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Q&A Chapters

Spain


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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, 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 implemented EU Directive on Antitrust Damages Actions by means of Royal Decree-Law 9/2017 (**RDL 9/2017**), which amends the SCA and the Civil Procedure Act.

Last but not least, on April 2021, Spain enacted Royal Decree-Law 7/2021, transposing the Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market (**Directive ECN+**). The Directive ECN+ introduces relevant changes to the Spanish competition law regime. Additionally, the vast majority of infringements provided for by the law will be considered "very serious", which means that in all those cases fines of up to 10% of the turnover may be imposed.

The Directive ECN+ 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 Directive ECN+ 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.

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 via a number of judgments in 2015.
- In June 2013, the former CNC also published its Communication on the Leniency Programme, which replaced the former provisional guidelines relating to the handling of applications for exemptions and reduction of fines published in February 2008. Said guidelines aimed to explain 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 in 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 as an obstruction to dawn raids.
- The CNMC published, in October 2018, 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 of implementation and development of compliance programmes that can be effective in preventing or mitigating anticompetitive conduct. For that purpose, the CNMC lays down the basic criteria that it deems relevant to make 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.
- In June 2023, the CNMC published a communication on criteria for the determination of the prohibition to contract for distortion of competition by the CNMC, which introduces a new system that will allow the geographic and product scope and duration of the ban to be set from the outset and will also enhance compliance programmes and competition culture.
- The CNMC also published guidelines to facilitate quantification of damages in private actions for competition law infringements in July 2023. The document presents relevant economic, statistical and econometric concepts with practical examples and checklists.

The SCA has a public and a private sphere. Regarding 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 that of damages claims lodged by third parties affected by anticompetitive 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 rarely applied whereby cartel conduct is punishable by imprisonment (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 reference to the inter-State trade affection 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 (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) (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 refers to the alteration of prices resulting from free competition, providing a term of six months to six years imprisonment and fines from 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 imprisonment and daily fines from one to two years and a ban for participating in public bids; and (iii) Article 281 prohibiting 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 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*". In accordance with its 2022 Annual Report, the CNMC issued one decision punishing a cartel in 2022, specifically, the Scrap and Steel cartel (Decision of 4 March 2022, *CHATARRA Y ACERO*, file S/0012/19).

The CNMC is an autonomous authority organically and functionally independent from the Government. The CNMC consists of a chairman, a Council and four different investigation directorates: a specific Directorate for Competition (**DC**); and three further Directorates for Telecommunications and the Audio-visual 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 composed of four additional members. The

President holds managerial and representation duties. In June 2021, some of the positions of the Council were renewed and the presidency was given to a highly reputed competition law professional.

The DC is in charge of 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 de-centralised administrative structure of Spain, the enforcement of Spanish competition law is shared with the regional competition authorities who have assumed such powers (except for merger control). Competition law can be applied by regional authorities provided that the conduct in question has regional 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 having a significant impact on the regional territory.

The SCA expressly recognises the private enforcement of its Articles 1 (prohibition of anticompetitive 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 (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 DC; and the decision is taken by the Council's Competition Chamber.

Proceedings are initiated by the DC 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 DC opens a preliminary and initial investigation phase (*información reservada*). During this preliminary phase, the DC may carry out inspections and submit formal information requests. This preliminary phase is subject to no formal deadlines or time constraints for the DI, who can investigate in principle for as long as it wants without any formal indictment.

Once proceedings have been formally initiated (*incoación*) because the DC 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 DC can resort to various investigation powers: it can carry out inspections in the homes of directors, managers and other staff members, the power to seal any business premises, to make copies and seize original documents, etc. – see section 2 below.

The Council can adopt interim measures at any time during the course of the proceedings. Once the DC has finished its investigation, it adopts a decision proposal (*Propuesta de Resolución*), granting the parties the opportunity to submit allegations in its defence once again. Thereafter, the DC 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 24 months (although under certain circumstances this deadline can be extended). 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 24-month maximum time limit may entail that the administrative procedure lapses. As a result, the CNMC may initiate once again the proceedings but must do so in the five-year limitation period (the limitation period was increased from one to five as a result of the Damages Directive).

