ICC COMPENDIUM OF ANTITRUST DAMAGES ACTIONS

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Introduction

This chapter is part of the *ICC Compendium of Antitrust Damages Actions* (the “Compendium”) which can be read in full on the ICC website at www.iccwbo.org.

Designed to provide decision-makers with a comparative overview of the issues most frequently arising in private antitrust litigation in key jurisdictions, the Compendium reflects contributions from leading antitrust law specialists around the world. It does not try to explore the complexity of each legal system but strives to capture a comprehensive picture of the matter, organised around nine topics, and completed in some jurisdictions by an additional chapter highlighting key issues. A collection of decisions issued in the same jurisdictions is also available on the ICC website. This database is the essential complement to the overviews for a comparative approach and will allow a better understanding of the rules presented in the compendium.

With this publication, ICC hopes to help in-house counsels, antitrust practitioners and enforcers, but also judges of the courts and academics, navigate through a new, fast-changing legal environment.
**Glossary**

**Appeal:** a proceeding undertaken to have a decision reviewed by a higher authority whose jurisdiction may include (i) an entirely new assessment of the case, (ii) a limited review of manifest errors of law and facts, or (iii) a specific review limited to legal issues.

**Article 101 TFEU:** This provision prohibits as anti-competitive all agreements, decisions, and practices between undertakings and concerted practices which may affect trade between EU Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market.

**Article 102 TFEU:** This provision prohibits any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it. Those behaviours are incompatible within the internal market in so far as it may affect trade between EU Member States.

**Award:** a final judgment or decision, especially one by an arbitrator or by a jury assessing damages.

**Burden of proof:** The responsibility for a party during legal proceedings to prove the facts it asserts; the burden of proof may be shifted to the opposing party once the standard of proof has been met.

**Cartel:** Any horizontal collusion between competitors whose purpose is to fix prices or quantities, allocate markets, while sharing sensitive commercial information.

**Cease-and-desist order:** a court’s or agency’s order prohibiting a person from continuing a particular course of conduct which is deemed harmful. In competition law proceedings, these orders also include a prohibition from adopting future conducts likely to have the same effects as the one which is prohibited.

**Claimant:** the party who brings a civil suit in a court of law.

**Class action:** a lawsuit where a person or a group seeks damages for a larger group of claimants. Class action proceedings typically include a preliminary stage to define the characteristics of the group, which needs to gather persons with identical cases and who have suffered a prejudice from the same tort.

**Competition authority:** Any public authority, whether independent of forming part of a government administration, whose role is to enforce rules which prohibit unilateral and coordinated behaviours that restrict competition.

**Damages:** money claimed by, or ordered to be paid to, a person as compensation for loss or injury.

**Defendant:** a person sued in a civil proceeding.

**Discovery:** Proceeding whereby a party has to disclose information and documents relating to the litigation upon the request of the opposing party. This procedure is usually implemented during the pre-trial phase of the lawsuit.
** Directive 2014/104/EU:** European Union Directive issued on 5 December 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and the EU. The purpose of this text is to set forth common rules among EU Member States in order to enhance private enforcement of Articles 101 and 102 TFEU and full compensation for victims of anti-competitive conducts. The text also provides for specific rules on the interplay between civil lawsuits and enforcement proceedings before competition authorities.

**Follow-on:** A competition law claim for damages where the alleged infringement has previously been found by a final decision of a competition authority.

**Immunity:** Total exemption of fine for a company that is the first to reveal the existence of a competition law infringement to a competition authority.

**Infringer:** Any company that has implemented unilateral or coordinated behaviours infringing competition law, where a competition authority has found such infringement in a decision.

**Joint-and-several liability:** liability that may be apportioned either among two or more parties or to only one or a few select members of a group of Infringers upon the decision of a competition authority or a civil court.

**Leniency:** A competition law procedure that rewards companies that adopt anti-competitive conducts with Immunity or reduction of fine, if they inform the competition authority of an infringement that it did not previously have knowledge of.

**Limitation period:** a statutory period after which a lawsuit or prosecution cannot be brought in court.

**Passing-on defence:** a competition law defence that relies on the civil law principle of unjust enrichment. During civil proceedings, a defendant may argue that the plaintiff’s claim for compensation should be totally or partially denied as it passed the alleged overcharge resulting from a competition law infringement on its own customers.

**SME (Small—and Medium-sized Enterprise):** categories of micro, small and medium enterprises defined based on their staff headcount, and either their turnover or balance sheet total.

