Update on damages claims in Spain - paper envelope cartel damages recovery.

Several rulings have been issued by Spanish lower courts shedding light on key aspects of antitrust damages claims, such as the treatment of evidence concerning the calculation of compensation for damages. Also the discussions on statute of limitations and joint and several liability are relevant.

The rulings result from follow-on claims stemming from a National Markets and Competition Commission (**NMCC**)'s Decision fining 15 paper companies with a total of €44 million for bid-rigging, sharing customers and fixing the prices of envelopes on March 2013 (Decision of 25 March 2013, *SOBRES DE PAPEL*, case S/0316/10 (**Decision**)).

To date, first instance commercial Courts have rendered seven Judgments: two in Madrid and five in Barcelona.[1] Interestingly, while the Barcelona Courts awarded compensation for damages, the claims heard before the Madrid Courts were dismissed, on the basis that the economic evidence submitted by the claimants to substantiate their claims was inconsistent. In any event, both the Madrid and Barcelona Judgments offer practical insight concerning a number of key issues arising from damages claims:

(i) ***Dies a quo of damages claims:*** this is one recurrent point in damages claims. The rules of the Civil Code governing antitrust damages claims prior to the entering into force of the provisions implementing the EU Damages Directive (**Directive**[2]) (applicable to the claims discussed in this commentary), contain a one-year statute of limitations for damages claims, from the moment the claimant acquired knowledge of the harm. The defendants claimed that the action for damages was time-barred because, even though the NMCC's Decision was published on 25 March 2013, the action could have been exercised from the moment of the NMCC's press release of 16 March 2011 announcing the formal opening of antitrust proceedings: the defendants argued that the said press release conferred knowledge of the facts necessary for taking legal action.

In response to this argument, the first instance Courts (relying on the seminal *Sugar Cartel* Supreme Court[3] case law) declared that a press release reporting the initiation of an antitrust investigation does not contain the adequate factual and legal elements enabling a party to litigate. In particular, the Courts declared that the limitation period is only initiated when a potential claimant has knowledge of *(i)* the conduct amounting to a competition law infringement; *(ii)* the characterization of such conduct as a competition law infringement; *(iii)* the fact that the infringement caused harm; and *(iv)* the identity of the wrongdoer (*i.e.* the elements mentioned in the Directive).

Consequently, the Courts dismissed the defendants' arguments, and held that it was not until the publication of the NMCC's Decision declaring the existence of the anticompetitive conduct that the claimants had reasonable knowledge of the points required to litigate and, therefore, the damages claims were not time-barred.

(ii) **Joint and several liability:** The defendants asserted that the claimant had to seek compensation only from the cartel members with whom it maintained commercial relations. However, the Courts dismissed the said argument. Indeed, the general principle under Spanish civil law prior to the transposition of the Directive, was that cartel members are not to be held joint and severally liable for cartel damages. Despite this, in cases where the damages result from a coordinated and joint performance, such as in a cartel, and it is not possible to individually determine the liability attributable to each cartelist for the infringement,[4] the principle of joint and several liability applies, under which all participants in a cartel are liable for the damage caused by the collusive agreement. Thus, due to the application of this exceptional rule, the Courts deemed that it was not relevant that some of the defendants maintained commercial relations with the claimants and others did not: in the *Bankoa* Judgment, the Court dismissed Envel Europa's claims that it had very limited participation in the cartel and a small commercial

---

1 See Judgments of the Commercial Court of Madrid of 7 May 2018, appeal number 241/2015 and of 8 June 2018, appeal number 189/2015 and Judgments of the Commercial Court of Barcelona of 6 June 2018, appeal number 30/2015, of 6 June 2018, appeal number 15/2015, of 5 September 2018, appeal number 30/2015 and of 10 September 2018, appeal number 320/2015.

2 Directive 2014/104/EU of the European Parliament and the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union.

3 Judgments of the Supreme Court of 8 June 2012, appeal number 2163/2009 and of 7 November 2013, appeal number 2472/2011.

4 According to the general rule in the Civil Code, joint and several liability only arises in cases where it is not possible to individualize the harm caused by each wrongdoer.

relationship with Misiones Salesianas, one of the claimants. Accordingly, the injured party can seek relief from any cartel member and, in any event, a co-infringer shall have a right to claim a contribution from other co-infringers if it has paid to the claimant more compensation than its share.

Regarding Adveo Group International (**Adveo**)'s request for non-liability by virtue of its condition of leniency applicant, the ample majority of the Judgments that ruled on this matter declared that whistleblowers are still liable for damages under the Civil Code. However, the Commercial Court nº 7 of Barcelona held in its ruling of 6 June 2018 that, even though the Directive had not been transposed in Spain at the time, the liability regime to be applied should be interpreted according to its purpose and content (*i.e.*, Adveo could only be held joint and severally liable for damages caused to the claimant, Bankoa, only where full compensation cannot be obtained from the other cartel members). This means that the Directive was applied retroactively in that instance, which is expressly prohibited (Article 22 of the Directive), as it was noted in the Judgments issued by the Commercial Court nº 3 of Barcelona concerning parallel claims.[5]

(iii) ***Calculation of damages:*** In spite of the fact that the claims filed in Madrid and Barcelona were substantially the same, the resulting judgments are apparently contradictory.

On the one hand, the rulings of the Commercial Courts of Barcelona referred to the Supreme Court's ruling in one of the two cases concerning the *Sugar Cartel*,[6] deciding that the complexity of damages calculation should not preclude the victims from receiving compensation, and that defendants, when using expert reports, must not merely question the claimant's report, but must offer an alternative amount. The Courts acknowledged the existence of a valid presumption that cartel infringements cause harm provided that the claimants submit a reasonable and feasible calculation of the damages suffered, established through a counterfactual scenario (*but for*, hypothetical scenario had the infringement not taken place).

For instance, in the ruling concerning a claim from the non-profit organization *Misiones Salesianas*, the Court agreed with the expert report that there was no appropriate reference to compare the prices of the products purchased by the claimant, which was a small client, with a non-cartel situation. Despite this, the Court accepted comparable scenarios such as data of prices overcharged for larger customers used in the Decision, acknowledging that the homogeneity of the market and the single nature of the infringement justified such reconstruction of the overcharged price.

Conversely, the Madrid Courts dismissed the expert report's reasoning on the basis that the evidence submitted to prove the overprice was inconsistent. In the ruling issued last May concerning a claim filed by the Madrid Chamber of Commerce, the Court declared that the claimant had not proven the harm because the expert report referred to instances of overprice in the purchase of envelopes through public tenders, while the claimant had purchased the envelopes directly from cartel members, both scenarios not being comparable. Similarly, in a ruling rendered in June, *Obras Misionales Pontificias*, the expert report referred to a price-fixing agreement while the conduct analyzed in the lawsuit was a customer-sharing agreement.

Thus, both Judgments dismissed the damages claims because the transactions used to determine the reference price were not equivalent to those in the actual claims.

For more information contact:

Pedro Callol (pedro.callol@CallolCoca.com)
Jorge Manzarbeitia (Jorge.Manzarbeitia@CallolCoca.com)
Enrique Fayos (Enrique.Fayos@CallolCoca.com)
For more information on our firm go to www.CallolCoca.com

---

[5] Judgments of the Commercial Court of Barcelona of 5 September 2018, appeal number 32/2015 and 10 September 2018, appeal number 320/2015.

[6] Judgments of the Supreme Court 8 June 2012, appeal number 2163/2009 and of 7 November 2013, appeal number 2472/2011.