In these cases of suspension of the 24-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 features 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 apply, provided the criteria set out in Article 101.3 of the TFEU are met. Furthermore, the EU Block Exemptions will also apply to those agreements even in the absence of any cross-border impact. In addition, the Spanish Government can adopt block exemptions. For instance, under the 1989 Competition Act, the Government adopted Royal Decree 602/2006, implementing the block exemption on information exchange agreements relating to late payments.

Article 6 SCA includes a provision similar to Article 10 of Regulation 1/2003 whereby findings of inapplicability may be made.

In addition, 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 of the SCA.

Moreover, pursuant to Article 4 SCA, the prohibition set out in Article 1 does not apply to conduct deriving from the application of law (Act of Parliament). Naturally, this exception on the application of the Spanish competition rules shall not apply when EU competition law provisions are also applicable.

Similarly, the prohibition will not apply to conduct of minor importance that qualifies as *de minimis*, according to the criteria set out 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).

During the height of the COVID-19 outbreak, some competition authorities such as that of the UK or 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 sanitary 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 already provides that any conduct "*which has as its object or effect the prevention, restriction or distortion of competition in all or part of the Spanish market*" is prohibited, any cartel conduct taking place outside Spain which affects or may affect all or part of the Spanish market may fall under the cartel prohibition. In this regard, it is worth noting that according to the SCA, any conduct restricting imports or exports is regarded as a cartel (see question 1.2). As an example, in the *Refrigerated Transport* case (S/0454/12), the restrictive practices concerned products originated in the Spanish market and intended for export to the European market (primarily to Germany, France, Italy, 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 Directive ECN modified this interpretation by expressly referring to a worldwide turnover of the sanctioned company.

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 trucks cartel case. Even if none of the companies addressed in the EC'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 the ones 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 European Court of Justice (**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 stemmed 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 Directive ECN+ contains several provisions aiming at increasing cooperation and coordination between the CNMC and other NCAs or the EC in terms of merger control, mutual assistance and limitation periods.

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 may conduct the necessary inspections of the companies or associations, the private domicile of the entrepreneurs, administrators and other personnel of the companies that may be in possession of relevant information without prior notice. The DC must issue an investigation order which must contain: (i) the object and purpose of the inspection; (ii) the date on which it will commence; and (iii) must refer to the sanctions provided for in the SCA in case the subjects under investigation do not submit to the inspections or obstruct them.

The exercise of inspection powers involving the restriction of a fundamental right, i.e., the inviolability of the home, will require judicial authorisation. Normally, the CNMC requests judicial authorisation prior to the inspection from the competent judicial body.

CNMC inspectors and authorised personnel may access any premises, facilities, land and means of transport of the inspected entities and parties. In turn, they may seal premises, books or documentation, electronic devices and other goods. They may also examine any documentation on paper, computer or electronic support.

Likewise, in connection with the above, the CNMC may also make copies of books or documents; request explanations on relevant facts or documents from the company's representative or staff member.

Entities are obliged to submit to inspections. The refusal of the entity will result in the initiation of a sanctioning proceeding.

In matters of investigative powers, the CNMC will collaborate with the regional competition authorities, the European Commission, and the National Competition Authorities under the terms established in Regulation (EC) No. 1/2003, of December 16, 2003, No. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, in Council Regulation (EC) 139/2004 of 20 January 2004 on the control of concentrations between undertakings, and in Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018.

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

There are no unusual features of the investigatory powers in Spain. The investigative powers of the CNMC have been updated in accordance with the transposition of the Directive ECN+.

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 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 specialized IT unit. The IT support unit works very closely with the Competition Directorate during on-site inspections. The IT unit and the Competition Directorate jointly compile a catalogue of search criterion to be used during inspections together with software tools specifically designed for that aim.

