PRIVATE LITIGATION GUIDE

THIRD EDITION

Editors
Nicholas Heaton and Benjamin Holt

Private Litigation Guide

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Introduction

Nicholas Heaton and Benjamin Holt[1]

We are delighted to edit a further edition of the GCR Private Litigation Guide. Part I of the Guide includes 10 chapters written by leading practitioners, exploring in depth the key themes raised in competition litigation across the globe, such as jurisdictional considerations, class actions and damages. These chapters explore different perspectives on key issues, including views from the standpoint of both claimant and defendant and from different parts of the world.

Part II of the Guide contains an invaluable summary of the position on a jurisdiction-by-jurisdiction basis to allow quick access to key information and a cross jurisdictional analysis. It takes the form of a series of questions covering the most critical private litigation issues. Experienced practitioners in eight countries have supplied digestible, targeted responses to these questions. The Guide presents these insights in an accessible manner that lets users focus on specific issues and compare them across jurisdictions.

This Guide reflects the remarkable growth of private competition litigation across the world. Indeed, litigating antitrust or competition claims has become a global matter, requiring coordination among jurisdictions, and requiring counsel and clients to understand the rules and procedures in many different countries and how the approaches of courts differ with regard to key issues.

The landscape is continuing to evolve at pace.

In Europe, three distinct trends are evident. First, the effect of the EU Directive on competition damages claims, implemented by Member States in 2016 and 2017, is now being felt. Some jurisdictions in which there had previously been little private competition litigation have seen a dramatic growth of claims, such as Spain. By requiring Member States to ensure that law and procedures meet minimum requirements, the Directive has no doubt gone a long way to meet

1 Nicholas Heaton and Benjamin Holt are partners at Hogan Lovells.

the objective of facilitating claims. Although those minimum requirements are now met in all EU jurisdictions, it would be a mistake to think this has resulted in a harmonised approach. In fact, there is variation in the way in which the Directive has been implemented and there remain significant differences between the regimes in Member States. Claimants, defendants and their lawyers need to be on top of these. However, just as a degree of harmonisation is achieved within the EU, the UK's departure from it as a result of Brexit will throw up fresh challenges in this area. The second trend is the expansion of different forms of class action in Member States. The opt-out regime in the UK is beginning to bite, with the first claim recently certified and many others waiting their turn, and 2020 saw the introduction of new regimes in the Netherlands and Italy. These promise to change the dynamic in the EU yet again. The third trend is the developing depth of experience and a lengthening track record of judicial decisions on important issues in those jurisdictions in which private competition litigation has been more common for some time, such as the UK, Germany and the Netherlands.

In the United States, where private damages procedures are well developed, competition litigation has become increasingly high-profile and complex, and courts continue to grapple with various procedural issues related to competition lawsuits. Many of these disputes make their way to federal appellate courts and the US Supreme Court, where every decision has the potential to dramatically affect the law. In recent years, for example, the Supreme Court has weighed in on the interpretation of long-standing precedent prohibiting indirect purchasers from suing for damages under US federal law and addressed the appropriate analysis of two-sided markets in antitrust litigation. In addition, standards applicable to class actions have been hotly contested in lower courts in recent years, and a new round of disputes about the circumstances under which antitrust plaintiffs may certify a class is emerging as a key issue before appellate courts.

In other parts of the world, the story is more complex. For example, in Asia, private competition litigation levels generally continue to rise in Japan but have fallen from a recent high in China. South America, Brazil and Mexico now have laws in place to facilitate private competition claims, but actual litigation is still nascent. Canada has also seen recent important developments regarding certification of competition class actions, but has yet to see an award of damages at trial in such a case. Nevertheless, it is increasingly apparent that these jurisdictions, and others covered in this Guide, cannot be ignored in any assessment of the threats and opportunities private competition litigation brings.

Antitrust and competition practitioners, as well as corporate counsel, often require a basic understanding of the key aspects of private antitrust litigation in many different countries. For example, how does one bring a claim in the first

instance? What are the standards for collective actions? Can indirect purchasers collect damages and is a passing-on defence available? Different countries and different jurisdictions take a divergent approach to these and many other questions.

GCR has created this book to address this daunting task and to provide a method of comparing and contrasting specific issues and topics across jurisdictions. The Guide was developed in conjunction with the competition litigation team at Hogan Lovells, which has extensive experience litigating antitrust and competition claims in many jurisdictions.

Part 2

Overviews

CHAPTER 18

Spain Q&A

María Pérez Carrillo, Esther de Félix Parrondo and María Martínez Fuentes[1]

Effect of public proceedings

1 What is your country's primary competition authority?

The National Commission on Markets and Competition (CNMC) is currently the primary Spanish competition authority.

Regional competition authorities (RCA) also exist, although not in all Spanish regions, and they only have jurisdiction when anticompetitive conducts affect the region in which they are established. The Catalan competition authority and the Basque competition authority have been particularly active in recent years.

2 Does your competition authority have investigatory power? Can it bring criminal proceedings based on competition violations?

