COMPETITION DAMAGES ACTIONS IN THE EU – SPAIN

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Chapter 2 – The underlying right to damages.

II. National Law: Legal basis for a claim for damages for breach of EU Competition Law.

Spain

1.1. Subsequent to the implementation of the Directive by Royal Decree-Law 9/2017 (RDL), Article 71 of Law 15/2007, of 3 July, on Competition (Competition Act) establishes that undertakings that infringe competition law are liable for any harm caused by their conduct.[1] For the purposes of the said provision, "Competition law infringements" refers to infringements of Articles 101 and 102 TFEU, as well as Article 1 and 2 Competition Act.[2]

1.2. Claims related to infringements prior to the implementation of the Directive in Spain are governed by the general rules on tort. Article 1902 of the Civil Code establishes that any natural or legal person that, either intently or negligently, causes any harm by act or omission is obliged to repair the damage. General rules on torts are still very relevant in Spain, since for instance all claims related to the *Trucks* cartel (counted by the thousands) are being adjudicated.

1.3. When it comes to contractual liability, Article 1303 Civil Code establishes a mechanism of reciprocal compensation between the parties of a contract declared null. The rules on contractual liability have been used by the Spanish courts in the context of antitrust claims related to vertical restraints included in distribution agreements.[3]

1.4. Concerning cartel damages claims, the Supreme Court has expressly stated it its case law that the civil law rules on non-contractual liability apply in those cases.[4]

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[1] Articles 72 and 78 Competition Act enshrines the right to full compensation.

[2] Infringements related to Article 3 Competition Act, which prohibits unfair competition conduct capable of distorting competition and affecting the general interests, are excluded of the antitrust damages regime established in the Competition Act by the RDL.

[3] In particular distribution agreements related to retail gas station, which have been the object of extensive litigation before the Spanish courts. See, for instance, Judgment of the Supreme Court of 13 May 2015, number 243/2015.

[4] See seminal judgment of the Supreme Court of 8 June 2012, appeal number 2163/2009, in the Spanish *Sugar cartel* case.

Chapter 3 - Indirect purchaser standing and Passing-on.

National law.

1. *Spain*

1.1 Following Article 13 of the Directive, current Article 78.3 Competition Act establishes that the defendant can invoke as a defense against the claim that the claimant passed all or part of the overcharge resulting from the infringement of competition law. The burden of proving that the overcharge has been passed-on by the claimant is on the defendant, which may reasonably require disclosure from the claimant or from third parties.

1.2 Regarding the regime prior to the implementation of the Directive, the Supreme Court confirmed the application of the passing-on defense under the general rules on torts in its seminal judgment in the Spanish *Sugar* cartel.[5] In essence, the Supreme Court concluded that the award of damages related to antitrust infringements has a compensatory nature. Only a plaintiff that has suffered harm should be compensated. Therefore, compensating a plaintiff that has passed-on the harm to its clients would amount to a breach of the general civil law principle against unjust enrichment. When it comes to the burden of proof, the Supreme Court established that it is for the defendant to prove that the plaintiff passed-on the harm suffered to its clients and to what extent, so the jurisprudential approach prior to the Directive coincides with the current Article 78.3 Competition Act.[6]

1.3 The standing to sue of indirect purchasers, is now recognized in the Competition Act following the implementation of the Directive.[7] It is worth noting that Spanish courts

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5 Judgment of the Supreme Court of 7 November 2013, appeal number 2472/2011. Fifth legal ground.

6 By application of Article 217 Civil Procedure Act, which establishes that it is for the defendant to prove the facts and legal effect of the facts on which the plaintiff bases the action. In its Judgment in the *Sugar* cartel (cited above), the Supreme Court quashed the judgment issued by the Provincial Court of Madrid on several grounds, including the application of the passing-on defense. In that regard, the Supreme Court concluded that the defendant had not sufficiently proved that the plaintiff passed-on the entire harm to its clients by increasing its prices. In particular, the Supreme Court found that if the price increase had not passed the entirety of the harm to the plaintiffs' clients (for instance due to sales lost as result of a fall in demand, market share lost to competitors that not participated in the cartel), then the passing-on defense was not applicable, or only partially.