Further, during the inspections, the appointed CNMC officials may call the police in the case of obstruction. As an example, on 15 October 2009, during the inspection of the construction company *Extraco*, in the context of a suspected bid-rigging cartel for road construction (S/0226/10), the officials of the former CNC called for the police in order to have access to a safe box because Extraco refused to open it.

Finally, the CNMC may send a request for information to the suspected companies or to other third parties. Should these parties fail to collaborate with the CNMC by not responding to such requests or by providing incomplete or misleading information, the CNMC may impose fines of up to 5% of the total turnover of the infringing company. As an example, the CNMC fined Mediapro €200,000 on 31 July 2012 and a €1,285,649 fine upon Cementos Portland on 31 May 2012. In April 2016, the CNMC imposed a fine to a company for providing a turnover figure lower than the one included 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 into business and residential premises will be carried out by the CNMC (or Regional Competition Authorities) officials. 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 starting to 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 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 explain 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 DC in the *Stanpa*, *Salvat Logistica*, *Unesa* and *Consenur* cases, the current position is only external legal advice covered by legal privilege; and *sensu contrario*, 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 European Court of Justice 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.

The exercise of the power to enter premises, private homes, land and means of transport shall require the prior express consent of the affected party or, failing this, judicial authorisation. As previously mentioned, in practice, the CNMC usually requests a judicial authorisation before taking action in order to avoid delays and/or denials.

The investigations carried out by CNMC personnel are restricted to the matter at hand and the information found cannot be used for other purposes different than those included in the scope of the investigation. Furthermore, documents drafted by external lawyers are protected by legal privilege, and personal documents shall be excluded from the inspection or redacted appropriately as the case may be.

In a judgment of the Supreme Court on 4 December 2012, in the *Stanpa* case (cartel of perfumery and cosmetics), the Court ruled that the former CNC was entitled, on the basis of a key-word search, to copy certain electronic documents which included personal communications and other documents not related to the investigation, but it was obliged to return those documents once identified. Likewise, the ECJ has recently decided that competition authorities are entitled to make copies of data without carrying 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 National High Court, in judgments such as the judgments of 21 July 2014 (*Renault* case) and 12 June 2014 (*BP* case), and the Supreme Court, on 9 June 2012, May 2011 (*Unesa* case) and April 2010 (*Salvat Logistica* case), have confirmed the investigative powers and the practice of the former CNC.

Nevertheless, the Supreme Court has showed a very strict approach when scrutinising search warrants and the compliance of the CNMC's inspections with the scope and aim of the search warrants (CNMC's orders of investigation and judicial authorisations). In this regard, by judgments of 10 December 2014 (*UNESA*), 10 December 2014 (*Campezo*), 27 February 2015 (*Transmediterránea*), 12 March 2019 (*Uder*) the Supreme Court annulled the CNMC's respective orders of investigations for not being sufficiently precise and not clearly indicating the scope and aim of the investigation; for not being consistent with the judicial authorisation; and lastly, for being too vague and imprecise. As a consequence of these annulments, the further appeals brought on the merits have derived on judgments overturning the respective 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?

The SCA provides that the following types of conduct, amongst others, constitute an obstruction of an investigation: (i) the lack of submission and the incorrect, misleading or incomplete submission of documents requested by the CNMC; (ii) the refusal to answer or the providing of incomplete, inexact or misleading answers to the questions formulated by the CNMC; and (iii) the breaking of seals affixed by CNMC personnel.

These infringements will be treated as serious infringements and fined with up to 5% of the total worldwide turnover of the undertaking concerned in the previous year. In the event that it is not possible to make such a calculation, the undertakings in question will be fined between €500,001 and €10 million.

In the case mentioned in question 2.4, on 6 May 2010, Extraco was fined €300,000 after having obstructed the inspections carried out by the former CNC by hiding documents, providing misleading information and impeding the inspections. However, the Supreme Court reduced this fine to €100,000 by the judgment of February 2015, considering that the fine should be adapted to the circumstances of the case.

