THE PRIVATE COMPETITION ENFORCEMENT REVIEW

Seventh Edition

Editor
Ilene Knable Gotts

Law Business Research
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SPAIN

Helmut Brokelmann

I OVERVIEW OF RECENT PRIVATE ANTITRUST LITIGATION ACTIVITY

In 2013, the Spanish Supreme Court rendered two important judgments clarifying basic questions concerning actions for damages for breaches of EU and Spanish competition law.

Together with a previous judgment of 8 June 2012, the Supreme Court's judgment of 7 November 2013 in the Sugar cartel case addresses key issues on damages actions, such as the binding effect of previous decisions of the competition authority, the burden of proof, the passing-on defence or the calculation of damages. The case goes back to an infringement decision adopted in 1999 by the Spanish competition authority, which found that from 1995 to 1996 two sugar manufacturers had fixed prices of sugar for industrial use and allocated markets and customers in Spain. The decision was subsequently confirmed on appeal by the Audiencia Nacional and the Supreme Court. Once the administrative decision became final, several companies that had purchased sugar for industrial use from the fined companies brought two follow-on actions claiming damages for the overcharge suffered, which were eventually heard by the Supreme Court.

The Supreme Court's judgment of 4 September 2013 turns on the issue of time limitation for commencing follow-on actions. In 2009, the Markets and Competition Commission (CNMC) concluded that Iberdrola Distribución had abused its dominant position in the electricity market and hindered competition in the electricity supply market. Specifically, the abusive conduct consisted in denying supplier Centrica the...
information needed to compete in the retail market. Centrica brought a follow-on action for damages against Iberdrola Distribución before the Commercial Court of Bilbao, which rejected Centrica’s claim on the basis that its action was time-barred. This judgment was affirmed on appeal by the Audiencia Provincial, which held that the starting date of the one-year limitation period commenced when Iberdrola communicated to Centrica that the requested information was now available. The Supreme Court, however, held that the limitation period only starts when the claimant becomes completely aware of the damage suffered. In this case, the damage suffered could not be calculated until Centrica had complete knowledge of the information, which had taken place at a later stage when it actually received the information in a computerised form. Thus, the Supreme Court concluded that the action was not time-barred.

Another noteworthy development relates to stand-alone actions in which the competition rules have been directly enforced by the civil and commercial courts. In a series of petrol station cases, the civil courts have ruled on the validity of exclusive supply agreements and awarded damages where the contracts contained anti-competitive clauses (resale price maintenance or excessive non-compete commitments). In Fontanet v. Repsol, the Supreme Court confirmed in a judgment of 8 May 2013 that the contract in question was partially void given its excessive duration and damages for lost profits had to be granted. Although in these cases there was no previous infringement decision from a competition authority, damages were awarded following a European Commission commitment decision on Repsol’s supply agreements.

A further example of a stand-alone damages action is the 9 May 2014 judgment of the Commercial Court of Madrid in the MUSAAT v. ASEFA/CASER/SCOR case related to an insurance cartel fined by the Spanish Competition Authority in 2009. The judgment awarded damages to a competitor of the alleged cartel for suffering a boycott by three reinsurance companies for offering the insurance in question at prices below the minimum agreed by the members of the cartel. The Court qualified the boycott as an infringement distinct from the cartel and awarded €3 million in damages.