7 Article 72 Competition Act sets out that any individual or legal entity that has suffered harm has the right to claim full compensation of the said harm. Article 79.1 Competition Act establishes that indirect purchasers claiming compensation for antitrust damages have the burden to prove the existence (and amount) of the harm, having the right to reasonably ask for disclosure of evidence in hands of the defendant or third parties. In addition, Article 79.2 Competition Act lays down a rebuttable presumption that the direct purchaser has passed-on the overcharges to the indirect purchaser claiming damages (to rebuke the said presumption the defendant must prove that the overcharge was not transferred).

have accepted the standing of a plaintiff to claim "*umbrella*" damages under the general torts regime.[8]

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[8] Judgment of the Commercial Court number 2 of Madrid of 9 June 2020, case 535/2017, concerning the Decennial insurance cartel.

Chapter 4 – Evidence I

II. Access to evidence included in the file of a competition Authority.

B. An application to the court for disclosure of evidence included in the file of the Commission or an NCA. (NEW – not included in Second Edition)

I. Spain

1.1 The procedural provisions of the Directive were included in Law 1/2000, of 7 January, on Civil Procedure (Civil Procedure Act) by the RDL. Thereafter, Article 283 bis (i) of the Civil Procedure Act governs the access to evidence in an administrative file of competition authorities, mirroring the content of Article 6 of the Directive.

1.2 In summary, upon request to disclose information in the file of a Competition Authority the court should carry out a proportionality assessment of the said request.[9] If the Court decides to grant access to documents in the file of a Competition Authority, the disclosure is subject to the limits included in the Directive. For instance, certain categories of documents (submissions prepared specifically by the parties for the purpose of the administrative file, statements of objections and other documents prepared by the authorities, as well as withdrawn settlement petitions) can only be disclosed once the administrative proceedings are closed. Leniency statements and settlement submissions are protected and cannot be disclosed. Likewise, internal documents and correspondence between authorities are protected. Also, disclosure will not be ordered if the other party or a third party is reasonably able to provide the requested documents.

1.3 In practice, some orders issued by first instance courts deciding on the disclosure of documents in the file of the Spanish Competition Authority have been published (whereas, first instance courts' orders are not published in most instances). In general, courts are not granting the disclosure, on the grounds that claimants are not justifying why the documents are necessary.[10] Another ground to reject disclosure petitions is that the party fails to explain the reasons why the documents cannot be obtained from third parties.[11]

1.4 Finally, it is worth mentioning that Law 19/2003, of 9 December, on transparency, access to public information and good government (Transparency Act) provides that any individual has the right to access public information. Public information is defined

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9 Considering criteria such as whether or not the request has been formulated specifically with regard to the nature, subject matter or contents of documents (rather than a general, un-specific request) or whether the disclosure is related to the civil action before the court.

10 See, for instance, Order of Commercial Court of Barcelona of 14 June 2019, appeal number 338/2019 or Order of the Commercial Court of Barcelona of 23 November 2020, appeal number 2182/2019.

11 See, for instance, Order of Commercial Court of Las Palmas of 9 December 2019, appeal number 163/2019.

in the Transparency Act as any contents or documents that Public Administrations (including State owned companies) have produced or acquired in connection with the exercise of its functions. Public Administrations have certain margin of discretion and can refuse access to the information on confidentiality grounds, amongst other limits. To our knowledge, no antitrust damages claimant has had access to evidence included in the files of Spanish competition authorities by means of the Transparency Act, although it is a possibility at least in theory.

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Chapter 5 - The evidential value of prior NCA decisions in national law.

I. The evidential value of prior administrative infringement decisions.

A. Commission decisions: Article 16 of Regulation (EC) 1/2003.
Consideration of Article 16 by National Courts. (NEW – not included in Second Edition)

1.1 Spanish civil courts are applying Article 16 of Regulation (EC) 1/2003, for instance, in the context of the multiple *Trucks* litigation, expressly recognising the binding effect of the final Decision issued by the European Commission (EC)[12] in the said cartel case.[13] It is worth mentioning that, until the implementation of the Directive in Spain, EC decisions provided a stronger position for follow-on claimants; before the implementation of the Directive, only judgments issued by contentious-administrative review courts were binding for civil courts.[14]

C. The evidential value of NCA decisions in national law.

Spain

1.1 After the implementation of the Directive[15] an infringement of competition rules declared by a final decision of a Spanish Competition Authority[16] or by a Spanish review court is irrefutably established for the purposes of an antitrust follow-on claim brought before Spanish courts.