Similarly, on 1 March of 2011 the former CNC fined manufacturer of office supplies and stationery Grafoplas del Noroeste €161,600 for obstructing the inspection work of the aforesaid authority during the inspection of its business premises. Said decision was confirmed by the National High Court in its Judgment of 29 November 2016, appeal number 31/2013.

3 Sanctions on Companies and Individuals

3.1 What are the sanctions for companies?

The SCA includes a classification of infringements according to their seriousness (minor, serious and very serious). By way of example, cartels between competing companies are classified as very serious, anticompetitive vertical agreements as serious, as well as obstruction of CNMC inspections and, as minor infringements, having submitted a merger notification to the CNMC after the deadlines or failing to notify a merger requested by the CNMC.

The amount of the fine depends on the seriousness of the infringement, up to 1% (for minor infringements), 5% (for serious infringements) and 10% (for very serious infringements) of the total turnover of the infringing undertaking in the business year immediately preceding that of the imposition of the fine. When turnover cannot be calculated, the Council can impose a fine of up to €10 million.

The SCA sets out the criteria that are taken into account when calculating the exact amount of the fine (scope and characteristics of the affected market; market shares of responsible undertakings; scope of the infringement; duration; effects of the breach on consumers or any other undertaking; and unlawful profit). The SCA also lists a series of mitigating and aggravating factors.

The Supreme Court declared on 29 January 2015 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, second, 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. In cases in which the undertaking benefits from a reduction in 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 are not sufficiently clarifying 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 €120,728,000 on several insurance companies. The High Court overturned the fines for all companies, but the Supreme Court in May and June 2015 confirmed the existence of an anti-competitive conduct for four out of the six companies but referred those four cases to the CNMC in order to recalculate the fines to be adapted to the new method for 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 that 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 or television advertising, to name but a few.

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

There is currently no settlement procedure in Spanish antitrust law. 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. 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 allocation of public tenders of railway infrastructure. The total amount imposed to the directors was of €666,000. And as for the most recent decision, the CNMC imposed a fine of €285,000 in total to six managers in its Decision of 19 July 2023, *LICITACIONES MATERIAL MILITAR*, file S/0008/21.

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 anticompetitive agreements or decisions.

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.

It is worth noting that, despite the financial turmoil, the former CNC did not seem particularly keen to reduce fines following requests for a reduction of fines 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 anticompetitive 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?

Limitation periods for very serious infringements are of four years; 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 for his/her employer for legal costs or financial penalties.

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, see response to 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 exerts a decisive influence on, and determines the conduct of, the wholly owned subsidiary (Judgments of the Supreme Court 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*). It is also worth mentioning that 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. This system has been implemented by the RD 261/2008, which regulates those procedures. The leniency programme entered therefore into force in February 2008. As previously mentioned, on 21 June 2013 the Spanish Competition Authority published guidelines on the leniency programme aimed at providing further guidance to leniency applicants and increasing the transparency of its decisions.

Following the European model, the programme offers immunity from fines or reduction of the fine. Leniency is open not only to undertakings but also to individuals (either because the original applicant is an individual or because the company requests that leniency be extended to its employees).

The moment at which participants in a cartel reveal information (prior to or following the opening of an investigation) is relevant not only for immunity applicants (who must be the first to report the information), but also for undertakings or individuals seeking partial leniency. The range for the reduction of the fine imposed depends on that timing: 30% to 50% for the second party revealing information; 20% to 30% for the third party; and up to 20% for the remaining parties.

Immunity is therefore reserved for the first undertaking which provides evidence that, in the view of the CNMC, it will be enabled to carry out an inspection or to find an infringement of Article 1 SCA, and this is subject to the condition that the CNMC does not already have sufficient evidence on the infringement. Cartel instigators are excluded from the benefit of immunity. To benefit, the applicant is required to: cooperate fully throughout the investigation; end its involvement in the alleged cartel immediately following its application, unless otherwise directed by the CNMC to preserve the effectiveness of the inspections; not destroy relevant evidence relating to its application; and not disclose to third parties other than the European Commission or any other national authorities its intention to submit an application or its content.

