can a parent company be held liable for cartel conduct of a subsidiary even if it is not itself involved in the cartel?

Yes, please see question 1.6 above.

There is a strong presumption (almost equivalent to a *iuris et de iure* presumption that admits no evidence to the contrary) that the mother company determines the conduct of the wholly owned subsidiary (Judgments of 23 May 2019, appeal number 2117/2018, and 27 May 2019, appeal number 5326/2017).

The CNMC repeatedly cites this European case law in cartel cases to extend the liability of cartel members to their parent companies (Decisions of 22 September 2014 in case S/0428/12, *Pales* and 28 July 2015 in case S/471/13, *Car Manufacturers*). Likewise, the parent company will also benefit from the leniency programme (see below) if the subsidiary meets the requirements.

4 Leniency for Companies

4.1 Is there a leniency programme for companies? If so, please provide brief details.

Yes. The leniency programme is regulated by RD 261/2008, and came into force in February 2008. In order to provide further guidance for leniency applicants and improve the transparency of its decisions, the former CNC also published guidelines on the leniency programme on 21 June 2013 (as discussed briefly above).

Similar to European practice, the leniency programme provides immunity from fines or a reduction of the fine. Leniency is open both to undertakings and individuals. Leniency may be granted to individuals either because the original applicant is an individual or because the undertaking asks for its employees to be included.

Participants in a cartel may report information before or after the opening of an investigation. Applicants for immunity, on the one hand, must be the first to report the information. For undertakings or individuals applying for partial leniency, meanwhile, the timing determines the size of the reduction of the fine. The reductions are as follows: 30% to 50% for the second party to report information; 20% to 30% for the third party; and up to 20% for subsequent parties.

Immunity, therefore, is granted only to the first undertaking which provides evidence that, in the view of the CNMC, will allow CNMC officials to carry out an inspection or find an infringement of Article 1 SCA. However, full immunity will not be granted if the CNMC already has sufficient evidence on the infringement, or if the applicant was an instigator of the cartel. To benefit from immunity, moreover, the applicant is required to: cooperate fully for the duration of the CNMC's investigation; end its involvement in the alleged cartel immediately after its application, unless otherwise directed by the CNMC to ensure that its investigation is effective; not destroy any evidence which is relevant to its application; and not disclose its intention to submit an application or the content of the application to third parties other than the European Commission or other NCAs.

If companies or individuals later provide additional evidence, their fines may be reduced by up to 50%. To benefit from a reduction, the undertaking's evidence of the alleged infringement must represent significant "added value" compared with the evidence which the CNMC already has. Furthermore, the applicant must meet all the conditions listed above *mutatis mutandis*.

In regions where a Regional Competition Authority has been established, leniency applications may also be submitted before this authority. Once received, the Regional Competition Authorities provide details of all such applications to the CNMC.

If legal representatives or members of management bodies have participated in the alleged infringement, they are also eligible for immunity or a reduction of the fines as long as they cooperate with the CNMC.

In the event that the infringement affects multiple Member States and, consequently, multiple Competition Authorities can act against the infringement, the Commission encourages undertakings to apply for leniency with all relevant Competition Authorities. Applicants generally resort to the European Competition Network Model Leniency Programme. When the Commission is especially well-placed to act on an infringement, applicants typically submit summary applications with those NCAs which might similarly take action.

According to the most recent annual report (2019), since 2010, when the first leniency resolution was published, 31 cartels have been identified and sanctioned pursuant to the leniency programme. Up to 2019, fines of nearly €500 million were imposed in relation to the programme.

The CNC's first Decision resulting from a leniency application related to a cartel in the Bath and Shower Gel Manufacturing Sector (27 January 2010, S/0084/08). The proceedings were initiated on the day when the leniency programme first entered into force. On that day, Henkel and Sara Lee, two undertakings participating in the cartel, submitted respective statements to the CNC, in which they disclosed the existence of the cartel and their participation, as well as the participation of three other undertakings (Puig, Colgate and Colomer).