The CNMC (and also the RCA) has investigatory powers and can carry out unannounced inspections of business premises. This means that the CNMC can enter business premises, review and seize documents that relate to the scope of the inspection (regardless of the medium on which they are stored and including documents or information stored on the cloud or on third-party owned servers), take hard or electronic copies of or extracts from any document that relates to the inspection and ask company representatives for explanations in relation to matters falling within the scope of an inspection order issued by the CNMC. The CNMC could ultimately also enter the homes of directors, managers and other members of the staff of the undertakings. To enter premises, the CNMC requires the consent of the affected party or, failing that, judicial authorisation.

1 María Pérez Carrillo and Esther de Félix Parrondo are partners, and María Martínez Fuentes is an associate at Cuatrecasas.

The CNMC cannot bring criminal proceedings based on competition violations; the sanctions are only administrative (e.g., fines against companies and directors, and prohibitions on participation in public contracts). However, some conducts can both infringe competition law and constitute criminal activity, for example, alteration of prices or bid rigging (Articles 262 and 284, Spanish Criminal Code). Criminal proceedings arising from anticompetitive conduct can be brought by any affected party or by the public prosecutor.

3 Can private antitrust claims proceed parallel to investigations and proceedings brought by competition authorities and criminal prosecutors and appeals from them?

Yes. Since the derogation of the former Competition Act 16/1989 in 2007 in the case of Spanish competition law, and at least since the implementation of Council Regulation (EC) No. 1/2003 in the case of EU competition law, there is no need for a claimant to await a final decision from the relevant competition authority to bring civil claims (in other words, stand-alone claims are allowed).

If criminal proceedings are initiated, civil claims will be suspended if (1) the parties' pleas are based on one or more grounds that are being investigated as a criminal matter, and (2) the decision of the criminal court may have a decisive influence on the civil case.

4 Is there any mechanism for staying a stand-alone private claim while a related public investigation or proceeding (or an appeal) is pending?

Under the Spanish Code of Civil Procedure (LEC), the time limit for issuing a judgment following trial may be suspended in proceedings dealing with the application of Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU) or Articles 1 and 2 of the Spanish Competition Act (LDC), when the court is aware of related administrative proceedings being conducted by the European Commission (EC), the CNMC or any of the RCA, and when the administrative decision is relevant to the claim. According to case law, the same rule will apply by analogy to decisions of the relevant competition authority that are pending appeal.

5 Are the findings of competition authorities and court decisions binding or persuasive in follow-on private antitrust cases? Do they have an evidentiary value or create a rebuttable presumption that the competition laws were violated? Are foreign enforcers' decisions taken into account? Can decisions by sector-specific regulators be used by private claimants?

Prior to the new regime pursuant to Directive 2014/104, implemented in Spain by Royal Decree-Law 9/2017 of 26 May, decisions of the CNMC and RCA were not to be granted legally binding effect in civil proceedings; the res judicata principle was not applicable. However, findings of fact in administrative proceedings were to be granted effect by civil courts and courts should only deviate from the legal interpretation applied to these findings by the relevant competition authority when the civil court's interpretation was adequately reasoned.

Only decisions issued by the EC had (and currently have) binding effect according to Article 16 of Council Regulation (EC) No. 1/2003.

Royal Decree-law 9/2017 has introduced a new Title VI to the LDC on compensation for damages, which provides (Article 75.1, LDC) that the finding of a competition law infringement in a final decision of the CNMC (or RCA) or a Spanish review court is to be considered as binding in civil proceedings. Final decisions by competition authorities and courts of other EU Member States create a rebuttable presumption.

Sector-specific regulators have no power to find competition law infringements. However, their decisions can be used as evidence of facts that a claimant may use to support its case.

6 Do immunity or leniency applicants in competition investigations receive any beneficial treatment in follow-on private antitrust cases?

Under pre-existing rules, leniency applicants received no specific beneficial treatment in the context of follow-on claims. Pursuant to Royal Decree-law 9/2017 (Article 73.4, LDC), immunity recipients are only jointly and severally liable with respect to their direct or indirect purchasers or providers – except if full compensation cannot be obtained from co-infringers. Equally, the amount an immunity recipient can be liable to pay in contribution cannot exceed the amount of the harm it caused to its own direct or indirect purchasers or providers and, in relation to harm caused to parties buying from (or selling to) non-infringing parties, its relative responsibility for that harm.

7 Can plaintiffs obtain access to competition authority or prosecutors' files or the documents the authorities collected during their investigations? How accessible is information prepared for or during public proceedings by the authority or commissioned by third parties?

If the claimant is recognised as an 'interested party', it can participate in the CNMC's administrative proceedings and in subsequent appeals to the judicial review courts if the decision is appealed. An interested party may then gain access to the non-confidential version of the CNMC's file (or the RCA's file).