1.2 The main modification resulting from the implementation of the Directive is the binding effect of decisions issued by a Spanish Competition Authority in cases when such decisions become final, because their addressees have not applied for judicial review before the contentious-administrative courts. This is so because the Supreme Court had previously ruled in one of its leading judgments in the *Sugar* cartel claims, that civil courts are bound by final judgments issued by contentious-administrative review courts concerning the existence of the infringement.[17] The Supreme Court reached that conclusion on the grounds that the facts relevant in the context of the

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12 European Commission Decision of 27 September 2017, Case T.39824 -*Trucks*.

13 For a recent example of a judgment applying Article 16.1 Regulation (EC) 1/2003, see, for instance, the Judgment of the Provincial Court of Zaragoza of 20 May 2022, appeal number 666/2022.

14 Not the case for competition authorities' decisions not appealed before the courts. See Section C below in this chapter for details.

15 Article 75 Competition Act includes the provisions in Article 9 of the Directive.

16 In Spain the National Markets and Competition Commission (*Comisión Nacional de los Mercados y la Competencia*, or CNMC) coexists with the authorities of Autonomous Communities, which have jurisdiction over conduct affecting its territory only.

17 Judgment of the Supreme Court of 7 November 2013, cited.

judicial review of the administrative decision were similarly relevant in the context of the civil claim.[18] The Supreme Court also concluded that civil courts are not bound by any considerations in areas other than the existence of the infringement (*i.e.* causation, calculation of damages) made by the contentious-administrative review courts and competition authorities.[19]

1.3 In fact, the Supreme Court has expressly ruled that civil courts hearing follow-on claims had the capacity to decide on the facts of the case, despite the existence of a prior Competition Authority decision.[20] However, in the same judgment the Supreme Court also found that administrative decisions can constitute qualified evidence of the existence of an infringement.[21]

1.4 On the other hand, final decisions and judgments issued in other Member States establish the *iuris tantum* presumption that an infringement of competition rules has taken place, although a claimant may introduce new facts and evidence before the Spanish courts.[22] The Competition Act thus provides stronger value to this kind of decisions in comparison with the Directive, which just required decisions stemming from other Member States to be considered as *prima facie* evidence. To our knowledge, there have not been claims based on final decision or judgments issued in other Member States yet, so the application of this provision by Spanish courts remains to be tested.

1.5 As a final comment, according to the Civil Procedure Act,[23] even if the existence of the infringement is not disputed, the claimant in a follow-on action still has the burden to prove that the infringement has caused harm and the existence of a causal link (obviously, stand-alone claimants must also prove the antitrust infringement).

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18 Legal ground 3.5.

19 Legal ground 3.6.

20 Judgment of the Supreme Court of 9 January 2015, appeal number 220/2013. Legal ground 16.

21 Judgment of the Supreme Court of 9 January 2015 (cited). Legal ground 16.

22 Article 75.2 Competition Act. This is an improvement regarding the Damages Directive, which only required that Decisions stemming from other Member States had to be considered as evidence.

23 Article 217.2 Civil Procedure Act.

Chapter 7 - Damage.

II. Presumption of harm.

B. National law.

Spain

1.1 Article 75 of the Competition Act establishes that a breach of competition law is presumed when it has been declared by a final decision of a Competition Authority or court of another EU Member State. Also in line with the Directive, a breach of competition law is irrefutably deemed to exist when it has been declared by a final decision of the Spanish competition authorities or courts.

III. Quantification.

B. National law.
Spain (NEW – not included in Second Edition)

1.1 Pursuant to the procedural rules on the burden of proof, it is for the claimant to quantify the damages.[24] In order to do so, the standard practice is to submit economic experts' reports to the court with the lawsuit.

1.2 The Supreme Court has provided guidance on quantification principles in one of its judgments in the Sugar cartel claim.[25] According to the Court, expert opinions should articulate a reasonable hypothesis, grounded on non-erroneous and contrastable data from the technical standpoint. The Court confirms that the analysis of the overcharge based on a counterfactual scenario (considering the situation before the cartel, cost analysis, etc.) is reasonable.[26] The Court (somewhat presuming the existence of harm) also found that the defendant's expert opinion must formulate an alternative quantification of the harm, and not merely challenge plaintiff's expert opinion accuracy and precision.[27]

1.3 It is also worth mentioning that the Supreme Court recognizes the difficulties of quantifying harm in antitrust damages cases, since it is based on counterfactual situations that have not taken place. On that basis, the Court states that it is justified that judges have greater leeway to quantity damages that in other areas.[28]

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24 Article 217.2 Civil Procedure Act.