Leniency applicants receive no immunity in connection with damages claims under Spanish law. However, the new provisions in the SCA resulting from implementation of the Damages Directive foresee that the liability of leniency applicants shall be limited to the harm caused to their own direct and indirect purchasers (although there is an exception in cases where the remaining co-infringers are unable to fully compensate the other victims). The SCA also limits claims from other co-infringers to the harm caused to their own direct and indirect purchasers.

4.2 Is there a 'marker' system and, if so, what is required to obtain a marker?

The SCA does not have a "marker" system. However, the CNMC may grant, upon an applicant's prior justified request, additional time for submitting evidence in relation to the cartel.

Pursuant the Draft, a marker system is introduced under which the CNMC will hold the place in line of the first leniency applicant while it gathers documentation.

4.3 Can applications be made orally (to minimise any subsequent disclosure risks in the context of civil damages follow-on litigation)?

The CNMC accepts oral applications for leniency if requested. In these cases, the applicant organises a meeting at the CNMC offices and the application is registered by the CNMC once the recording of the meeting has been transcribed. When submitted orally, applications for both immunity and a reduction of the fine must be recorded at CNMC premises with a transcript entered into the register. Applicants must also provide all information and evidence relevant to the application. The order of receipt of the leniency application is determined by the entry date and time of the transcript in the CNMC register.

However, according to the SCA, the CNMC cannot provide the information obtained through leniency applications to the commercial courts. This provision is to make sure that the leniency system remains effective, and it also provides applicants with a degree of protection in damages actions. Whereas EU case law practice is ambiguous in this respect (*e.g.*, *Pfleiderer* case), under Spanish law all documentation and declarations in a leniency application, as well as the application itself, are confidential, as established by Article 15 *bis* of the Spanish Civil Procedure Act, Article 50 of the SCA and Article 51 of RD 261/2008.

The transcript of an oral application may only be accessed by the interested parties. When requesting access to the CNMC's file, mechanical and electronic copies of oral submissions are prohibited.

4.4 To what extent will a leniency application be treated confidentially and for how long? To what extent will documents provided by leniency applicants be disclosed to private litigants?

The filing of a leniency application, as well as all application data and documents, will be treated confidentially until the issuance of the statement of objections. After this point, interested parties will have access to the information if this is necessary to submit a response to the statement of objections.

The CNMC opens a special separate file of all documents and data deemed confidential (including the applicant's identity). However, the interested parties can access all non-confidential information necessary to respond to the statement of objections (with the exception of the oral leniency statements).

Private litigants may not request the CNMC or other Competition Authorities to provide materials submitted within the scope of a leniency programme.

According to the SCA, the CNMC cannot provide the courts with any information obtained through the applications for immunity or a reduction of fines. This provision is to ensure the effectiveness of the leniency system.

4.5 At what point does the 'continuous cooperation' requirement cease to apply?

The full, continuous and diligent cooperation includes bringing the alleged conduct to an end, not destroying any evidence, not disclosing any information to third parties and not forcing other parties to take part in the infringement. The implementing regulation, RD 261/2008, states that the leniency applicant should cooperate with the CNMC for the full duration of the proceedings.

The CNMC applies high standards when determining whether undertakings have fully and continuously cooperated. In several cases in which the applicants provided information with added value, the former CNC nevertheless withheld the benefits of the leniency programme on the basis that they had not complied with their obligations to cooperate.

Therefore, cooperation must be full, continuous and diligent until the conclusion of the proceedings. Nevertheless, during the course of the proceedings, the applicant has the right to be informed about whether the CNMC intends to maintain the conditional immunity that has been granted.

4.6 Is there a 'leniency plus' or 'penalty plus' policy?

No, there is no 'leniency plus' or 'penalty plus' policy.

5 Whistle-blowing Procedures for Individuals

5.1 Are there procedures for individuals to report cartel conduct independently of their employer? If so, please specify.