In a follow-on damages claim, claimants can ask the court to request a copy of the administrative file from the CNMC (or RCA), subject to several exceptions. Royal Decree-law 9/2017 (which introduced new disclosure rules for competition claims to Article 283 bis, LEC) provides that the following information can be disclosed only after the CNMC has closed its administrative proceedings: (1) information specifically prepared by natural or legal persons in the context of proceedings before the CNMC; (2) information prepared by the CNMC that has been sent to the parties during the course of the proceedings; and (3) settlement submissions that have been withdrawn. Leniency statements and settlement submissions that have not been withdrawn can never be disclosed (see below).

8 Is information submitted by leniency applicants shielded from subsequent disclosure to private claimants?

The other parties to CNMC (or RCA) proceedings (i.e., other than the leniency applicant) can have sight (but cannot make copies) of the non-confidential version of the leniency statement, and can take copies of documents filed therewith to reply to the statement of objections. However, it would be unusual for private claimants to be involved in this stage of the proceedings. Leniency statements, and any confidential parts or sections of accompanying documents and information, are treated as strictly confidential and are physically separated by the CNMC and the judicial review courts from the other materials within the administrative file. These documents are not provided to parties involved in civil litigation.

9 Is information submitted in a cartel settlement protected from disclosure?

The CNMC does not currently operate a settlement regime. Royal Decree-law 9/2017 provides, however, that civil courts cannot order the disclosure of settlement submissions, unless these have been withdrawn and the corresponding procedure closed.

10 How is confidential information or commercially sensitive information submitted by third parties in an investigation treated in private antitrust damages claims?

The CNMC protects confidential information and prepares a non-confidential version of the file for interested parties (see questions 7 and 8). Under the new Article 283 bis of the LEC, civil courts also have the power to protect confidential or commercially sensitive information that is to be the object of disclosure (see further discussion in question 27).

Commencing a private antitrust action

11 On what grounds does a private antitrust cause of action arise?

Competition law actions can arise in contract or tort. In contract, a claim may be brought on the basis of the provisions on nullity of contracts under the Spanish Civil Code (CC). In tort, claimants may base actions on the general Spanish provision for tort liability (Article 1902, CC) or the Unfair Competition Act (LCD).

The new Articles 71 and 72 of the LDC introduced by Royal Decree-law 9/2017 specifically establish the liability of competition infringers and the rights of claimants to damages.

12 What forms of monetary relief may private claimants seek?

Damages actions under Spanish law are compensatory in nature. Those who have suffered harm can claim compensation for the damage actually suffered, which may encompass (1) direct damage, (2) lost profits and (3) interest. Punitive damages (overcompensation) are not allowed under Spanish law.

13 What forms of non-monetary relief may private claimants seek?

A claimant can seek declaratory or injunctive relief (or both) under either the LEC or the LCD. Indeed, claimants may request to the relevant courts the (1) nullity (total or partial) of an agreement or clause that infringes competition law, and (2) the return of the payment made under it.

In addition, claimants may request the relevant courts to order an undertaking that infringes competition law to refrain from carrying out a specific conduct (for instance, a company affected by an abusive conduct may request the judge to force the infringer to stop such conduct) or to adopt a specific conduct.

14 Who has standing to bring claims?

Any natural or legal person who has suffered harm caused by the anticompetitive conduct.

15 In what forums can private antitrust claims be brought in your country?

Commercial courts have been attributed exclusive competence in actions applying competition law by the Judiciary Act (LOPJ). Ancillary competition claims (e.g., exceptions of nullity raised in a defence) can also be brought before the general first instance civil courts.

16 What are the jurisdictional rules? If more than one forum has jurisdiction, what is the process for determining where the claims are heard?

In general, if the defendant is domiciled in the European Union, the rules of international jurisdiction provided in Regulation (EU) No. 1215/2012 (Brussels I Regulation recast) apply. In particular: Article 4 (General Provision) providing for the jurisdiction of the courts of the defendant's domicile and Article 7.2 providing for the jurisdiction of the courts of the place where the harmful event occurred or may occur. It is also possible for the courts of a Member State to declare themselves competent by application of other rules of international jurisdiction (i.e., in case of several defendants, in the courts for the place where any one of them is domiciled, Article 8).

Recently, the Court of Justice of the European Union (CJEU) has established that Article 7.2 of the Brussels I Regulation recast 'confers directly and immediately both international and territorial jurisdiction on the courts for the place where the damage occurred' (C-30/20). For the purposes of determining international jurisdiction under the Brussels I Regulation recast in application of Article 7.2 in matters related to damages based on collusive arrangements contrary to Article 101 TFUE, the criteria laid down by the Court in the following cases must be considered: CDC (C-352/13), Flylal (C-27/17) and Volvo (C-30/20).

If the defendant is not domiciled in the European Union or the claims are purely domestic in nature, Spanish procedural law applies. Common rules on international jurisdiction are regulated by the Organic Law of the Judiciary and establish that a person may be sued in Spain if: (1) that person, or any other co-infringer, is domiciled in Spain; or (2) Spain is the place where the harmful event occurred. With respect to territorial jurisdiction within Spain for tort claims, the general rule is that a defendant may be sued in its domicile. An undertaking may also be sued in the place where the situation or legal relation in dispute arose or is to produce its effects, as long as the undertaking has either an establishment open to the public or a representative who is authorised to act on behalf of the undertaking in that place.