**Stand-alone action:** A competition law claim for damages where the alleged infringement has not previously been found by a final decision of a competition authority.

**Standard of proof:** In any legal procedure, the level of evidence that is required to establish with certainty a fact or a liability.

**Tort:** A civil wrong, other than breach of contract, for which a remedy may be obtained, usually in the form of damages; a breach of duty that the law imposes on persons who stand in a particular relation to one another.
In Spain, private damages actions have historically played a very limited role in the enforcement of competition law. As a result of the enactment of the current Spanish Competition Act 15/2007 of 3 July 2007 (the “SCA”), private enforcement of competition law was facilitated, increasing the number of antitrust damages actions brought before Spanish Courts. However, there was still no specific regulation on the liability for such kind of damages.

Private antitrust litigation is expected to grow further as a result of the recent transposition of the directive 2014/104/EU of 26 November 2014 (the “Damages Directive”) into Spanish law through the royal decree-law 9/2017 of 26 May 2017 (the “RDL 9/2017”), which has approved certain specific rules, both substantive and procedural, in the field of private antitrust actions, by respectively amending the SCA and the Spanish Act 1/2000 of 7 January 2000 on Civil Procedure (the “SACP”).

Both follow-on and stand-alone actions (i.e. based or not based on a previous resolution issued by a competition authority) are allowed under Spanish law.

1. Jurisdiction

Apart from the European Commission, the main administrative bodies in charge of enforcing competition law in Spain are the National Commission on Markets and Competition (“Comisión Nacional de los Mercados y la Competencia or CNMC”) and several regional competition authorities. However, they are only competent for public enforcement of competition law.

On the whole, judicial actions for damages resulting from infringements of competition law must be brought before the commercial courts, which are the competent courts regardless of
whether the victim is a public or a private entity. However, a breach of competition law may also be submitted as a defence vis-à-vis an action brought by the infringer before civil courts.

In addition, certain anti-competitive conducts are qualified as a crime by the Spanish Criminal Code, and therefore may give rise to criminal liability. In such a case, criminal courts will have jurisdiction and criminal proceedings will prevail. Criminal courts will also deal with the civil liability derived from such criminal offences (i.e. damages compensations), unless the injured party reserves its right to claim the damages in further civil proceedings, to be brought once the criminal proceedings have ended.

The rules applicable to administrative and criminal proceedings are not covered in this overview.

2. Relevant legislation and legal grounds

Before the rdl 9/2017 came into force, and without prejudice to the specific antitrust legal provision breached, antitrust damages actions were generally founded on tort liability provisions contained in the Spanish Civil Code (the “SCC”). SCC general provisions on contracts may also be invoked in certain cases. The applicable procedural rules were those generally provided by the SACP for any other civil ordinary proceedings.

In addition to these provisions, private antitrust actions are now dealt with in the new Title VI of the SCA, which regulates certain substantive aspects, and in the new Article 283bis of the SACP, which sets out specific rules on disclosure of evidence in proceedings regarding antitrust damages actions.

The SCA states that undertakings which have infringed competition law are liable for the harm caused by the infringement (new Article 71.1 of the SCA). As a result, any natural or legal person who has suffered harm caused by an infringement of competition law is entitled to claim full compensation for that harm from the infringer (new Article 72.1 of the SCA).

The burden of proof of the harm rests with the claimant (new Article 76.1 of the SCA). In addition, the claimant must bring evidence of the infringement and the causal link between it and the harm.

The rdl 9/2017 has reformed the SCA in order to make it easier to comply with these evidence requirements so that:

- In the event of a Spanish competition authority (the CNMC or a regional authority) or a Spanish court having found an infringement of competition law in a final decision, such an infringement is deemed to be irrefutably established for the purposes of an action for damages (new Article 75.1 of the SCA). The same rule applies to infringements of Articles 101 or 102 of the Treaty on the Functioning of the European Union (the “TFEU”) found in EU Commission decisions (Commission decisions have direct effect and are legally binding in national courts, therefore, there is no need for them to be final) and judgments. However, there will only be a rebuttable presumption of existence of those infringements of competition law declared in final decisions issued by competition authorities or courts of other EU Member States (new Article 75.2 of the SCA).
When, on the basis of the evidence available, it is practically impossible or extremely
difficult to precisely quantify the harm suffered by a claimant as a result of an
infringement of competition law, Spanish courts will be entitled to estimate an amount
(new Article 76.2 of the SCA).