The SCA explicitly states that the exemption granted to an undertaking also benefits its legal representatives or the persons comprising the management bodies, provided that they have cooperated with the CNMC. Although the SCA does not expressly foresee employees of the undertaking being the whistle-blowers, this scenario might be considered to be covered. As far as we are not aware, no whistle-blowing actions have been independently brought by employees before the CNMC to date.

Since 2014, any company or citizen may submit relevant information about anti-competitive practices to the CNMC through an online and confidential "mail-box". Since this "mail-box" is anonymous, there is no need for the whistle-blower to provide his/her name to the CNMC.

6 Plea Bargaining Arrangements

6.1 Are there any early resolution, settlement or plea bargaining procedures (other than leniency)? Has the competition authorities' approach to settlements changed in recent years?

There is no settlement or similar procedure available for cartels

in Spain. However, the Draft Regulation includes settlement proceedings in Spanish antitrust law, allowing the companies under investigation to benefit from a reduction of up to 15% in the amount of the fine if they acknowledge their participation in the infringement.

7 Appeal Process

7.1 What is the appeal process?

First, during the CNMC's formal proceedings, the resolutions and acts of the Directorate leading to non-defendable or irreparable damage can be appealed before the Council within 10 days (administrative appeal) and subsequently before the National High Court and (if the conditions for the cassation appeal are met) before the Supreme Court in last instance. For example, in 2019, the Council resolved 18 appeals against the acts of the Directorate and only partially admitted one of them.

Secondly, the decisions – including fining decisions – and acts of by the Chairman and the Competition Chamber of the Council may only be appealed before the Administrative Chamber of the National High Court within two months (judicial appeal). In a second review, appeal is possible in certain cases (*e.g.*, where there is a cassation interest) before the Supreme Court.

A recent study for the period 2014–2018, released in May 2019, shows that the National High Court has confirmed on average 73.8% of the Competition Authority's antitrust decisions. The percentage rises to 83% in the case of the Supreme Court. These statistics only include judgments which confirm or reject the existence of the infringement observing due process. Instead, rulings quashing lower decisions on grounds such as the calculation of fines, interim measures or the dismissal of appeals for fundamental rights, were not included; for these rulings, the confirmation percentages decrease to 71.5% and 52%, respectively.

During 2019, the National Court and the Supreme Court issued judgments reviewing 26 antitrust-related decisions.

7.2 Does an appeal suspend a company's requirement to pay the fine?

No, an appeal does not suspend the requirement unless interim relief is sought from the court to stay payment of the fine.

In practice, interim suspension is granted if it is shown to the satisfaction of the court that immediate payment of the fine can cause harm, whereas the public interest is not served by immediate payment. If interim suspension is granted, a bond must be posted by the requesting party to ensure eventual future payment of the fine in full with the judgment on the merits. Alternative guarantees (share or asset pledge) can be accepted.

Although the High Court has traditionally granted interim suspension, there are recent examples of refusals to grant the interim relief. For example, on 8 June 2020, the National High Court rejected a request for the suspension of a €215,592 fine payment brought by a company involved in the Volvo dealer cartel, as the Court considered that the *periculum in mora* had not been sufficiently proven (Judgment of 8 June 2020, appeal number 476/2016). Likewise, through its Order of 10 January 2020, the National High Court rejected a request for the suspension of a €3 million fine on the same grounds (Judgment of 10 January 2020, appeal number 2297/2019).

The bank fees associated with a bank bond paid for the constitution and maintaining of that guarantee can be recovered if the appeal is successful.

7.3 Does the appeal process allow for the cross-examination of witnesses?

Administrative litigation is mostly in writing. Regarding evidence, the general rules apply and it is possible to examine witnesses and experts in court.

8 Damages Actions

8.1 What are the procedures for civil damages actions for loss suffered as a result of cartel conduct? Is the position different (e.g. easier) for 'follow on' actions as opposed to 'stand alone' actions?