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4 Commercial Court of Bilbao, judgment of 16 July 2012, Centrica Energía v. Iberdrola Distribución.
6 See also the judgments of the Audiencia Provincial of Madrid of 11 March 2013 (Repsol Comercial de productos petrolíferos v. Don Dimas y TAYGRAO); of 19 April 2013 (Estación de servicio Azpeitia-azkoitia v. Repsol Comercial de productos petrolíferos); of 15 July 2013 (Estación de servicio Fuente la Reina v. BP Oil España).
7 Commission Decision of 12 April 2006 relating to a proceeding pursuant to Article 81 of the EC Treaty (Case COMP/B-1/38.348 – Repsol CPP).
8 Fines totalling €120 million were imposed on six insurance and reinsurance companies. The Audiencia Nacional quashed this decision and the appeals are pending before the Supreme Court, where the European Commission has submitted an amicus curiae brief requesting that these judgments be overturned and the decision of the Competition Authority confirmed.
Another example of a stand-alone action is the 12 March 2013 judgment of the Madrid Commercial Court,\(^9\) in which a claim brought by an association of pharmaceutical wholesalers (EAEPC) against Janssen-Cilag for abusive refusal to supply and introduction of a dual pricing system was dismissed.

II GENERAL INTRODUCTION TO THE LEGISLATIVE FRAMEWORK FOR PRIVATE ANTITRUST ENFORCEMENT

As elsewhere in the EU, in Spain the emphasis is clearly on the public enforcement of the competition rules by the administrative competition authority (Comisión Nacional de los Mercados y la Competencia, CNMC) and its counterparts at the regional level. Nonetheless, since 2004 private enforcement has been possible before the commercial courts, which are competent to hear cases involving both national and EU competition law.\(^10\) Although there have been occasional stand-alone actions before these courts, these are rather exceptional, since most actions are follow-on damages actions after an infringement of the competition rules has been declared by the CNMC or the European Commission.

Antitrust claims can be brought under Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU) if trade between EU Member States is affected by the agreement or practice in question and/or under Articles 1 and 2 of the Spanish Competition Act (SPA).\(^11\)

Damages claims are usually based on tort law, although in claims from direct purchasers it should also be possible to bring a contractual action or an action of unjust enrichment. The limitation periods for each of these claims are different under Spanish law.

Tort claims are governed by Article 1902 et seq. of the Spanish Civil Code (CC): ‘any person who by action or omission causes damage to another by fault or negligence is obliged to repair the damage caused.’ Article 1968(2) establishes a limitation period of one year. This period starts to run as of the date in which the injured party had full knowledge of the harm suffered. It is not yet judicially settled how this applies in follow-on claims, but the prevailing view seems to be that the period starts to run when the administrative decision is published (or notified to the injured party). Nonetheless, it could also be argued that the deadline does not start to run until the administrative decision is final, particularly in view of the risk of having to bear the judicial costs if the claim is eventually dismissed. The above-mentioned Centrica judgment of the Supreme Court relates to a claim brought under the former Competition Act of 1989, which required the administrative decision to be final before damages claims could be brought. The 2007 SPA has derogated this requirement, although in practice injured parties often wait until the decision is final before bringing damages claims.


\(^10\) Article 86-ter (2)(f) of the Judiciary Act.

Although in the above-mentioned Sugar cartel case the Supreme Court refused to qualify the damages action brought by direct purchasers of the cartel as of a contractual nature, focusing instead on tort law, pursuant to Article 1101 of the Civil Code it is possible to claim damages when a contract is performed in bad faith (in the case of a cartel, because the seller knew that the price was affected by an infringement of the competition rules). The limitation period to claim damages in such cases is 15 years (Article 1964 CC).

Finally, it should in principle also be possible to claim that the contract with the direct purchaser is null and void due to a fraudulent misrepresentation on the part of the seller as regards the contract price. In such cases, it should be possible to claim restitution (Article 1303 CC) of the price paid to the infringing party (the latter’s claim for restitution being barred due to the principle of nemo auditur propiam turpitudinem allegans, Article 1306 CC). The limitation period for such claims is four years (Article 1301 CC).

III EXTRATERRITORIALITY

There are no special rules regarding extraterritoriality. Spanish competition rules apply if the practice or conduct in question has actual or potential effects on competition in the national territory, irrespective of the nationality of the infringing company. According to EU Council Regulation 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, defendants domiciled in an EU Member State must in principle be sued in the courts of that Member State, although the Regulation provides for exceptions to that rule. Similar rules apply for non-EU countries under the Lugano Convention.