Spanish courts may request any Spanish competition authority (the CNMC or
a regional authority) to report on the criteria that should be considered for the
quantification of the harm (new Article 76.4 of the SCA).

There is a rebuttable presumption that cartels cause harm (new Article 76.3 of the
SCA).

**Ratione temporis application of the RDL 9/2017**

In accordance with the First Transitional Provision of the RDL 9/2017, the substantive
provisions implemented through the amendment of the SCA will not apply retroactively.
These substantive provisions are those regulating the limitation period to bring an action
for damages and its interruption, the application of certain presumptions of damages and
rules for determining its amount, the effects of the resolutions handed down by the antitrust
authorities once they are final, the liability of the infringers and the special liability regime of
the small—or medium-sized enterprises and the immunity recipients.

In Spain, there is currently an ongoing debate on how to interpret the non-retroactivity
principle set forth by the RDL 9/2017. There is already case-law from the European Court
of Justice confirming that the national laws that have transposed the substantive provision
of the Damages Directive cannot be applicable *ratione temporis* to actions brought before
the expiry of the transposition deadline or before the transposition of the Damages
Directive into the national legal order, without prejudice to the application of the principles
of equivalence and effectiveness (judgment of 28 March 2019, Cogeco, case C-637/17).
However, it is still not clear whether the substantive provisions of the RDL 9/2017 may apply
to those cases referring to infringements of competition law that ceased before its entry
into force (*i.e.* 27 May 2017). Particular questions arise with regard to limitation periods,
especially when, despite the conduct ceasing before the entry into force of the new regime,
the competition authority adopts a decision declaring the existence of an infringement after
the entry into force of same.

With respect to the procedural provisions implemented through the amendment of the
SACP, which regulate access to the sources of evidence, the First Transitional Provision of
the RDL 9/2017 states that they will apply to proceedings initiated after its entry into force
(*i.e.* 27 May 2017), regardless of whether they refer to an infringement of competition law
that ceased before said date.

### 3. **What types of anti-competitive conduct are damages actions available for?**

Although damages actions are available for conducts falling within the scope of the Spanish
Act 3/1991 of 10 January 1991 on Unfair Competition, the new provisions included in the SCA
by the RDL 9/2017 are only applicable to actions for damages resulting from the breach of
Articles 101 or 102 of the TFEU or their national equivalent provisions, *i.e.* Articles 1 or 2 of
the SCA (new Article 71.2.a of the SCA).
4. **What forms of relief may a private claimant seek?**

Without prejudice to other remedies when an antitrust action has to do with a contract (in which case SCC general provisions on contracts, and the remedies set therein, will also apply), pursuant to the new Article 72.1 of the SCA, claimants are entitled to obtain full compensation for the harm caused by any breach of competition law.

Full compensation means that the person who has suffered the harm must be placed in the position in which it would have been had the infringement not been committed. The compensation shall therefore cover actual loss (damnum emergens) and loss of profit (lucrum cessans), plus interest (new Article 72.2 of the SCA).

Overcompensation by means of punitive damages, in whatever form, is not allowed under Spanish law (new Article 72.3 of the SCA).

Undertakings which have jointly infringed competition law shall be jointly and severally liable for the harm caused. The injured party has the right to claim compensation in full for the harm from any of the infringers (new Article 73.1 of the SCA).

Infringing undertakings which had compensated the injured party may seek a contribution from the rest of the infringers, the amount of which shall be determined in accordance with their relative responsibility for the harm caused by the infringement (new Article 73.5 of the SCA). Such recovery actions must be brought within the general time limit of five years, pursuant to Article 1964.2 of the SCC.

There are two exceptions to the aforementioned general principle of co-infringers’ joint and several liability set out by new Article 73.1 of the SCA:

- Where the infringer is a small—or medium-sized enterprise (“SME”), as defined in European Commission Recommendation 2003/361/EC, it will be liable only to its own direct and indirect purchasers, provided that certain conditions expressed by the Damages Directive are fulfilled (new Articles 73.2 and 73.3 of the SCA).

- Where the infringer has been granted immunity by a competition authority, it will be jointly and severally liable only to its own direct and indirect purchasers or providers. Immunity recipients shall also be liable to other injured parties if full compensation for the harm caused by the infringement of competition law cannot be obtained from the other infringers (new Articles 73.4 of the SCA).