RDL 9/2017 has transposed the EU Damages Directive, and the main changes introduced are as follows:

a) increasing the limitation period from one to five years. This period is suspended when a Competition Authority initiates a proceeding;

b) introducing a presumption of harm in cartel infringements, which generally facilitates claims. Claimants are allowed to obtain full compensation for the damages suffered, comprising the right to be indemnified for actual loss and loss of profit, plus interest;

c) introducing a presumption of harm to indirect purchasers. In Spanish civil law, the burden of proof in civil proceedings lies with the party that alleges the harm. Thus, indirect purchasers must provide evidence of the defendant's unlawful conduct, the causal link and the existence of harm and its quantification. In the RDL 9/2017, this rule is reversed, introducing a presumption of harm in favour of indirect purchasers. Notably, Spanish courts have recognised the "passing-on" defence when considering a defendant's position in damage claims involving cartel infringements (*e.g.*, judgments of the Supreme Court of 8 June 2012 in *Acor/Gullón*, 7 November 2013 in *Nestlé España/Ebro Foods*);

d) introducing specific mechanisms to facilitate claimants' access to relevant documents before substantiating the claim. The pre-trial disclosure process in Spain was rather limited, and courts have been reluctant to award broad disclosures of documents to claimants. RDL 9/2017 modifies this regime and makes it easier for claimants to access evidence that is required to substantiate the claim, although claimants must justify the request and provide reasonable available evidence to support a damages claim, and must identify specific items or, at least, relevant categories of evidence. Thus, RDL 9/2017 does not foresee the introduction of a discovery system in Spain. Moreover, the party who requests access is expected to provide sufficient caution to cover the expenses incurred by the defendant as well as any potential damage they may suffer as a result of the misuse of the information obtained. Specific protection for leniency statements and settlement submissions is guaranteed, and specific mechanisms are foreseen to ensure the confidentiality of business secrets of entities called to reveal documentary evidence;

e) in line with the Directive, making the CNMC's final decisions declaring infringements of competition law binding on Spanish courts. A final decision made by any other Member State's NCA creates a presumption that a competition law infringement exists;

f) going beyond the Directive, extending the liability of parent companies for damage caused by their subsidiaries to civil proceedings, and declaring the joint and several liability of all co-infringers in relation to damages caused

as a result of anti-competitive behaviour. This principle of joint liability is exempted in cases involving small and medium-sized enterprises that meet certain requirements and benefits of immunity; and

g) declaring the effective compensation of the damages before the adoption of a decision by the CNMC to be a mitigating factor when setting the amount of the antitrust fines.

Some of the reforms advocated (such as the system requiring the production of evidence by the infringer) are still to be appropriately applied and developed. However, RDL 9/2017 has fostered awareness among claimants and is expected to incentivise them to bring damages actions for antitrust infringements in Spain.

Both follow-on and stand-alone actions are possible in Spain. Follow-on claims with a precedent administrative decision contain relevant data about the unlawful conduct that may come to reduce the burden of proof or even to exempt the claimant from proving the unlawful practices. If there has been no administrative decision, a stand-alone claim is available, in which the court will need to make a deeper assessment to confirm the legality of the business conduct as a prerequisite for a damages award.

Prior to the current SCA, there was an anomaly in that national competition law provisions could only be invoked in administrative proceedings, not in civil proceedings, whereas Articles 101 and 102 TFEU could be invoked in private litigation as they have direct effect. Under the new SCA, mercantile courts acquired jurisdiction to adjudicate on both stand-alone and follow-on actions.

The general rule to claim damages is found in Article 1902 of the Civil Code: "*any person who by action or omission causes harm to another by fault or negligence is obliged to repair the damage caused*."

Prior to the SCA, damages cases for a breach of the SCA were very rare. The reason for this may have been that, under the law in force prior to the SCA, a final judgment (by the highest court competent in the case to decide on appeal) was required, which erected a very high barrier to damages claims. There were some cases of follow-on actions on the basis of antitrust decisions confirmed by the Supreme Court by resorting to the unfair trade laws (*i.e.*, unfair conduct based on infringement of Articles 101, 102 TFEU).