IV STANDING

In accordance with the case law of the Court of Justice of the European Union (CJEU) in the Courage v. Crehan and Manfredi judgments, any person or undertaking that has suffered loss or damage as a result of an infringement of Spanish or EU competition law (both final consumers as well as the direct and indirect purchasers of the companies that have incurred in anti-competitive practices or the parties to an anti-competitive agreement) may bring a claim for damages. Any such claim may be brought on a ‘stand-alone’ basis where there is no prior infringement decision of a competition authority, or on a ‘follow-on’ basis. In addition, if one party contributing to any damage has compensated the victim in full, it has standing to start proceedings against the other contributing parties to recover the part of the damages paid on their behalf.

Consumer associations representing the interests of final consumers also have standing to defend the rights and interests of their members and consumers in general (see Section VII, infra).

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V THE PROCESS OF DISCOVERY

US-style discovery is not available under the Spanish Civil Procedural Law (CPL), which only provides for pretrial discovery (diligencias preliminaries, Article 256 et seq. CPL) to a very limited extent for the purposes of identifying the defendant or complying with other admissibility requirements of the future claim. Only in cases of violation of intellectual property rights does the CPL provide for a more far-reaching discovery mechanism which also allows requesting evidence proving the violation. Broader discovery rules are also provided for in the Unfair Competition Act.

In a ruling of 7 October 2011, the Audiencia Provincial of Madrid held that pretrial evidence may only be requested exceptionally if it is ‘objectively indispensable’ to prepare the trial. If the information could, however, be obtained during the usual phase of evidence gathering after filing the claim, such information may not be requested beforehand. Although the CPL provides for certain mechanisms that can be used by the future claimant to obtain information from the defendant, or secure the future production of evidence, these instruments have a very limited scope aimed at avoiding existing evidence no longer being available at a later stage.

Under the general evidence gathering rules of the CPL, parties to the proceedings may request any evidence in the preliminary hearing following the submission of the plaintiff’s claim and the defendant’s reply. Possible evidence covers any admissible means, such as documentary evidence, testimony by the parties’ representatives or third parties, or expert opinions. As regards the limits, in particular regarding leniency documents, see Section XI, infra.

Article 328 CPL establishes a duty of making available to the parties the documents that refer to the object of the proceedings.

Third parties may only be required to produce documentary evidence where the court deems that such documents are essential to reach a judgment (Article 330 CPL). In addition, unless there is a special legal duty to secrecy or reservation, public bodies are subject to the obligation of making available the necessary documents and issuing certifications and attestations (Article 332 CPL).

VI USE OF EXPERTS

Economic experts are widely used in civil competition litigation, both to establish the existence of a violation in stand-alone actions and to prove the existence of damages in follow-on actions, particularly as regards the quantification of lost profit. Article 299 CPL includes expert reports among the evidence that can be submitted by the parties, and the court may also appoint an independent expert or seek advice from the Spanish competition authority on the quantification of damages.

In the above-mentioned judgment of 7 November 2013 in the Sugar cartel case, the Supreme Court rejected the expert opinion submitted by the defendant, declaring

that it was not enough to question the accuracy of the claimant's expert opinion. The expert must provide an alternative quantification that is better founded. In the case at issue, the Court confirmed that the only acceptable economic evidence submitted in the proceedings was that of the claimants' expert and awarded the full amount originally claimed (the lower instances had first granted 50 per cent of the claimed amount and then nothing on appeal). With regard to the method used in this report, the Supreme Court stated that the difficulty of reproducing the counterfactual scenario should not prevent the injured party from receiving a proper amount of compensation. What should be required is that the expert report provides a reasonable and technically founded hypothesis on contrasted and reliable data.

The Court also acknowledged the difficulty of appointing a judicial expert due to the specialisation required of the expert and the list-system, which impeded any meaningful selection by the court.