Finally, one of the main innovations introduced by the RDL 9/2017 is parent companies’ joint and several liability for the harm caused by the infringements of competition law committed by their subsidiaries (new Article 71.2.b of the SCA). Although the parent companies’ liability rule was not directly required by the Damages Directive, the Court of Justice of the EU ruled that the concepts of undertaking and economic unit in EU competition law involve such liability in damage claims.\(^1\) Yet, the parent company is not liable when it does not determine the subsidiary’s economic behaviour.

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\(^1\) CJEU, Case C-724/17, 14 March 2019, Skanska, para. 28-32.
5. **Burden of proof/Passing-on defence**

Right to full compensation for the harm caused by a breach of competition law does not cover the overcharge that the claimant passed on to its customers (new Article 78.1 of the SCA).

The defendant may argue that the claimant passed on the whole or part of the overcharge resulting from the infringement. The burden of proof shall be on the defendant (new Article 78.3 of the SCA).

6. **Pre-trial discovery and disclosure, treatment of confidential information**

New Article 283bis of the SACP provides specific rules on disclosure of evidence in proceedings relating to antitrust damages actions, in line with the Damages Directive.

Accordingly, both the claimant and the defendant may reasonably request each other or a third party (typically, a competition authority) to disclose relevant evidence which lies in their control. The court shall limit the disclosure of evidence to that which can be considered proportionate.

Request for the disclosure of evidence may be submitted prior to filing the claim (in that case, the claim must be brought within twenty days from the date on which this disclosure had taken place), at the time of filing it or over the course of the judicial proceedings.

The disclosure of evidence included in the file of a competition authority is specifically regulated by the SACP, in a more restrictive manner than the disclosure of other evidence:

- Spanish courts cannot order the disclosure of the following categories of evidence before the closure of the relevant competition proceedings: (i) information that a natural or legal person has specifically prepared for such proceedings, (ii) information that the relevant competition authority has drawn up and sent to the parties in the course of the proceedings, and (iii) settlement submissions that have been withdrawn.

  - Spanish courts cannot order the disclosure of _leniency statements_ and _settlement submissions_.

  - Spanish courts cannot order the disclosure from a competition authority of evidence included in its file unless no other party is reasonably able to provide that evidence.

With regard to evidence containing confidential information, Spanish courts shall be empowered to order its disclosure where they consider it relevant, but must take effective measures to protect such information (e.g. redacting sensitive passages in documents, conducting closed hearings or restricting access to them, limiting the number of persons allowed to examine the evidence, instructing experts to produce summaries of the information in an aggregated or otherwise non-confidential form, redacting a non-confidential version of court resolutions containing confidential data and limiting access to certain sources of evidence to the parties’ legal representatives and advocates and to experts subject to confidentiality obligations). Legal professional privilege shall be protected by the courts when ordering the disclosure of evidence.
7. Limitation Periods

The RDL 9/2017 has implemented a relevant change in the limitation period for bringing antitrust damages actions. Prior to its entry into force, such actions had to be brought within the general time limit of one year provided for damages resulting from tort liability (Article 1968.2 of the SCC). The dies a quo for this one-year limitation period has been interpreted by the Spanish Supreme Court as the day on which the party suffering the damage knew about it and was able to bring the corresponding damages action. However, new Article 74.1 of the SCA lays down a time limit of five years (the minimum required by the Damages Directive).

The five-year limitation period shall begin to run on the date when, once the infringement has ceased, the claimant has or can reasonably be expected to have knowledge of all the following circumstances: (i) the behaviour and the fact that it infringes competition law, (ii) the harm caused by the infringement, and (iii) the identity of the infringer (new Article 74.2 of the SCA).

The limitation period shall be interrupted if a competition authority initiates an investigation or sanctioning proceedings in respect of an infringement related to the action for damages. The interruption shall end one year after the resolution issued by the relevant competition authority has become final or the proceedings are otherwise terminated (new Article 74.3 of the SCA).

Likewise, the limitation period shall be interrupted during any out-of-court settlement process concerning the claim for damages, for a maximum term of two years. The interruption shall apply only to those parties involved or represented in such a process (new Articles 74.4 and 81 of the SCA).

8. Appeal

Judgments issued by commercial courts may be challenged before the corresponding Appeal Court.

Judgments issued by courts of appeals may in turn be appealed before the Spanish Supreme Court, provided that certain requirements set out by the SACP are met.

9. Class actions and collective representation

US-style class actions are not available in Spain, but the SACP provides for a sort of collective legal standing of consumers’ and users’ associations that would also be available for antitrust damages actions.

