COUNTRY COMPARATIVE GUIDES 2023

The Legal 500 Country Comparative Guides

Spain

COMPETITION LITIGATION

Contributor

Cuatrecasas

María Pérez Carrillo

Partner | maria.perez@cuatrecasas.com

Esther de Félix Parrondo

Partner | esther.defelix@cuatrecasas.com

Pepa Aróstegui Chapa

Associate | pepa.arostegui@cuatrecasas.com

This country-specific Q&A provides an overview of competition litigation laws and regulations applicable in Spain.

For a full list of jurisdictional Q&As visit **legal500.com/guides**

SPAIN
COMPETITION LITIGATION

1. What types of conduct and causes of action can be relied upon as the basis of a competition damages claim?

Competition damages claims can be based on EU law (Articles 101 and 102 TFEU) – if they concern cases where there is an effect on trade between EU member states- or on Spanish law (Articles 1 and 2 of the Spanish Competition Act 15/2007 of 3 July, on the Defence of Competition (the SCA)).

Concerning the cause of action, a distinction must be made depending on the applicable regime:

- For damages claims not governed by the **SCA**, Article 1902 of the Spanish Civil Code (the **CC**), the Spanish general tort liability provision, is to be relied on. This regime is what will be referred as the "pre-Directive" regime.
- For damages claims governed by the SCA, Article 72.1 providing for a specific damages action (in connection with Article 71 of the SCA) is to be relied on. This regime will be referred as the "post-Directive" regime.

Concerning the applicable regime, Directive 2014/104/EU (the **Directive**) was transposed into Spanish law through Royal Decree-Law 9/2017 of 26 May (**Royal Decree-Law 9/2017**), which amends:

- the SCA aimed at incorporating substantive provisions; and
- the Spanish Civil Procedure Act (Act 1/2000 of 7 January, on Civil Procedure), aimed at incorporating procedural provisions (the **SCPA**).

According to the first transitional provision of Royal Decree-Law 9/2017, substantive provisions will not retroactively apply while procedural provisions will only apply to legal proceedings initiated after its entry into force.

In June 22, 2022, the Court of Justice of the European Union (**CJEU)** has ruled a judgment on a request for a preliminary ruling from the Provincial Court of Leon (Spain) (Case C-267/20) regarding the retroactive effect of the Directive and the classification of its provisions on limitation, the presumption of harm and the faculty to judicially estimate damages as substantive or procedural provisions. In its judgment, the CJUE clarifies that the question whether a provision has a substantive or procedural nature must be assessed in light of European Union (**EU**) law and not according to the national law. It further rules that the Directive's provisions on limitation (art. 10) and presumption of harm (art. 17.2) are substantive, whereas the Directive's provision on judicial estimation of harm (art. 17.1) is procedural.

2. What is required (e.g. in terms of procedural formalities and standard of pleading) in order to commence a competition damages claim?

According to Article 399 SCPA, proceedings are initiated with the filing of the statement of claim to the court. The facts and legal arguments on which the claim is based must be clearly explained in this writ, and the petitions to the court must be specified with precision, as no later extension is possible. In a follow-on action, the claimant must prove the existence of harm and its causal relationship with the infringement, and he must quantify the damage, all this by means of an expert report, as the anti-competitive conduct would be already proven by the administrative decision. In a standalone action, the claimant must prove the anti-competitive action as well (see question 8). As a general rule and according to Article 265 SCPA, the documents supporting the alleged facts of the claim and the expert report proving and quantifying damages must be produced with the statement of claim. The same applies to the statement of defence, which must be submitted in 20 days. However, the expert report on which the defence is based may be submitted up to five working days before the preliminary court hearing.

The above means that in Spain it is crucial to prepare

the case at a very early stage of the procedure, as the submission of allegations and supporting documentation is subject to strict time limits.

3. What remedies are available to claimants in competition damages claims?

Claimants are entitled to full compensation for the harm suffered. We refer to Question 4 for further detail on the right to full compensation.