17 Can claims be brought based on foreign law? If so, how does the court determine what law applies to the claim?

Yes. If the claims are based on a law of a Member State of the European Union and the events giving rise to damage occurred after 11 January 2009, the court will determine the applicable law on the basis of Regulation (EC) No. 864/2007 on the law applicable to non-contractual obligations (Rome II). In this context, the applicable law will be that provided for in Article 6 of the Regulation. However, in application of Article 14 (freedom of choice), parties may agree to submit non-contractual obligations to the law of their choice.

If the claims are based on a different (i.e., non-EU) foreign law, or if the events giving rise to damage predate 11 January 2009, the court will apply the applicable law of the country where the wrongful conduct occurred.

18 Give details of any preliminary requirement for starting a claim. Must plaintiffs post security or pay a filing fee? How is service of claim affected?

Corporate claimants are subject to a small filing fee. Service is generally performed by the courts' administrative services. If the defendant is domiciled in an EU Member State other than Spain, Regulation (EC) No. 1393/2007 on the service of documents applies.

19 What is the limitation period for private antitrust claims?

For tort claims, which are not subject to the new regime of Royal Decree-law 9/2017, the limitation period is one year (in Catalonia, a three-year limitation period applies). Under the new regime, the period is five years (Article 74.1, LDC). For claims under the LCD, the period can be up to three years.

Because contracts (or specific clauses) contrary to competition law are null and void, and cannot be rectified under Spanish law, actions for nullity are not subject to any time limit. The passing of time may be an obstacle to claiming damages, however, as a result of contractual nullity if a defendant can prove that the claimant has benefited from the restriction of competition contained in the contract (i.e., unclean hands doctrine).

20 Are those time limits procedural or part of the substantive law? What is the effect of their expiry?

Limitation is considered a substantive issue under Spanish law. As such, it can only be dealt with by courts in final judgment (i.e., there is no way of trying limitation as a preliminary issue). If the relevant time limit has expired, claims will be considered time-barred and be rejected.

21 When does the limitation period start to run?

In tort, the limitation period starts when the claimant has knowledge of all the elements necessary to file its claim, in particular of the alleged harm. In cases of ongoing harm, the limitation period does not start to run until a claimant is in a position to quantify its harm. For claims where Royal Decree-law 9/2017 is applicable, the limitation periods starts to run when the infringement ceases and the claimant has knowledge or could reasonably have had knowledge of (1) the conduct and the fact that the conduct constitutes an competition infringement, (2) the damage suffered and (3) the identity of the infringer (Article 74.2, LDC).

22 What, if anything, can suspend the running of the limitation period?

Limitation periods are suspended from the moment a mediator, or mediation institution, receives a request for mediation.

Claimants can also interrupt limitation by making an extrajudicial claim or filing for conciliation proceedings. Interrupting limitation has the practical effect that the limitation period starts to run anew from the date on which the claimant interrupted. Limitation can also be interrupted by filing a claim before the courts.

Where Royal Decree-law 9/2017 applies, the limitation period is interrupted if a competition authority initiates an investigation or sanctioning proceedings in respect of an infringement of competition law to which the action for damages relates (Article 74.3, LDC). Any such interruption will end one year after the infringement decision becomes final or after the proceedings are otherwise terminated. In addition, if any consensual dispute resolution process is initiated, the limitation period will be also suspended (Article 74.4, LDC).

23 What pleading standards must the plaintiff meet to start a stand-alone or follow-on claim?

To start a claim, it is sufficient that a claimant identifies the parties to the dispute and their domiciles, states in a clear and orderly manner both the facts (identifying the corresponding evidence on which it relies) and the legal grounds of the claim (including why the court has jurisdiction, why the claimant is entitled to make its claim and its legal basis), setting out what rulings (remedies) are requested from the court. Although it is theoretically possible for a court to dismiss a claim if these standards are not met, courts generally, if not always, admit claims and tend to solve such issues at a later stage, either during the preliminary hearing (if the issues are procedural in nature) or in their final rulings (if they are substantive in nature). Importantly, a claimant must plead all the factual and legal arguments on which its claim relies since the LEC precludes any party from raising new facts

and allegations at a later stage in the proceedings, except in limited circumstances. Also, as a general rule, the documents supporting the alleged facts and the expert report quantifying damages must be produced with the claim.

24 Is interim relief available? What must plaintiffs show for the court to grant interim relief?

Claimants must prove three elements to obtain interim measures:

- fumus boni iuris (i.e., awarding the interim relief would make, on the face of it, good law): claimants must submit the arguments and documentary evidence that, without prejudging the merits of the case, justify a provisional judgment in their favour;
- periculum in mora (i.e., failure to award the interim relief would prevent or hinder the effectiveness of a future affirmative judgment): claimants must prove that there is an objective situation of risk, which may potentially hinder the effectiveness of a future judgment if the interim relief is not awarded. No periculum in mora exists where an applicant has acquiesced to a situation for a prolonged period, unless there are reasons that justify that the interim measures were not requested earlier; and
- bond: claimants must post security that is sufficient to compensate, in a speedy and effective manner, the damages that the adoption of the injunction may cause to the estate of the defendant. The court determines the level of security, taking into account the nature and contents of the claims and the existence and extent of the fumus boni iuris and periculum in mora.