Companies or individuals who subsequently provide additional evidence may have their fines reduced by up to 50%. Reductions can be granted when the undertaking provides the CNMC with evidence of the alleged infringement which represents significant "added value" with respect to the evidence already in the CNMC's possession. Furthermore, the applicant must meet the cumulative conditions set out above *mutatis mutandis*.

Leniency applications may also be submitted before the Regional Competition Authorities in those regions where the Competition Authority is in place. The Regional Competition Authorities shall communicate all leniency applications submitted to it to the CNMC.

Legal representatives or members of management bodies who have participated in the alleged infringement can also benefit from immunity and reduction of fines provided they cooperate with the CNMC.

When more than one Member State is affected by the infringement and subsequently more than one Competition Authority is well placed to act against the infringement, the Commission encourages all Competition Authorities affected to apply for leniency. The European Competition Network Model Leniency Programme is generally resorted to and in cases where the Commission is particularly well placed to deal with a case applicants typically submit summary applications with NCAs which might be well placed to act.

According to the last available annual report published in 2019, since 2010, the year when the first resolution pursuant to the leniency programme was adopted, 31 cartels have been discovered and sanctioned in direct relation with the leniency programme. This means that until 2019, close to €500 million in fines were imposed following the programme.

On 27 January 2010, the CNC published its first Decision stemming from a leniency application, in connection with a cartel in the Bath and Shower Gel Manufacturing Sector (S/0084/08). The proceedings had been initiated on the same date the leniency programme first came into effect. On that day, two of the cartel participants – Henkel and Sara Lee – submitted respective statements to the CNC disclosing the existence of the cartel and their participation, as well as the involvement of Puig, Colgate and Colomer. More recently, a company belonging to the Scrap and Steel cartel benefited from a 50% reduction of the penalty imposed, due to its cooperation with the CNMC in the framework of the leniency programme (Decision of 4 March 2022, *CHATARRA Y ACERO*, file S/0012/19).

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 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?

Yes. With the transposition of the ECN+ Directive, an indicator was introduced in Regulation 261/2008. In particular, the Competition Directorate may grant, upon a reasoned request from the applicant, a marker for the applicant's place in an application for immunity from fines while it submits the information and evidence necessary to comply with the requirements of the SCA. The applicant's position indicator will be valid for a period of time to be determined by the Competition Directorate. The Competition Directorate will have the discretion to assess whether the information and evidence provided is sufficient to grant the position indicator regulated in this paragraph. Upon completion of the leniency application, the date of submission of the exemption application will be deemed to be the date of the application for the benchmark.

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

At the request of the applicant, oral applications for leniency are accepted. To do so, a meeting has to be arranged at the CNMC offices and, after the recording has been transcribed, the

declaration is registered. Thus, both the exemption and reduction of fines may be submitted orally, accompanied by the relevant information and evidence, recorded at CNMC premises with a transcript entered on the register. The transcript's entry date and time in the CNMC register will determine the order of receipt of that leniency application.

However, in order to ensure the effectiveness of the leniency system, the SCA provides that the CNMC cannot provide the Commercial Courts with the information obtained via immunity or reduction of fines applications. This provision affords some protection to applicants in the event of damages actions. In that regard, unlike the EU case law practice (e.g., *Pfleiderer* case), Spanish law is unambiguous in connection with the fact that all documentation and declarations made together with a leniency application, as well as the application itself, are confidential, as provided by Article 15 *bis* of the Spanish Civil Procedure Act, Article 42 of the SCA and Article 51 of RD 261/2008.

Only the interested parties may have access to the transcript. Neither mechanical nor electronic copies of the oral submissions may be made when requesting access to the CNMC's file.

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 request for immunity from a fine or a reduction application and all application data and documents will receive confidential treatment until the statement of objections is issued. Interested parties will then have access to that information provided that this is necessary to submit a response to the statement of objections.

A special separate file of all documents and data deemed confidential (including the applicant's identity) is open. However, the interested parties have access to 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 that the CNMC or other Competition Authorities produce materials submitted within the scope of a leniency programme.