The first time that the Supreme Court decided on a damages claim was in the judgments of 10 May 2012 and 7 November 2013 in relation to the *Sugar Cartel* case. The Court approached the case from victim-friendly perspective. It included a number of guidelines for companies and consumers affected by cartel conduct and seeking compensation due to such conduct.

More recently, thousands of individual damages claims have been lodged against the *Truck Cartel* before first instance courts all over Spain. Since the first judgment was given in October 2018, there have been several first and second instance decisions, but the decisions vary. Those unfavourable to the interests of the claimants were often caused by poor economic expert evidence. It seems likely that these cases will end up in higher courts and, in some cases, even before the Supreme Court (please see question 1.6 above).

8.2 Do your procedural rules allow for class-action or representative claims?

No. In Spain, collective actions can only be lodged by groups and legal entities on behalf of consumers and end-users. The Civil Procedure Act sets out various ways to submit collective actions. The most straightforward collective action involves the consolidation of the claims of multiple claimants, though this is not always straightforward.

Article 11 of the Civil Procedure Act includes some provisions in relation to collective legal standing in cases that are limited to the defence of the interests of "consumers and final users", which grant standing to sue to consumers' associations to protect not only the interests of their associates, but also the general interests of all consumers and final users. This could potentially be applicable to antitrust cases.

However, actions by consumer associations to claim damages for antitrust infringements have been lacking. As an exception, on 30 July 2015, the Spanish consumer association OCU announced its potential intentions to bring collective damage claims against the car dealers of various car brands that had been fined by various CNMC decisions in 2015. No information is available as to whether any of these have become final.

Finally, it is possible for affected groups to bring a joint action (for instance, an association of companies claiming damages after the abuse of a dominant position by a competitor) or for third parties, having a direct and legitimate interest, to join proceedings that have already been initiated, as co-claimants. Only the parties represented during the proceedings benefit from the judgment.

8.3 What are the applicable limitation periods?

As asserted in question 8.1, after the implementation of the Damages Directive, the limitation period for antitrust infringements is five years.

However, for infringements committed and declared by the CNMC before RDL 9/2017 entered into force, the Civil Code applies, which provides for a limitation period of one year from the time when the infringement is known. This refers to damages claims based in non-contractual liability, or tort, which is the kind of damage claim contemplated under RDL 9/2017.

The limitation period for contractual claims is fifteen years from the moment when there is a civil judgment declaring the invalidity of the contract or alternatively from the moment when the action could be lodged.

In both cases (*i.e.*, non-contractual and contractual obligations), the limitation period can be interrupted by lodging an extrajudicial claim.

It can sometimes be difficult to determine if contract or tort law is applicable to a given case and, therefore, if the limitation period applies. For example, this difficulty was seen in the civil damages claim lodged against Azucarera Ebro, in relation to the *Sugar Cartel* case. The judgment of the Court of First Instance Nº 50 of Madrid (*Autos* 735/07) did not clearly establish the type of liability. However, the tort liability of the damages (*responsabilidad extracontractual*) resulting from a cartel (*Sugar Cartel* case) was eventually confirmed by the Supreme Court. This was also confirmed for other antitrust infringements such as abuse of a dominant position (*Centrica* case).

A difficult question can arise regarding the exact date at which the limitation period starts to run. In follow-on cases, this will typically be the day when the administrative antitrust decision is available, containing the main information items enabling preparation of the damages claim.

In order to avoid having its action time-lapsed, the claimant must either sue or interrupt the limitation period by serving an out-of-court claim before it expires.