Generally, Spanish courts have tended to be rather restrictive in granting interim measures. Furthermore, the above requisites could prove difficult to be met in an antitrust damages case.

25 What options does the defendant have in responding to the claims and seeking early resolution of the case?

A Spanish court may declare a claim inadmissible only if it is manifestly abusive or entails a procedural error (e.g., wrongful joinder) or legal fraud. Such decisions are quite rare in practice.

There are no other procedural mechanisms that allow courts to dispose of a case at an early stage (other than if it considers itself as lacking jurisdiction either of its own motion or as a result of a challenge brought by the defendant).

Defendants may challenge claims by filing a defence or a defence and counterclaim. Defendants may also seek to dismiss the action on the basis of procedural grounds during the preliminary hearing (e.g., because of lack of procedural standing, undue joinder of claims, lack of the necessary parties, res judicata or undue selection of proceedings by reason of its matter).

Disclosure or discovery

26 What types of disclosure or discovery are available? Describe any limitations and the courts' usual practice in ordering disclosure or discovery.

Pursuant to the new Article 283 bis of the LEC, which provides for a new disclosure regime targeted specifically to antitrust damages claims, a litigant may seek disclosure of evidence from the other party or a third party. Disclosure requests may be made before a claim has been filed or at any moment during the proceedings. The court may order the disclosure of specific evidence or relevant categories of evidence, subject to the requirement that the party seeking disclosure submits a reasoned justification for the request for documents, and defines the requested document or category of documents as precisely and as narrowly as possible based on reasonably available facts. Disclosure can also cover evidence filed by the relevant competition authority, subject to certain restrictions (see question 7). In making an order, the court will seek to limit disclosure to what is proportionate, considering the legitimate interests of the parties concerned and of any third parties. The party requesting disclosure is liable to cover the costs (and any damages) occasioned by that disclosure and may be required to make a deposit in advance.

Disclosure requests can also rely on other general provisions of the LEC: Article 328 (which refers to the disclosure of documents among the parties to the proceedings) and Article 330 (which refers to the disclosure of documents from third parties).

27 How do the courts treat confidential information that might be required to be disclosed or that is responsive to a discovery proceeding? Is such information treated differently for trial?

Courts can adopt certain measures to protect confidential information when they consider it appropriate. These measures include redactions, conducting closed-doors hearings or restricting access to such hearings, restricting the persons allowed to see evidence, and instructing experts to produce summaries of information in an aggregated or otherwise non-confidential form (see Article 283

bis (b), LEC). Some courts have also acceded to implementing a data room to provide controlled access by one party to data and calculations used in the preparation of another party's expert report.

28 What protection, if any, do your courts grant attorney–client communications or attorney materials? Are any other forms of privilege recognised?

Professional conduct rules on professional secrecy govern privilege in Spain. Professional secrecy extends to documents received by lawyers from the counterparty or its lawyers. Based on certain constitutional rights, it is generally understood that such materials cannot be admitted or taken into account as evidence in civil proceedings without the relevant individual's consent. Article 283 bis (b) of the LEC provides that courts are to ensure that applicable attorney–client privilege rules, as well as rules on secrecy, are given full effect when ordering disclosure.

Trial

29 Describe the trial process.

During the trial, the parties produce evidence and make their conclusions orally.

The trial starts by taking the evidence that has been admitted at the preliminary hearing. However, if fundamental rights are alleged to have been violated in the taking of any of the evidence, the judge must decide on those matters first. Likewise, if any facts or evidence have come to light following the preliminary hearing, the proposal and admission of such new evidence must be carried out before the evidence can be given at trial.

Oral examinations will then take place in the following order: parties, witnesses, experts from each side. There is no jury: judges decide on the facts before them and based on the law.

If some evidence cannot be taken at trial (e.g., because an important witness does not appear), the court may order an additional hearing. Once evidence has been taken, the parties state orally their conclusions on the facts at issue, giving a brief summary of the relevant evidence and the legal arguments grounding their pleas.

30 How is evidence given or admitted at trial?

Evidence is proposed orally by the parties at the preliminary hearing, although the parties are also obliged to provide details in writing of evidence proposed for admission. If the court deems that the evidence put forward by the parties could

turn out to be insufficient to clarify the facts at issue, the judge will inform the parties of the facts that, in his or her opinion, could be affected by such evidential gaps. The court will admit the evidence that it considers relevant and useful.

As regards how evidence is given at trial, see questions 29 and 31.

31 Are experts used in private antitrust litigation in your country? If so, what types of experts, how are they used, and by whom are they chosen or appointed?