VII CLASS ACTIONS

Spanish legislation does not contain any specific provision regarding US-style class actions. However, a collective antitrust damages action may be brought pursuant to Article 11 CPL. Both consumer and user associations can bring actions to protect the rights and interests of their members as well as the general interests of consumers and users.

This provision distinguishes between two possible scenarios. First, actions to protect the ‘collective interest’ under Article 11(2) CPL, when the claimants affected are identified or are easily identifiable. These may be brought by a consumer association, by other authorised legal entities or by the affected group. To inform the potential claimants about an action, the claimant must give prior notice of the filing of the claim to all those parties that may be interested in joining the action.14

Second, actions to protect diffuse interests of individuals under Article 11(3) CPL, when those damaged by an event are an undetermined number of consumers or users or a number difficult to determine. In such cases, the standing to lodge a claim corresponds exclusively to the associations of consumers and users which, in accordance with the law, are ‘representative’. The publication of the claim suspends the course of the proceedings for two months. Affected consumers or users who do not identify themselves before the court within this period will not be able to join the action, notwithstanding the possibility of benefiting from the final outcome of the case. In such case, the judgment will be binding on all affected consumers and users, not only on those that have appeared in the proceedings.

It is also possible for other interested parties, who were not original parties to the proceedings, to be admitted as claimants in the proceedings as long as they prove a direct and legitimate interest in the outcome of the case.15

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14 Article 15 CPL.
15 Article 13 CPL.
Pursuant to Article 222 CPL, the res judicata effect also extends to parties who have not participated in the collective action brought by an association that defends their interests. Thus, consumers would be barred from bringing an individual action if a consumer association has already brought a collective action.

**VIII CALCULATING DAMAGES**

Damages claims for breach of EU and Spanish competition law are based on the general rules on tort liability. Under Spanish tort law any party causing harm to another party must restore the injured party to the position it had before being harmed. Damages awarded are monetary sums equivalent to the harm caused to the claimant. Punitive or exemplary damages do not exist under Spanish law.

The CC differentiates between actual damage (damnum emergens) and damage in the form of lost profits resulting from the infringement (lucrum cessans). The courts will only grant damages under either category if the harm is certain and can be demonstrated.

In the above-mentioned judgment of 7 November 2013 in the Sugar cartel case, the Supreme Court established that the right to effective judicial protection to be indemnified must be granted to any victim of anti-competitive behaviour. The judgment also acknowledges that the difficulty of establishing a counterfactual justified a greater freedom of judges to estimate damages. According to the Court, hypothesis of factual situations that have not occurred in reality may justify a greater flexibility for the judge in estimating the damages, particularly as regards lost profit. In accepting a counterfactual scenario, the judgment of the Commercial Court of Madrid of 25 February 2014 in the Estació de Servei Cornellà v. Cepsa case concerning an anti-competitive petrol supply agreement explained that ‘although these estimations are not perfect, the defendant does not raise valid objections or, at least, they are not quantified.’

As regards legal fees and costs, the general principle under Spanish law is that they are borne by the party who has had its pleas rejected with a cap of one-third of the value of the action unless the court considers that the case raises difficult issues of law or fact. If the claim is partially rejected, each party bears its own costs and the common costs are shared equally.

Regarding the mitigation of damages defence, in the Sugar cartel case the members of the cartel argued that the plaintiffs could have reduced the losses arising out of the cartel by importing sugar from other countries. However, the Supreme Court held that this defence would have required negligent conduct on the part of the injured party which positively contributed to their losses.

**IX PASS-ON DEFENCES**

The passing-on defence was definitively accepted by the Spanish Supreme Court in the above-mentioned judgment of 7 November 2013 in the Sugar cartel case on the basis

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17 Article 394 CPL.
that the CJEU also admits this defence in cases of devolution of tariffs and taxes contrary to EU law to avoid any unjust enrichment. This is also consistent with Article 12 of the Proposal for a Directive governing actions for damages, according to which the burden of proving that the overcharge was passed on shall rest with the defendant (i.e., the infringer). Spanish tort law states that compensation must be equivalent to the damages effectively suffered by the claimant and the damages subject to compensation must be reduced by the profit or advantage that the injured party has gained through the actions causing the harm.