25 Judgment of the Supreme Court of 7 November 2013, cited. Legal Ground 7.

26 Legal Ground 7.2.

27 Legal Ground 7.3.

28 Legal Ground 7.4.

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Chapter 8 – Further substantive issues I.

II. Joint and several liability.

B. National law.

Spain (NEW – not included in Second Edition)

1.1 In line with Article 11 of the Directive, Article 73 of the Competition Act states the general principle of joint and several liability of companies jointly participating in an anticompetitive conduct. Under this rule, that harmed parties can seek full compensation from any of the joint and severally liable companies. The exceptions to joint and several liability (for SMEs and leniency applicants) are regulated in similar terms to those included in the Directive.

1.2 The law applicable pre-Directive is still of relevance regarding damages claims governed by the legal regime prior to the Directive. Indeed, pursuant to the transition provisions in Article 22 of the Directive, the law applicable to the substantive aspects of damages claims cannot apply retroactively. In Spain the legal regime applicable *ratione temporis* is that *ex* Article 1902 of the Civil Code.

1.3 The general principle under the Spanish law prior to the Directive is that joint and several liability cannot be presumed and must be based either on statute or on express agreement between the parties.[29] Cartel members under the pre-existing law are as a general rule not to be held joint and severally liable for cartel damages. In the *Sugar Cartel* case, which is to date the leading cartel damages case in Spain, the claimants submitted their claims individually and against each cartel member individually, and no submission was made regarding alleged joint and several liability.[30]

1.4 Notwithstanding the foregoing general principle, there is also case law[31] establishing that joint and several liability may be construed by the courts in non-contractual damages claims when the following requirements are met:

(i) Participation of a plurality of entities in the damaging conduct.

(ii) It is not possible to individually determine the liability attributable to each entity.

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29 Article 1137 of the Civil Code and Judgment of the Supreme Court of 24 May 2004, appeal nº 1948/1998.

30 *Ebro Puleva S.A. and Acor, Sociedad Cooperativa General Agroportuaria*, Judgments of the Supreme Court of 8 June 2012, appeal nº 2163/2009 and of 7 November 2013, appeal nº 2472/2011.

31 For instance, Judgment of the Supreme Court of 24 September 2003, appeal nº 3828/1997.

This type of joint and several liability cannot be presumed but, rather, must be declared by the judge on the basis of the factual circumstances of the case tried before it.

1.5 In its Judgment of 9 May 2014, cited above, a First Instance Court in Madrid declared the defendants joint and severally liable for the damages stemming from an anticompetitive boycott, which was found to have harmed the claimant. Following the abovementioned rules on construed joint and several liability set out by the Supreme Court, joint and several liability was construed on the grounds that it was not possible to individually determine the portion of damage attributable to each of the defendants in the case at hand.

1.6 Further to the above, recent case law of lower (first instance) courts is considering that the law pre-Directive is equivalent to the regulation in the Directive regarding joint and several liability of cartel members, *i.e.*, because of the nature of cartels where it is not possible to individualize liability of each cartel member, joint and several liability can be construed by the judge.[32]

1.7 From a procedural standpoint, no joint and several liability can be construed regarding damage caused by any parties (*e.g.*, cartel members) which have not been sued jointly and therefore have not been included as co-defendants in the recovery proceedings.[33] The need to have any potentially condemned party being brough before the court and able to answer and defend itself is logical in view of the basic rights of defence and to a hearing in connection with proceedings that may impact a party's legal or economic position.

1.8 Consequently, the general principle under the law in force prior to the Directive is that no joint and several liability can be found to apply as a rule, unless such joint and several liability can be construed by the court on the basis of the facts at hand (*i.e.*, because liability cannot be individualized, see above); in cartel damages matters there is recent case law (*Trucks* damages claims) suggesting that in cartel cases it is not possible to individualize the liability amongst cartel members, in which case joint and several liability applies.