Experts are frequently used in Spanish proceedings. As claimants have the burden of quantifying their claims at the time of filing, it is common practice for parties to file an expert report quantifying the damage suffered, typically prepared by an economist, accountant or industry expert. Each party has the right to appoint its own expert. The court may also appoint a judicial expert upon a party's request.

32 What must private claimants prove to obtain a final judgment in their favour?

Claimants must prove the infringement, fault, harm suffered and causal link between the harm and the defendant's anticompetitive conduct. They also must quantify damages.

In follow-on actions, the proof of the violation will be provided by the administrative decision, while in stand-alone actions the claimant will have to prove it (see question 5 on the binding effect of final decisions adopted by the relevant competition authorities to prove the existence of the violation).

As regards the harm, Royal Decree-law 9/2017 has introduced a new provision that establishes a rebuttable presumption that cartels cause damage (Article 76.3, LDC).

33 Are there any defences unique to private antitrust litigation? If so, which party bears the burden of proving these defences?

The Supreme Court has expressly accepted the passing-on defence (in a judgment predating Directive 2014/104/EU on actions for damages for infringements of competition law (the Damages Directive) relating to the Spanish Sugar cartel). In that case, the Supreme Court held that, for the defence to succeed, the defendant must prove both that the claimant passed on the overcharge down the supply chain to its customers and that the overcharge did not result in the claimant's sales volume being reduced.

The new provisions of the LDC explicitly recognise that the defendant in an action for damages can invoke as a defence against a claim for damages the fact that the claimant passed on the whole or part of the overcharge resulting from the

infringement of competition law. The burden of proving that the overcharge was passed on is on the defendant, who may reasonably require disclosure from the claimant or from third parties (Article 78.3, LDC).

34 How long do private antitrust cases usually last (not counting appeals)?

There are no specific statistics for damages claims in antitrust cases. On average, proceedings before first instance courts in relation to antitrust damages claims can take 16 months to get to trial and a year and a half until the first instance judgment is issued. However, this depends largely on the specific court and the complexity of the matter.

35 Who is the decision-maker at trial?

The judge.

Damages, costs and funding

36 What is the evidentiary burden on plaintiffs to quantify the damages?

Plaintiffs must prove that the damage is certain and can be demonstrated. The Supreme Court has stated (Sugar cartel case) that the basic requirement for a claimant (or its expert) is to provide a reasonable and technically founded hypothesis based on contrasted and reliable data. Where there is an administrative decision that has established that an infringement caused harm, the Supreme Court has held that it is not sufficient for the defendant's expert merely to criticise the plaintiff's quantification – a more robust alternative quantification is required of the defendant.

As already indicated, Royal Decree-law 9/2017 provides for a presumption that cartel infringements cause harm. It has also empowered courts to estimate the amount of harm if it is established that a claimant suffered harm, but it proves to be practically impossible or excessively difficult to precisely quantify the harm suffered (see Article 76, paragraphs 2 and 3, LDC).

37 How are damages calculated?

Typically, each party will produce an expert report containing an estimation of the damages and the court decides on the basis of its evaluation of those reports and the experts' defence of the same at trial. Experts tend to use the methods included in the 'Practical Guide on the Quantification of Harm in Actions for

Damages Based on Breaches of Articles 101 or 102 TFEU'. The Supreme Court has confirmed that the 'but for' analysis, such as a comparator-based before-and-after model, is appropriate to assess the quantum.

38 Does your country recognise joint and several liabilities for private antitrust claims?

In tort, the Supreme Court's case law states that, when damages are the result of the conduct of several offenders and it is not possible to determine the degree of liability of each one, the offenders will be held jointly and severally liable to the victim. Accordingly, it is generally assumed that co-infringers of competition law will be jointly and severally liable. The rule in contract is joint liability; joint and several liability is the exception.

The new regime under Royal Decree-law 9/2017 specifically establishes that each of the undertakings that has jointly infringed competition law is jointly and severally liable for the harm caused. In line with the Damages Directive, an exception is provided for small and medium-sized enterprises and for immunity recipients (see question 6 and Article 73, LDC).

39 Can a defendant seek contribution or indemnity from other defendants, including leniency applicants, or third parties? Does the law make a clear distinction between contribution and indemnity in antitrust cases?

If a joint and several defendant has paid a debt (i.e., damages to the claimant), it has the right to claim reimbursement from its co-debtors for the relative part corresponding to each of them. Subject to certain specificities, that right also covers contribution from the immunity recipient (see question 6).

40 Can prevailing parties recover attorneys' and court fees and other costs? How are costs calculated?

Yes, the 'loser-pays' principle applies thus, as a general rule, litigation costs are imposed on the party that has all its pleas materially rejected (Article 394, LEC). Nevertheless, if the court considers that the case involved reasonable doubts of fact or law, costs may be imposed on none of the parties. According to the same provision, if the court partially upholds the claim, each party must pay its own litigation costs. This rule has been the object of a recent request for a preliminary ruling submitted by the Commercial Court No. 3 of Valencia in which the CJEU has been requested to decide if such rule is compatible with the right to obtain full compensation (C-312/21). Courts may also impose costs when a party is deemed to have litigated recklessly or frivolously.