In order to protect the effectiveness of the leniency system, the SCA establishes that the CNMC cannot provide the courts with any information obtained through the applications for immunity or the reduction of fines.

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

The full, continuous and expeditious 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 throughout the entirety of the proceedings.

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

Cooperation must therefore 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 expressly states that the exemption granted to an undertaking shall also benefit its legal representatives or the persons comprising the management bodies provided that they have cooperated with the CNMC. The scenario of employees of the undertaking being the whistle-blowers is not expressly foreseen but might be considered to be covered by the SCA. To date, we are not aware that any whistle-blowing actions have been independently brought by employees before the CNMC.

In 2014, the CNMC opened an online and confidential "mailbox" in which any company or citizen may submit relevant information to the CNMC concerning anti-competitive practices. This mailbox is anonymous, which means that 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 applicable to cartels in Spain.

7 Appeal Process

7.1 What is the appeal process?

First, it must be noted that 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 14 appeals against the acts of the Directorate where one was partially upheld, 10 were dismissed, two were inadmissible and one was shelved.

Secondly, the decisions – including fining decisions – and acts issued 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) and, in a second review, appeal is possible in certain cases (e.g., where there is a cassation interest) before the Supreme Court.

A study carried out for the period 2014–2018, and 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. That percentage includes only 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 those the confirmation percentage decreases to 71.5% and 52%, respectively.

During 2022, the High Court and the Supreme Court have handed down 110 judgments resolving challenges to CNMC decisions. Of these 110 judgments, 103 corresponds to the High Court and seven to the Supreme Court.

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

No, unless interim relief is sought from the court to stay payment of the fine.

Interim suspension is granted in practice 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 the 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 the precautionary suspension, there are recent examples of refusal of the precautionary measure: the High Court rejected an application for suspension of the payment of a fine of €1,605,648 filed by a company involved in the road maintenance cartel, considering that the company's financial situation had not been sufficiently accredited (Order of 25 October 2022, appeal number 2508/2021). The bank fees associated to 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?

Royal Decree-Law 9/2017, of 26 May (**RDL 9/2017**), transposed Directive 2014/104/EU of 26 November 2014 on antitrust damages claims, amending the SCA and the Civil Procedure Act

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 of 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. Spanish civil law states that the burden of proof in civil proceedings lies with the party that alleges the harm. Thus, indirect purchasers must provide evidence of the defendant's unlawful conduct, the causal link 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. It is relevant to mention here that 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, 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 CNMC's final decisions declaring infringements of competition law binding on Spanish Courts. A final decision made by any other Member State's National Competition Authority creates a presumption that a competition law infringement exists;

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

g) declaring the effective compensation of the damages caused before the adoption of a decision by the CNMC as a mitigating factor for the purposes of setting the amount of the antitrust fines.

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 conducts that may come to reduce the burden of proof or even to exempt the claimant to prove the unlawful practices; and in the absence of an administrative decision, *a stand-alone claim* is available where the court will need to make a deeper assessment to confirm the legality of business conduct as a pre-requisite for a damages award.

Prior to the current SCA there was an anomaly due to the fact 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 persons who by action or omission causes harm to another by fault or negligence is obliged to repair the damage caused*", as well as Article 71 SCA: "*competition law infringers will be liable of the harm caused*".

Prior to the SCA damages cases for breach of the SCA were very scarce. 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 was some case 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 and 102 TFEU).

The first time the Supreme Court decided on an antitrust damages claim took place by means of judgments of 10 May 2012 and 7 November 2013 in relation to the *Sugar Cartel* case. The court adopted a victim-friendly approach and included a number of guidelines for companies and consumers who have been affected by collusive behaviour, and who seek compensation as a result of such conduct.

More recently, thousands of individual damages claims have been lodged against the Trucks Cartel (and more recently the Cars Cartel, a Spanish case) before first instance courts all over Spain. Since the first judgment on the Trucks Cartel was given in October 2018, hundreds of first and second instance decisions have been adopted. Those unfavourable to the interests of the claimants were often caused by poor economic expert evidence. The Supreme Court issued a first badge of decisions concerning the Trucks Cartel, largely confirming second instance decisions.