In the Sugar cartel judgment the Supreme Court held that the defendant has the burden of proving the passing-on defence (Article 217 CPL) and that the civil judge was not bound by any findings of the administrative decision (or judgment) because questions of causality are the exclusive competence of the civil jurisdiction. However, also based on the case law of the CJEU, the Court held that what must be passed on to the clients in a cartel case is not merely the overcharge but the economic damage derived from such a price increase (i.e., the entire damage, including loss of competitiveness, commercial reputation, and a possible reduction in sales volume). It is therefore necessary to prove that with the price increase to its clients the direct purchaser has been able to pass on the entire damage suffered due to the price increase of the cartel. The overcharge can involve a loss of competitiveness (especially serious in this case due to the intense export activity in this sector) and a negative effect on the brand image of the plaintiffs, all of which constitute the harm suffered.

X FOLLOW-ON LITIGATION

Under the previous Competition Act of 1989, follow-on litigation was the only way of seeking damages in antitrust matters. Parties could only seek compensation for damages caused by infringements of the competition rules once an administrative decision of the competition authority declaring the breach had become final (including any judicial appeals). This is why, for instance, the damages claims in the 1999 Sugar cartel case took until 2013 to reach the Supreme Court. Although the current SPA of 2007 has removed this requirement, injured parties often wait until the administrative decision becomes final before bringing judicial claims, because the cost risks are considerable.

To ensure that Articles 101 and 102 TFEU are applied uniformly, decisions of the European Commission are binding on national courts pursuant to Article 16 of Regulation (EC) 1/2003. However, there are no provisions regarding the binding effects of decisions adopted by the CNMC, both as regards the application of Articles 101 and 102 TFEU (the Proposal for a Directive on damages actions establishes the possibility of granting binding effect to these decisions) or the equivalent Articles 1 and 2 SPA. Pursuant to Article 434 CPL, a civil court may suspend delivering judgment in cases

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of application of the competition rules – both EU and national – if there is a risk of conflicting decisions with a case pending before the European Commission, the CNMC or a regional competition authority. In a judgment in the *Ausbanc v. Telefónica* case, the Audiencia Provincial of Madrid held that this provision did not allow the judge to suspend the case at the beginning of the proceedings, but only at the very end before delivering judgment, so that in practice both proceedings – administrative (including judicial appeals) and civil – may run in parallel before their final resolution.

**XI PRIVILEGES**

The general rule in civil proceedings is full documentary access for the litigating parties, with confidentiality considerations being limited.

The Constitutional Court has recognised the obligation of lawyers to observe professional secrecy (they cannot be obliged to report information provided by the client for the purposes of obtaining such legal advice). The Spanish competition authority has in the past further recognised the client’s right not to disclose any information submitted to an external lawyer in a competition case to seek legal advice. However, the administrative courts, both the Audiencia Nacional and the Supreme Court, have recently interpreted legal professional privilege (LPP) in narrow terms, holding that as long as the CNMC does not use the legally privileged document retained during an inspection there is no violation of the company’s rights of defence. The Supreme Court confirmed that there could be no infringement of the right to LPP if the company in question had not invoked a document’s privileged nature during the inspection and evidence of the LPP nature of the documents was not provided by the company.

In follow-on cases, a civil court may, under Article 15a CPL, request a copy of the administrative file from the CNMC, which could become subject to the full access principle governing civil litigation. As an exception to this principle, this article provides that the CNMC is under no obligation to provide copies of documents obtained in the framework of its leniency programme. It has not yet been judicially clarified whether this special protection of oral statements and documents submitted in a leniency application also gives leniency applicants the right to oppose submitting such documents in civil proceedings, where confidentiality claims are rarely successful.