Claimants can also request to the court the i) nullity (total or partial) of an agreement or clause that violates competition law, and ii) the return of the economic benefit paid under it.

Injunctive remedies are also available. Claimants can request that the relevant courts order an undertaking that violates competition law to adopt a certain conduct or 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).

4. What is the measure of damages? To what extent is joint and several liability recognised in competition damages claims? Are there any exceptions (e.g. for leniency applicants)?

Claimants are entitled to obtain full compensation for the harm effectively suffered. The compensation will cover actual loss (usually identified as an overcharge in cartel claims) and loss of profit suffered as a result of a total or partial passing-on of the overcharges, plus interest, as well as interest. Punitive damages (overcompensation) are not allowed under Spanish law.

Undertakings that jointly carried out an anticompetitive behaviour are jointly liable for the damage caused by such behaviour.

This joint and several liability already existed for competition damages prior to the Directive. The pre-Directive regime does not provide any exception for the leniency applicant.

As to the post-Directive regime, Article 73 SCA recognises joint and several liability but provides for two exceptions, the most relevant being that the leniency applicant will be liable before its direct or indirect purchasers or suppliers and not before other injured parties, save for cases when these cannot obtain full compensation from the other undertakings. The other exception is for small and medium-sized companies, which will only be liable before their direct and indirect purchasers when certain conditions are met.

5. What are the relevant limitation periods for competition damages claims? How can they be suspended or interrupted?

In the Pre-Directive regime, the one-year limitation period of Article 1968 CC applies (in Catalonia, a three-year limitation period applies, although some judgments have ruled that since the claim is based on a special regulation deriving from a matter of the State's exclusive competent, the 1-year time limit would still apply).

Such limitation period starts to run from the date on which the claimant becomes aware of the violation, the existence of the damage and the identity of the infringer, and according to Article 1973 CC, it can be interrupted by sending an extrajudicial claim, initiating a process to reach a settlement agreement among the parties (see Question 20 for further detail), requesting a conciliation to the court (i.e., to start a procedure under which the court invites the parties to reach a settlement) or filing a judicial claim.

For damages claims where the post-Directive regime applies, the five-year limitation period included in Article 74 SCA applies. This limitation period starts to run when the anticompetitive behaviour has ceased and the claimant knows or can reasonably be expected to know the existence of the behaviour and that it constitutes a violation of competition law, the existence of damage and the identity of the infringer.

Article 74 SCA further provides that the five-year limitation period will be interrupted when a competition authority initiates an investigation or a sanctioning procedure or if a settlement procedure is initiated. The interruption in the first scenario ends one year after the decision adopted by the competition authority becomes final or the proceedings are otherwise terminated.

The aforementioned judgment of the CJEU of 22 June 2022 has established that Article 10 of the Directive on limitation (Article 74 SCA), despite being a substantive provision (which should not be applied retroactively), is applicable in cases where the action for damages was exercised after the entry into force of the provisions transposing the Directive into national law to the extent that the action could still be validly exercised (i.e. the statute of limitations had not yet expired) at the date of expiry of the time limit for transposition of the Directive, that is, December 27, 2016.

Depending on the *dies a quo* in the specific case, the

application of this criterion in Spanish cases may be *contra legem*, given that:

- Spain transposed the Directive late (in May 2017); and
- the Spanish transitional law on the statute of limitations (Article 1939 CC) provides that the applicable law will be that in force when the limitation period starts to run.

6. Which local courts and/or tribunals deal with competition damages claims?

Unlike other jurisdictions, the Spanish court system does not have a specific tribunal competent in the matter. Commercial courts, which are present in all cities of Spain, have exclusive competence under the Judiciary Act to hear actions applying competition law.

7. How does the court determine whether it has jurisdiction over a competition damages claim?

A defendant domiciled in another state may be sued before the Spanish courts if the harmful event occurred in Spain (Article 7.2 of EU Regulation 1215/2012 (Brussels I), Article 5.3 of the Lugano Convention and Article 22quinquies(b) of the Judiciary Act).