Recoverable costs include attorney fees, expert fees, court agents (procuradores) and court fees. Costs are calculated by the court clerk and may only be challenged if they are undue or excessive. If challenged on the ground of being excessive, the court clerk will refer the assessment to the relevant bar association so that it can issue an opinion.

41 Are there circumstances where a party's liability to pay costs or ability to recover costs may be limited?

The amount paid by the losing party cannot exceed one-third of the value of the claim and, in practice, does not generally exceed in a material way the parameters applied by the bar associations (although it should be noted that these parameters have been the subject of CNMC investigations). Costs for tariff-regulated services (such as court agents) are, however, always recoverable, and thus not subject to this limitation. This limitation does not apply if a party is deemed to have litigated recklessly. If the value of the claim is unquantified, costs are calculated by reference to a hypothetical claim value of €18,000, unless the court decides otherwise.

42 May attorneys act for claimants on a contingency or conditional fee basis? How are such fees calculated?

Yes. The arrangements between lawyer and client are not restricted and can include conditional or contingency fee models as agreed between the parties.

43 Is litigation funding lawful in your country? May plaintiffs sell their claims to third parties?

Litigation funding is lawful in Spain. In addition, claimants may assign or sell their claims to third parties. However, if the claim rights are sold while litigation is ongoing (and after the filing of the statement of defence), the defendant has the right to cancel the 'credit' and to bring proceedings to an end by paying the third party the amount it paid to the original claimant plus any costs paid, as well as the interest accrued from the date the claim was sold.

44 May defendants insure themselves against the risk of private antitrust claims? Is after-the-event insurance available for antitrust claims?

Yes, claimants and defendants may insure themselves against the risk of antitrust claims, including purchasing after-the-event insurance. Given the relatively low-cost exposure resulting from litigation in Spain, currently this type of insurance is not commonly used.

Appeal

45 Is there a right to appeal or is permission required?

Any party is entitled to appeal a judgment or final order that is contrary to its interests. No permission is required, although deadlines for filing the appeal must be met.

46 Who hears appeals? Is further appeal possible?

An appeal will be heard at the court of appeal of the jurisdictional region where the court that heard the case at first instance is based. The corresponding court of appeal is entitled to perform a full review of the case. Extraordinary appeals on procedural (reip) and material (cassation appeal) matters can be elevated to the Supreme Court depending on the nature of the legal questions raised or the value of the case (over €600,000). No permission is required. However, the Supreme Court strictly controls fulfilment of procedural requirements and has a broad discretion to admit appeals – it may, and frequently does, reject appeals.

47 What are the grounds for appeal against a decision of a private enforcement action?

No special grounds for appeal apply to private enforcement actions. Appeals must be supported by the general grounds for appeal, such as breach of procedural rules, error in law or error in assessment of evidence, taking into account the specific requirements of appeals to the Supreme Court.

Collective, representative and class actions

48 Does your country have a collective, representative or class action process in private antitrust cases? How common are they?

Yes, apart from the general rules on joinder of parties, which, if met, allow several claimants to file their claims in a single lawsuit, the LEC provides for a collective action regime that may be used not only in private antitrust cases but in any case in which a group of persons (consumers) have been affected by the same harmful conduct. They are not common in private antitrust cases (i.e., only one action has been brought in Spain so far, by Ausbanc against Teléfonica, being dismissed on procedural grounds).

49 Who can bring these claims? Can consumer associations bring claims on behalf of consumers? Can trade or professional associations bring claims on behalf of their members?

Spanish law distinguishes between collective actions for the protection of collective or diffuse interests.

In the case of collective interest actions, the law confers standing to:

- consumer and user associations;
- representative associations legally incorporated for the defence of consumer or user rights;
- national (or a regional) consumer institutes;
- the attorney general; and
- ad hoc associations of affected individuals.

Ad hoc associations must demonstrate that they represent the majority of victims affected by the wrongful conduct.

In the case of diffuse interest actions, Spanish law confers standing exclusively to consumer and user associations regarded as representative, and the attorney general.

These procedural mechanisms have only been used to date by consumer groups or associations. However, it cannot be ruled out that corporate claimants may attempt to make use of these mechanisms in the future.

Finally, individuals can join collective action proceedings as a party with their own legal representation and have the right to the resolution of their own particular claim.

50 What is the standard for establishing a class or group?

The first requirement is to evidence that a class of individuals has been affected by the same harmful event. In the case of collective interest actions, claimants or representatives will need to prove further that all members of the class are determinable or may be easily determinable. In the case of diffuse interest actions, claimants or representatives will need to prove that the class of individuals affected by the conduct is difficult, or impossible, to determine.

51 Are there any other threshold criteria that have to be met?

Yes, in the case of collective interest actions, claimants will need to have communicated to each of the individuals affected by the conduct their intention to file a claim. In the case of diffuse interest actions, the court clerk will suspend the proceedings for a period of time (not exceeding two months) to inform, generally by constructive notice (e.g., publication in a newspaper), all potentially affected individuals so that they have the opportunity to join the proceedings.