8.4 Does the law recognise a "passing on" defence in civil damages claims?

Under Spanish law, the burden of proof in civil proceedings lies

with the party that alleges the harm. Thus, indirect purchasers must provide evidence of the defendant's unlawful conduct, the causal link and the existence of harm and its quantification. Under the RDL 9/2017, this rule is reversed, introducing a presumption of harm in favour of indirect purchasers. Although the passing-on defence is now expressly regulated in the SCA following the transposition of the Damages Directive, the Supreme Court had already accepted the possibility of establishing this defence in *Nestle España v Ebro foods* (Judgment of 7 November 2013, appeal number 2472/2011). However, the Court rejected the passing-on defence in that case by establishing a stringent standard of proof of harm in quantitative terms including loss of goodwill.

This matter is also at stake in the *Truck Cartel* litigation in Spain. For instance, the judgment of the Provincial Court of Bilbao of 4 June 2020, appeal number 1606/2019, referring to the reasoning of the Provincial Court of Valencia in its Judgment of 16 December 2019, has confirmed that the passing-on defence as foreseen in Directive 2017/104/EU, similarly to the new limitation periods, cannot apply to the case, since it would mean a retroactive application of RDL 9/2017. In any case, the judge stated that the economic report failed to meet the burden of proof to demonstrate passing-on.

8.5 What are the cost rules for civil damages follow-on claims in cartel cases?

The judge will generally order the losing party to pay the costs, unless the case is found to present serious doubts. When the judge does not rule entirely in favour of either party, the judge might not expressly determine who is to pay the legal costs, in which case each party will bear its own costs.

When the unsuccessful party is ordered to pay legal costs, it will only have to pay the lawyers' fees and those of other professionals whose fees are not fixed by official fee scales, which, in any event, cannot exceed one-third of the amount of the proceedings in question. If the amount of the proceedings cannot be calculated, ultimately the Bar Association may step in and issue a ruling on costs.

8.6 Have there been any successful follow-on or stand alone civil damages claims for cartel conduct? If there have not been many cases decided in court, have there been any substantial out of court settlements?

Due to the fact that the follow-on rule under the former SCA required that the Competition Authority must have previously issued a final decision, it was difficult for private parties to bring actions based on antitrust infringement proceedings because a final decision might only be available after several years.

Most of the damages claims actions brought before the Spanish courts have been based on abuse of dominance cases in the energy and telecoms sectors. Examples include the *3C v Telefónica* case in 2007 (follow-on action), the *Conduit v Telefónica* case in 2006 (stand-alone action), the *Cableuropa v AVS and Sogecable* case in 2010 and the *Centrica v Endesa* case in January 2011.

The two abovementioned judgments of the Supreme Court in the *Sugar Cartel* case (please see question 8.1) were the first two damages actions derived from cartel conduct in Spain (both follow-on actions).

Under the current SCA, individuals may bring actions for antitrust infringements before the commercial courts. As a result, the number of successful civil damages claims is expected to increase significantly in the near future.

Besides the *Truck Cartel*, where claims are generally successful, there have also been recent rulings from the Madrid and Barcelona Provincial Courts in follow-on damages claims deriving from the *Envelope Cartel*. During the first instance phase, while the Courts of Barcelona upheld the claim, the claims for damages submitted before the Madrid courts were dismissed for lack of evidence in the applicants' economic reports. However, the Provincial Court of Madrid has reversed the rulings, siding with the claimants (see rulings of the Provincial Court of Madrid of 3 February 2020, appeal numbers 165/2019 and 99/2019). Similarly, the Provincial Courts of Barcelona have confirmed the first instance rulings, although limiting the percentage of overcharge calculated for the compensation and restricting the liability of one of the cartel members who did not participate in the cartel throughout all of its duration (see judgments of the Provincial Court of Barcelona of 13 January 2020, appeal numbers 1197/2019, 236/2019, 1127/2019, 1963/2018, 1128/2019, and of 10 January 2020, appeal numbers 1964/2018 and 1965/2018).

Out-of-court settlements are private and there is little information available to the public. However, we do know first-hand that out-of-court settlements are happening in Spain.