Spanish courts have jurisdiction where:

- the harmful event took place in Spain; or
- the damage was suffered in Spain.

If the claimant suffered the damage directly, it may sue before the courts of the place where the claimant is domiciled. If the claimant suffered the damage indirectly, it may sue before the courts of the place of the establishment in which it purchased the product/service.

If one of the defendants is domiciled in Spain and the others in another EU member state (or in a contracting state to the Lugano Convention), international jurisdiction in respect of all defendants is determined by the Brussels I Regulation. The Spanish courts have jurisdiction over a defendant domiciled in Spain according to Article 4.1 of the Brussels I Regulation and Article 2.1 of the Lugano Convention). If there is a strong nexus, the defendant domiciled in Spain may be used as the anchor to join the other defendants to the proceedings (Article 8.1 of the Brussels I Regulation, Article 6.1 Lugano Convention or, for co-defendants domiciled outside the European Union and the Lugano Convention, Article 22ter(3) of the Judiciary Act).

If the infringement concerns the operation of a branch opened by the defendant in Spain, jurisdiction can also be based on:

- Article 7.5 of the Brussels I Regulation;
- Article 5.5 of the Lugano Convention; or
- for co-defendants domiciled outside the European Union and the Lugano Convention, Article 22quinquies(c) of the Judiciary Act.

8. How does the court determine what law will apply to the competition damages claim? What is the applicable standard of proof?

Courts will determine the applicable law by referring to Article 6 of Regulation (EC) No 864/2007 (Rome II).

The claimant must prove (i) a violation of competition law; (ii) the existence of damage and its amount; and (iii) a causal link between the violation and the damage.

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. We refer to Question 9 on the binding effect of final decisions adopted by the relevant competition authorities to prove the existence of the violation.

In the pre-Directive regime, the burden of proof of the damage (and the causal link) lies on the claimant, and there is no legal provision allowing the presumption of harm.

By contrast, in the post-Directive regime, Article 76 SCA (Article 17.2 of the Directive) establishes a rebuttable presumption that cartels cause damage. The CJEU has expressly confirmed in its judgment cited above -that of 22 June 2022, Case C-267/20- that this presumption of harm is not applicable to an action for damages which pertains to an infringement of competition law which ceased before the expiry of the time limit for transposing the Directive (27 December 2016).

9. To what extent are local courts bound by the infringement decisions of (domestic or foreign) competition authorities?

- For damages claims not governed by the SCA, only decisions issued by the EC have binding effect according to Article 16 of Regulation 1/2003. Decisions issued by the Spanish Competition Authority, the regional competition authorities or authorities from other Member States do not have binding

effect but can be considered as evidence. In this sense, the CJEU in its recent judgment of 20 April 2023 (Case C-25/21) has indicated that the infringement found in a final decision of a national competition authority must be deemed to be established by the claimant until proof to the contrary is adduced, thereby shifting the burden of proof of the conditions provided for in article 101.3 TFEU to the defendant, provided that the nature of the alleged infringement that is the subject of those actions and its material, personal, temporal and territorial scope coincide with those of the infringement found in the said decision.

- For damages claims governed by the SCA, in addition to decisions issued by the EC and according to Article 75 SCA, violations of competition law declared by **final** decisions issued by the Spanish Competition Authorities or courts are to be considered irrefutably established. Also, according to the same provision, a rebuttable presumption of its existence applies for competition law violations declared by **final** decisions adopted by competition authorities from other Member States.

Administrative decisions have proven to have a great deal of weight for the Spanish courts when deciding on damages claims. This has been the case for decisions of both the Markets and Competition Commission and the European Commission – even before the formal recognition of the binding effect of the former after the transposition of Directive (see the Spanish Supreme Court's judgment of 7 November 2013 in the sugar cartel case).

10. To what extent can a private damages action proceed while related public enforcement action is pending? Is there a procedure permitting enforcers to stay a private action while the public enforcement action is pending?