The duty of secrecy contained in Article 43 SPA could be jeopardised if a party intervening in the previous administrative proceedings were to use information obtained from the CNMC’s file to substantiate a subsequent private claim. Under Article 43, anyone who takes part in the handling or resolution of proceedings or becomes aware of the referred proceedings by reason of his or her profession, post or participation as a party, must keep the facts that they have learnt through them and the confidential information learnt during the course of their employment secret, even after ceasing their functions. In

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addition, several documents included in the administrative file will typically be declared confidential by the CNMC.

**XII SETTLEMENT PROCEDURES**

Article 1809 CC establishes the possibility of entering into agreements between private parties to avoid or terminate litigation. A distinction should be made between judicial and non-judicial settlements.

Under the CPL, should the parties state at the beginning of the preliminary hearing they have reached an agreement or show they are ready to do so immediately, they may abandon the proceedings and seek the court’s certification of the matters agreed upon. Once approved by the court, the settlement has the same effect as a judgment.

Extra-judicial settlements have the value of a private agreement between the parties, but they may have an effect in the early termination of the judicial proceedings as a waiver or abandonment by the claimant or acquiescence to the claim by the defendant. When the object of the proceedings is removed the parties must notify this circumstance to the court and if there is no objection the court will close the case.

**XIII ARBITRATION**

Under Article 2(1) of the Spanish Arbitration Act disputes on subjects within the free disposition of the parties can be submitted to arbitration. Commercial or contractual disputes are subjects within the free disposition of the parties, regardless of whether mandatory rules of public policy, such as the competition rules, are applicable to such disputes.

Hence, the competition rules must be applied in arbitration proceedings. In line with the judgment of the CJEU in the *Eco Swiss* case, Spanish courts have confirmed that the existence of mandatory rules must not be confused with the existence of subjects that are not within the free disposition of the parties.

A recent ruling of the Audiencia Provincial de Madrid of 18 October 2013 has confirmed that the arbitrator must implement the applicable mandatory rules. Otherwise, any party may bring an action for annulment of the arbitral award before the ordinary jurisdiction if the arbitral award infringes public policy (due to the disregard of EU or national competition law).

As stated by Spanish courts, the judicial review of arbitral awards aims to protect the public order and does not analyse the substance of the subject. However, regarding the intensity of control in the judicial review, the High Court of the Basque Country

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23 Ruling of Audiencia Provincial de Madrid of 18 October 2013, Wes. JUR/2013/354923.
declared that the courts should follow criteria of reasonableness and should verify that the arbitral award is sufficiently motivated.

**XIV INDEMNIFICATION AND CONTRIBUTION**

Contrary to what is common under the civil laws of other EU Member States, Article 1137 CC establishes as a general rule that, in case there is a plurality of debtors in a single obligation, this obligation is in principle joint, unless the agreement or a statute expressly determines that it is joint and several. As far as non-contractual liability (tort) is concerned, the Spanish Civil Code does not include any provisions as to whether or when such liability should be deemed joint and several.

However, Spanish courts have consistently interpreted the Civil Code so as to facilitate the effective recovery by the injured party of the damages caused by an illicit conduct. Thus, according to the case law of the Supreme Court, tort liability is joint and several when the damage is the result of the conduct of a plurality of offenders and it is not possible for the claimant to determine ab initio the degree of liability of each particular offender. Based on this case law, the liability of the co-cartelists with regard to the alleged victims of the cartel would usually be deemed by Spanish courts to be joint and several, although there are no specific precedents to date.

With regard to contractual joint and several liability, the Civil Code provides for detailed rules governing the relations between the co-debtors and the creditor (‘external relations’) and the relations among co-debtors (‘internal relations’). These rules are sometimes, but not always, applied to joint and several tort liability.