There are two different types of collective actions, depending on whether they are aimed at defending collective interests (i.e. those of victims that are perfectly determined or easily determinable) or diffuse interests (i.e. those of victims that are undetermined or difficult to determine). Consumers’ and users’ associations are entitled to bring any of these two actions, as well as the public prosecutor. Actions in defence of collective interests can also be brought by entities whose purpose is the defence or protection of the affected consumers and users or by the own groups of them (Article 11 of the SACP).
The admission for processing of the complaint will be published in the media so that any affected party can join the proceedings (Article 15 of the SACP). In practice, if the complaint is upheld, the judgment will determine the consumers that will benefit from the compensation. If the individual determination of the affected consumers is not possible, the judgment will establish the basis for the calculation of the compensation to which any injured party is entitled.

10. Key issues

The non-retroactivity of the substantive provisions introduced by the RDL 9/2017

In proceedings referring to antitrust infringements committed before the transposition of the Damages Directive into Spanish law, Spanish Courts seem to agree that it is not possible to interpret the former regime applicable to damages actions in accordance with the Damages Directive on the basis of the principle of interpretation in conformity. This is the reasoning used, for instance, by the 15th Section of the Barcelona Court of Appeals in its judgment of 13 January 2020 handed down in the so-called “envelopes cartel”, sanctioned by the CNMC (then referred to as “Comisión Nacional de la Competencia CNC”) in a decision dated 25 March 2013, to conclude that “the favourable treatment of the leniency provided for in Article 11 of the Directive is not appropriate and there is no presumption of damage on account of the principle of conforming interpretation”.

However, in the damages actions brought in relation to the “trucks cartel”, sanctioned by the European Commission by a decision dated 19 July 2016 (but published on 6 April 2017), despite referring to an infringement that had ceased also before the entry into force of the Damages Directive, some courts have interpreted the former regime in the light of the Damages Directive on the basis of the principle of interpretation in conformity, on the understanding that that decision was handed down when the Damages Directive was already in force and was published after its transposition period had elapsed. In practice, this implies embracing the presumption that cartels cause damages and being flexible in the determination of the damages to facilitate their calculation. However, other Courts, rather than invoking the interpretation in conformity (the Damages Directive was not applicable ratione temporis), have taken into account the Court of Justice of the EU case-law on equivalence and effectiveness when applying the former regime in these cases, thus arriving to a similar result.

Subsidiaries’ liability for their parent companies’ antitrust infringements found in European Commission decisions

In Spain, a significant number of actions for damages relating to the European cartel of truck manufacturers have been brought not against the companies sanctioned by the EU Commission in its decision of 19 July 2016, but against their Spanish subsidiaries, assuming that the commission of the infringement by the latter was irrefutably established as a result of such a decision, without need of further evidence.

In this regard, Spanish courts have taken two different positions. Some of them have dismissed the truck purchasers’ claims against the subsidiaries by arguing that the EU Commission decision only evidences that the companies mentioned therein infringed
competition law, but not their subsidiaries, which may only be deemed liable for the infringement if the claimants bring evidence that they effectively took part in it.

Other courts, however, have considered that the principle of economic unit established by the ECJ case-law, according to which the conduct of a subsidiary may be imputed to the parent company if the latter exerts a decisive influence on the former (there is a rebuttable presumption of that influence in the case of wholly-owned subsidiaries), must also apply in reverse, i.e. to extend the parents’ liability to their subsidiaries. Accordingly, these courts have deemed the subsidiaries’ infringement of competition law to be evidenced on the sole basis of the EU Commission decision, although it did only refer to their parent companies.

Such are the doubts about this issue that the 15th Section of the Barcelona Court of Appeals, in its judgment of 24 October 2019, referred this question to the Court of Justice of the EU for a preliminary ruling: “Does the ECJ doctrine on the economic unit justify the extension of the parent company’s liability to the subsidiary or only applies to the extension of the subsidiaries’ liability to the parent company?”

**Calculation of damages**

Courts dealing with antitrust damages actions encounter a major difficulty when quantifying the harm suffered. In practice, Spanish Courts will usually follow the guidance provided in the Communication from the European Commission on quantifying harm in actions for damages based on breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union (2013/C 167/07) and will compare the actual position of the claimants with the position in which they would have had if the infringement had not occurred. In order to do so, they will assess the expert opinions filed by the parties and will infer their own criteria on how to calculate the damages.
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