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32 *Trucks* damages litigation, for all, courts of first instance decisions of 23 September 2021, appeal 342/2919, and of 22 October 2020, appeal 152/2019.

33 Article 12.2 of the Civil Procedure Act.

Chapter 9 - Further substantive issues II.

I. Limitation periods.

B. National law.

Spain

1.1 Statute of limitations for damages claims regulated under Article 10 of the Directive has been implemented into Spanish law in Article 74 of the Competition Act. The national regulation is in line with that of the Directive, with the limitation period set at five years from the moment the claimant has basic knowledge of the conduct, infringement, harm and identity of the wrongdoer. The Civil Code applies generally to damages claims in the matters not regulated specifically by the legislation implementing the Directive.

1.2 The most interesting case law around statute of limitations in Spain to date arguably revolves around the one-year limitation in force prior to the national law implementing the Directive.

1.3 The Judgment of the CJEU of 22 June 2022, *Volvo, DAF v. RM*, case C-267/20, deals with a request for a preliminary ruling from a first instance judge in León, regarding the temporal application of the Directive and the five-year limitation period. In essence, the CJEU decided that the five-year limitation period in the Damages Directive is a substantive provision, therefore not subject to retroactivity pursuant to the temporal application rules therein. The point in time considered by the CJEU as relevant to determine retroactivity for statute of limitations purposes is also the *dies a quo* for accounting of the statute of limitations period, in that case the publication of the Commission Decision.

1.4 On the *dies a quo* or moment from which the limitation period starts to count AG Rantos' Opinion[34] which started by considering the one-year period foreseen by Spanish law as "*considerably shorter*" than the one in the Directive, though its compatibility with the EU principle of effectiveness was to be considered in view of all the circumstances (*Cogeco* case law[35]). He further reminds that the relevant starting date for accounting of the one-year period of the Spanish Civil Code is that of the publication of the summary of the Decision in the Official Journal of the EU. Spanish law as it stands prior to the Directive would not incompatible with EU law or the principle of effectiveness.

1.5 Dwelling into the actual regulation of statute of limitations by the Civil Code, as a preliminary note, it must be taken into account that the Spanish Supreme Court has

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34 Opinion of 28 October 2021, *Volvo, DAF v. RM*, case C-267/20.

35 Judgment of 28 March 2019, *Cogeco Communications*, case C-637/17.

found that follow-on damages cases fall under the civil rules on non-contractual liability included in the Civil Code, and not under the rules on contractual liability.[36]

1.6 As already pointed out, the limitation period for non-contractual damages actions pre-Directive is one year.[37] The one-year limitation period starts to run once the victim has knowledge of the harm suffered. Under Article 1973 Civil Code, the statute of limitations may be interrupted either by initiation of a court claim, or by serving of out-of-court claims by the claimant, or by the assumption of debt by the defendant.

1.7 Under the general case law on non-contractual damages, the victim is deemed to have knowledge of the harm suffered (*dies a quo*) when the victim has certain and precise knowledge of the dimension of the damage suffered, at least having the information required to carry out a valuation of the damage suffered.

1.8 In its Judgment of 4 September 2013, appeal nº 2120/2011, the Supreme Court ruled on the issue of the one-year limitation period in the field of non-contractual damages flowing from an infringement of competition law. The Supreme Court on that case applied the general principles on non-contractual liability, resorting to its own extensive case law in the field of personal injury (*e.g.*, Judgment of the Supreme Court of 21 January 2013, appeal nº 1614/2009). On that basis, the Supreme Court concluded that the *dies a quo* was the date in which the claimant had access to the information necessary to calculate the damage.

1.9 In the context of a follow-on claim for damages derived from a cartel, under Spanish civil law prior to the Directive, the statute of limitations may be considered to start to run on the date on which a Decision of the relevant Competition Authority is published (or individually notified if applicable), establishing: *(i)* the behaviour constituting the infringement; *(ii)* the qualification of such behaviour as an infringement of national or EU competition law; *(iii)* the fact that the infringement caused harm to the claimant; and *(iv)* the identity of the infringer who caused such harm, particularly when those elements were not known prior to the administrative Decision. Those elements are largely in line with Article 10 of the Directive.