Article 1145 CC grants one of the joint and several debtors that has paid the common debt the right to claim from his or her co-debtors the reimbursement of the part corresponding to each of them (acción de repetición). For these purposes, the defendant in a civil case may call a third party to intervene in the proceedings as co-defendant (intervención provocada). However, according to Article 14(2) CPL, this is in principle only possible ‘when provided by the law’, although this requirement is not always strictly applied by the courts. This induced intervention has two main consequences: (1) proceedings are suspended until the third party responds to the claim or until the expiry of the time limit granted to this third party to respond to the claim; and (2) the ruling of the court is res judicata for all the intervening defendants, and is thus relevant in any subsequent contribution claim between the co-defendants in the first proceedings.

Co-debtors that have not intervened in the initial proceedings may oppose against the contribution claimant not only the exceptions available against this claimant, but also those they could have opposed against the original creditor.

**XV FUTURE DEVELOPMENTS AND OUTLOOK**

In the European context of public enforcement of the competition rules by administrative authorities, the private enforcement of competition law focuses, also in Spain, on follow-on damages actions. Although some cases have been litigated or settled in recent years, relating in particular to abuse of dominance infringements and the myriad litigation surrounding petrol supply agreements, there has been nearly no follow-on litigation as
regards cartel cases. The only exception has been the *Sugar* cartel case, which dates back to a cartel decision of the Spanish competition authority from 1999 and which has taken until 2013 to be finally settled by the Supreme Court, since damages actions under the former Competition Act were only possible once the administrative decision had become final. Another reason for this lack of private enforcement in damages actions has been the fact that Spain lacked a leniency regime until 2008, which made cartel prosecution anecdotic. Since then, the CNMC’s cartel enforcement activity has significantly picked up and it may be expected that this enforcement activity will also lead to an increased follow-on litigation for damages, although injured parties often prefer to wait until the CNMC’s decision becomes final before launching judicial claims.

The landscape of private antitrust litigation law in Spain in the forthcoming years will undoubtedly be reshaped by the implementation into national law of the future Directive on antitrust damages actions,\(^\text{26}\) which the EU’s Council of Ministers is due to adopt soon. As a matter of fact, the Supreme Court already invoked the future Damages Directive in its judgment in the *Sugar* cartel case of November 2013 in anticipation of its imminent adoption.

Although several questions, such as the admissibility of the passing-on defence, the binding effect of decisions of the Spanish competition authority and the operation of limitation periods, have been addressed in the Supreme Court’s most recent case law, many issues remain open, which the future Directive will at least partly address.

Appendix 1

ABOUT THE AUTHORS

HELMUT BROKELMANN
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Helmut Brokelmann joined Martínez Lage, Allendesalazar & Brokelmann, a leading Spanish boutique specialising in competition and EU law, in 1994 and became a partner in 2000. He has worked on a range of cases involving Spanish national and EU competition law, EU law in general and regulatory law, across sectors such as telecommunications, media, pharmaceuticals, energy, transport, sports and distribution, both in administrative proceedings (merger filings, cartels and other infringement proceedings) and in litigation before Spanish national courts (follow-on damages actions and stand-alone actions as well as administrative judicial appeal proceedings before the High Court and the Supreme Court) and the European courts.

According to Chambers and Partners (2013), ‘Sources describe Helmut Brokelmann as fantastic. He’s a pioneer with exquisite technical expertise.’ Chambers and Partners (2014) states that ‘Clients describe Helmut Brokelmann as ‘responsive, technically solid and absolutely committed’ and as ‘an expert in European law with in-depth knowledge of cross-border projects’.’

Helmut studied law at the University of Munich, holds an LLM from the London School of Economics, was a research and teaching assistant at the Institute of Public International Law of the University of Munich (1988–1993) and is a regular lecturer in EU and competition law. He is the author of various publications in English, Spanish and German on competition law and EU law. He is the Spanish correspondent for the German competition law journal Wirtschaft und Wettbewerb.
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