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 different 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 grants 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.

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 of five years.

However, for infringements committed and declared by the CNMC before the entry into force of RDL 9/2017, 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 of 15 years from the moment there is a civil judgment declaring 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.

Determining whether the case relates to contract or tort law, and consequently whether the limitation period applies, can sometimes be a tricky issue. This is reflected in the judgment adopted by the Court of First Instance Nº 50 of Madrid (*Autos* 735/07) in the civil damages claim lodged against Azucarera Ebro, in relation to the *Sugar Cartel* case whereby the type of liability at stake was not clearly established. However, the Supreme Court finally confirmed the nature of tort liability of the damages (*responsabilidad extracontractual*) resulting from a cartel (*Sugar Cartel* case) and also on other antitrust infringement 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 (this is the case both before and after the Directive was implemented). In the recent judgments of the Supreme Court on the Trucks Cartel, the court established that the *dies a quo* was the day of publication of the EC Decision.

In order not to have 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), though it rejected it in that case by establishing a stringent standard of proof of harm having been passed in quantitative terms including loss of goodwill.

This matter is also at stake in the trucks 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 the 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 determined 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 applied under the former SCA required firms a prior final decision issued by the Competition Authority, it was difficult for private parties to bring actions based on antitrust infringement proceedings as 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 telecom sector, such as, for instance 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 or the *Centrica v Endesa* case in January 2011.

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

Under the current SCA, individuals may bring an action for antitrust infringements before the Commercial Courts. Therefore, the number of successful civil damages claims is expected to increase significantly in the near future.

Besides the Truck Cartel, where claims are being generally successful, there has also been recent rulings from the Madrid and Barcelona Provincial Courts in follow-on damages claims stemming 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 those 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 asserted, the CNMC has recently published two guides, one on the prohibition to contract, and another one that helps to quantify the damages. Until now it was the Ministry of Finance that had to determine the duration and scope of the prohibition to contract with public entities, but now it is the CNMC that will set it taking into account the nature of the infringement and the potential impact of the prohibition on the markets. As for the second guidelines regarding the quantification of damages, it will help judges, lawyers, experts and consumers when intervening in proceedings for damages claims for infringements of competition law.

The transposition of the ECN+ Directive has introduced novelties in the Spanish law, increasing the fines for all anti-competitive agreements, the duties of information and collaboration and the powers of inspection have been extended, as detailed in the answers to the previous questions.

A bill on consumers collective actions (in principle applicable to antitrust damages) was published earlier this year, although it has not been finally adopted so far due to general elections taking place in summer.

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 who led 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. Pedro has a Law Degree from the Universidad Complutense and a Business degree from San Pablo University (Madrid). He is a law graduate from the University of Chicago Law School (Fulbright – Banco Santander scholar) and has a Master's 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*. Pedro is the President of the Fulbright Alumni Association of Spain and Secretary of the Board of University of the Chicago Alumni Association of Spain and a member of the Advisory Board of the American Antitrust Institute, Washington, D.C. He reads specialist seminars at the Carlos III and San Pablo Law Schools and regularly speaks on other academic and business venues including the ABA, IBA and UIA.

Pedro leads Callol Coca's competition practice, which is recognised by the main international directorates such as *Chambers and Partners* and *The Legal 500* (who 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 he is a competition law specialist currently recognised by *Global Competition Review* and *Who's Who Legal* as one of the eight "Thought Leaders" in the area of competition law.

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Laura Moya is an attorney admitted to the Madrid Bar. Laura has participated in antitrust cases (infringement proceedings under Articles 101 and 102 TFEU and 1 and 2 of the SCA, general advice to companies and self-assessments) in the sectors of car distribution, bus transportation services and chemical industry. She has worked in the drafting and preparation of merger filings before national competition authorities in connection with advertising online platforms. Additionally, Laura has assisted in connection with the judicial review of cartel decisions in Spain.

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