1.10 Based on the above, the CJEU in its Judgment of 22 June 2022, cited, decided that in the circumstances of the (quite significative) *Trucks cartel* damages litigation, the summary decision issued by the Commission was the document containing all the elements required for the statute of limitations to start to count, ruling out the possibility that the *dies a quo* could be triggered, for instance, on the basis of the European Commission press release on the matter.

II. Interest.

B. National law.

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36 Judgment of the Supreme Court of 8 June 2012, appeal nº 2163/09.

37 Article 1968, second paragraph, in connection with Article 1902 Civil Code.

Spain (NEW – not included in Second Edition)

1.1 Full compensation of the harm caused normally includes compensation for ordinary interest.[38] The damage caused (*damnum emergens* and *lucrum cessans*) is compounded with the legal interest rate from the date the harm is caused in order to grant full compensation for the damage caused.[39]

1.2 Under Law 24/1984, of 29 June, concerning the legal interest rate of money, the legal interest rate is determined every year by the National Budget Act.

1.3 Ordinary interest should be added to the *quantum* claimed.[40] Ordinary interest must be claimed either out of court or in the lawsuit claiming damages. In case there is no prior (out of court) claim, there is a risk that the interest period would start to run only with the lawsuit.[41]

1.4 The law also foresees the procedural interest which arises once there is a judgment awarding damages for the event there is delay in the execution (payment) by the wrongdoer. The period of reference to calculate interest runs from the day the court issues the judgement to the moment the compensation is effectively paid. In the absence of agreement between the parties, this interest is calculated by adding two percentage points to the legal interest of money.

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38 Article 1101 to 1106 Civil Code.

39 See, for all, first instance Judgment of Mallorca of 23 September 2021, case 347/2019.

40 See Judgments of the Supreme Court of 8 June 2012, case 2163/2009 and of 7 November 2013, case 2472/2011.

41 First instance Judgment of León of 15 October 2019, case 170/2018.

Chapter 10 – Procedural issues: procedures for recourse to the expertise of public authorities by the national courts.

II. National law: consultation on the NCA.

Spain

1.1 Subsequent to the implementation of the Directive, the new Article 76.4 Competition Act establishes that the CNMC can provide an opinion on the criteria for the quantification of damages upon request by the relevant civil court hearing an antitrust damages case.[42] Article 5.2.(b) of Law 3/2013, of 4 June, on the creation of the CNMC includes a similar provision, although they refer to Articles 1, 2 and 3 Competition Act.[43]

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[42] To our knowledge, civil courts have reportedly asked the CNMC to issue a report on the quantification of damages in connection with the Cars manufacturers case declared by the CNMC (Decision of 23 July 2015, case S/0482/13).

[43] As already explained in Chapter 2, Article 3 Competition Act (unfair conduct affecting competition) infringements are excluded from the scope of the antitrust damages rules introduced in the Competition Act with the implementation of the Directive (general rules on torts are of application to claims related to this Article).

Chapter 11 – Collective action.

III. Collective action on Member States.

Spain

1.1 There is no regulation of class actions in Spain and the grouping of actions is no easy deed as shown by the great number of lawsuits being tried in Spain in the well-known *Trucks* litigation.

1.2 The above having been said, it is possible to group together claimants in antitrust damages actions in Spain:

(a) Groups of consumers can group together as claimants whenever such a group is determined or can easily be determined. The requirement for that group to act together is that the majority of consumers are included in the group.[44]

(b) Consumer associations duly formed in accordance with the laws on consumer protection have an *ex lege* standing to sue to defend the interests of such consumers.

1.3 Those devices remain largely untested in the area of antitrust damages claims in Spain. In the *Trucks* damages litigation in Spain (where the claimants are not consumers, but companies, even if often small companies) no bundling or joining of actions has taken place to our knowledge, though it is likely that some degree of coordination between the various courts involved has taken place.

V. Assignment of claims.

B. National law.

Spain (NEW – not included in Second Edition)

It is possible in Spain to assign claims. However, the Civil Code contains a rule that in case a claim has been assigned, the debtor (*i.e.*, the antitrust infringer in a competition damages context) can repurchase the claim at the same price paid by the initial assignee to the assignor. This legal rule would seem to eliminate or substantially reduce the business case for claim assignments.[45]

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44 Article 6.7 Civil Procedure Act.

45 Article 1535 Civil Code.