52 How are damages assessed in these types of actions?

Only one private enforcement collective action has to date, and to our knowledge, been brought in Spain: the above-mentioned action brought by Ausbanc against Teléfonica, and this case was dismissed on procedural grounds (the claimant association lacked sufficient representative status). As such, there is no legal precedent regarding the distribution of damages or settlements.

In relation to consumer collective actions brought in other contexts, courts have awarded sample damages to a class of individuals, each of whom is then able to claim damages by filing an application for execution of the sample damages judgment before any competent court.

53 Describe the process for settling these claims, including how damages or settlement amounts are apportioned and distributed.

There is no specific procedure to settle collective actions under the LEC. In the absence of a specific procedure, the general rule for settling individual claims would apply in principle. Under this procedure, parties must file the settlement agreement with the court so that it can be properly certified. Agreements are certified unless they are contrary to the law or they affect the rights of third parties. The collective action settlement would have the same effect as a collective action judgment, and hence, individuals who can qualify as beneficiaries of the settlement may file an application for execution before the competent court to seek their compensation in accordance with the terms of the settlement agreement.

54 Does your country recognise any form of collective settlement in the absence of such claims being made? If so, how are such settlements given force and can such arrangements cover parties from outside the jurisdiction?

No.

55 Can a competition authority impose mandatory redress schemes or allow voluntary redress schemes?

No, but the CNMC may reduce the amount of an administrative fine imposed if an infringer has adopted measures to redress the harm caused (see Article 64.3(c), LDC).

Arbitration and ADR

56 Are private antitrust disputes arbitrable under the laws of your country?

Yes. The Spanish Arbitration Act provides that disputes on matters that are within the free disposition of the parties can be submitted to arbitration. This includes antitrust disputes. Moreover, given that competition rules are mandatory, the arbitrator seated in Spain must apply the competition rules in any arbitration proceedings, irrespective of the law governing the contract.

57 Will courts generally enforce an agreement to arbitrate an antitrust dispute? What are the exceptions?

Subject to the formal and material validity of the arbitration clause, Spanish courts will generally enforce a clause providing for arbitration of disputes, including in relation to antitrust issues. However, Spanish courts may refuse to enforce an arbitration agreement if the clause is too narrowly drafted to include antitrust claims relating to the underlying contract.

58 Will courts compel or recommend mediation or other forms of alternative dispute resolution before proceeding with a trial? What role do courts have in ADR procedures?

Under Spanish law, mediation prior to filing a claim is not mandatory, unless the parties have signed a mediation agreement, in which case the parties are compelled to initiate mediation but not to finalise it. When the court summons the parties for the preliminary hearing, it will inform them of the possibility of resorting to negotiation, including mediation, in an effort to resolve the dispute. The preliminary hearing will then start with the judge asking the parties whether they have reached an agreement or are willing to do so immediately. At that time, the parties may also jointly request a stay of the proceedings to submit to mediation. If the parties do not so request, mediation does not stay court proceedings (subject to any specific rule).

Advocacy

59 Describe any notable attempts by policy-makers to increase knowledge of private competition law and to facilitate the pursuit of private antitrust claims?

By far the most notable development has been the implementation of the Damages Directive in May 2017.

APPENDIX 1

About the Authors

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María Pérez is specialist in damages actions for breach of competition law. She also handles the resolution of disputes arising from distribution and agency agreements, unfair competition, M&A transactions, energy and telecommunications. She also regularly advises on telecommunications law.

She has extensive experience in mass litigation with multi-jurisdictional implications. She has represented large multinationals in the automotive, distribution, audiovisual, infrastructure, energy and telecommunications sectors, resolving disputes of various kinds through litigation and arbitration. She currently focuses on civil damages actions for breach of competition law and is involved in leading cases, both at the international and national level, including the trucks, decennial insurance, and fruit and vegetable packaging cartels, among others.

She also provides pre-litigation advice in complex cases and in settlement negotiations. María Pérez has developed her career in the Cuatrecasas Litigation and Arbitration Practices, having completed a secondment at Hausfeld LLP.

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Private competition litigation has spread across the globe, raising specific, complex questions in each jurisdiction. The implementation of the EU Damages Directive in the Member States has furthered the ability of victims of anticompetitive conduct to seek compensation, even as US courts tighten the standards for forming a class action.

The *Private Litigation Guide* – published by Global Competition Review – explores in depth key themes such as territoriality, causation and proof of damages that are common to competition litigation around the world with jurisdictional overviews and Q&As. Beyond the established sites such as the US, Canada, Germany, the Netherlands and the UK, experts lay out the scene for competition litigation in countries such as Austria, China and Japan.

As the editors of this publication note, 'litigating antitrust or competition claims has become a global matter, requiring coordination among jurisdictions, and requiring counsel and clients to understand the rules and procedures in many different countries and how the approaches of courts differ as to key issues.'

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