9 Miscellaneous

9.1 Please provide brief details of significant, recent or imminent statutory or other developments in the field of cartels, leniency and/or cartel damages claims.

As discussed above, the CNMC has recently published Antitrust Compliance Program Guidelines in order to foster the use of these programmes by companies in Spain. Similarly, the CNMC has actively engaged in antitrust advocacy throughout 2019 and 2020 by organising a monthly discussion forum within the framework of the "Compliance Area", where the compliance and governance officers of the main Spanish companies and associations meet. The aim of these meetings is to ensure that these professionals include competence and compliance with sectoral regulations among their areas of responsibility.

Moreover, the CNMC has changed its previous practice to include a percentage or a range of the amount of the fine in the proposal decision that is submitted by the DC to the Council, so that the parties would have the opportunity to submit observations thereto before a final decision is adopted.

Finally, there is a Draft to amend the current SCA to implement the ECN+ Directive (please see section 1 above).

9.2 Please mention any other issues of particular interest in your jurisdiction not covered by the above.

There are none.

Pedro Callol is a dual-qualified (Spain and England and Wales) lawyer with over 20 years of specialist antitrust, trade regulation and transactional experience. Previously (2008–2014), he was a corporate partner leading the EU & competition practice of one of Spain's larger law firms. Before that (2002–2008), he created and led the EU & competition practice of a London magic circle law firm in Spain. Prior to that, he worked with Arnold & Porter in Washington, D.C. and London (1999–2002), and before that, he trained with some of Spain's best practitioners in Madrid and Brussels. He holds a law degree from Universidad Complutense and a business degree from San Pablo University (Madrid). Moreover, he is a law graduate of University of Chicago Law School (Fulbright – Banco Santander scholar), and holds a Master's degree in European law from the College of Europe, Bruges (sponsored by the Spanish Ministry of Foreign Affairs). He is the author of many specialist publications and is the Spanish correspondent of the *European Competition Law Review*. In addition, he is the President of the Fulbright Alumni Association of Spain and Secretary of the Board of the University of the Chicago Alumni Association of Spain. He is also a member of the Advisory Board of the American Antitrust Institute, Washington, D.C. He reads specialist seminars in the Carlos III and San Pablo Law Schools and regularly speaks at other academic and business venues including the ABA, IBA and UIA.
Pedro leads CallolCoca's competition practice, which is recognised by the main international directories such as *Chambers* and *The Legal 500* (which has selected him as one of the top individual competition lawyers in Spain). He was (twice) acknowledged at the time as one of the "top 40 under 40" by *Iberian Lawyer*, and is a competition law specialist currently recognised by *Global Competition Review* and *Who's Who* as one of the eight "Thought Leaders" in the area of competition law.
Pedro speaks English, French, Spanish, Italian and German.

Callol, Coca & Asociados
Calle Don Ramón de la Cruz 17
28001 Madrid
Spain

Tel: +34 91 737 67 68
Fax: +34 91 141 21 39
Email: pedro.callol@callolcoca.com
URL: www.callolcoca.com

Enrique Fayos is a junior associate at Callol, Coca & Asociados, where his practice focuses on EU and competition law. Prior to that, he interned in the competition department of an international law firm in Barcelona. Enrique is a graduate of Universidad Pontificia Comillas (ICADE) and holds a double LL.M. in Corporate Law and Legal Practice from Instituto de Empresa (IE) in Madrid, Spain. In 2019, he was awarded the XIII José María Cervelló Award.

Callol, Coca & Asociados
Calle Don Ramón de la Cruz 17
28001 Madrid
Spain

Tel: +34 91 737 67 68
Fax: +34 91 141 21 39
Email: enrique.fayos@callolcoca.com
URL: www.callolcoca.com

We are a specialist team devoted to antitrust law and providing our professional services in a zealously independent and professionally demanding environment. We provide services to private equity and investment funds, as well as to media, technology, consumer goods, pharmaceutical, distribution and industrial corporations, mostly from the EU, America and Asia.
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