Competition damages claims can proceed while related public enforcement proceedings are pending. However, according to Article 434 SCPA, the court may decide to stay the term to issue the judgment if the EC, the Spanish Competition Authority or any of the regional competition authorities have an ongoing investigation into the same alleged violation.

11. What, if any, mechanisms are available to aggregate competition damages claims (e.g. class actions, assignment/claims vehicles, or consolidation)? What, if any, threshold criteria have to be met?

According to Articles 12 and 72 SCPA, competition damages claims arising from the same anticompetitive behaviour and against the same defendant or defendants can be aggregated together in the same consolidated legal proceedings.

While the transposition of the Directive did not provide a specific class action regulation for competition damages claims, the general class action regime provided in Article 11 SCPA can be used to bring class actions in this field, albeit only for consumer claims.

Under Article 11 SCPA, a collective action may be brought when several consumers or end users have suffered a so-called 'harmful event'.

In the case of collective interest actions (where all members of the harmed group are, or can be, easily determined or identified), the law confers standing on:

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

In the case of diffuse interest actions (ie, where the members of the harmed group are undetermined or difficult to determine), Spanish law confers standing exclusively on consumer and user associations considered representative, and the attorney general.

However, this regime will be affected by Directive 2020/1828, on representative actions for the protection of the collective interests of consumers, which is yet to be transposed into Spanish law although the deadline for its transposition was 25 December 2022. Despite there is a preliminary draft law, its approval is at a standstill at the date of publication if this questionnaire since the Spanish Parliament has been dissolved.

The assignment of claims to specific vehicles would also be valid under Spanish law.

12. Are there any defences (e.g. pass on) which are unique to competition damages

cases? Which party bears the burden of proof?

While there may be other defences specific to competition damages cases, the most characteristic (and generally applicable) one would be the passing-on defence.

Although the passing-on defence is now included in Article 78 SCA, it was already recognised by the Spanish Supreme Court in its leading judgment of 7 November 2013 regarding the sugar cartel.

The burden of proving that the whole or part of the overcharge resulting from the infringement was passed on is on the defendant, who may reasonably require disclosure from the claimant or from third parties in order to prove it (please refer to Question 21 on disclosure requests).

While not unique to competition damage cases, the most common defence in these cases is the lack of proof of the damage or its amount (or the defective quantification of the damage due to deficiencies in the expert report).

13. Is expert evidence permitted in competition litigation, and, if so, how is it used? Is the expert appointed by the court or the parties and what duties do they owe?

Expert evidence is allowed according to Article 299 SCPA and is usually the key piece of evidence the court will rely on. It must be used to prove both the existence of harm and its amount.

Each party has the right to appoint its own expert. As claimants have the burden of quantifying their claims at the time of filing, they must file an expert report quantifying the damage suffered (prepared by an expert). It is common practice for the defendant to submit an expert report rebutting the claimant's report and providing its own counterfactual analysis. The defendant must submit its expert report five days before the preliminary hearing, which may be convened promptly. Therefore, preparing the expert report sufficiently in advance is crucial.

The court may also appoint a judicial expert upon a party's request as stated in Article 339 SCPA; however, the appointment of judicial experts is not common in competition damages claims, due to the expertise required and the way the Spanish system is structured (where experts are appointed from a pre-determined list that does not include experts in this field).

According to Article 335 SCPA, experts have the duty to not provide false information and must act as objectively as possible, taking into consideration both what may be to the advantage of and prejudicial to any party.

14. Describe the trial process. Who is the decision-maker at trial? How is evidence dealt with? Is it written or oral, and what are the rules on cross-examination?

The decision-maker at the trial is the judge of the corresponding court.

Both written and oral evidence is assessed in the trial process. The parties can present documentary evidence, usually at an initial written stage of the proceedings. Parties' representatives, witness and expert evidence are also allowed according to Article 299 SCPA, the examination and cross-examination of which will take place at a trial hearing. According to Article 372 SCPA, once the legal counsel has examined the witnesses and expert proposed by their party, the legal counsel of any of the other parties can cross-examine them. The SCPA does not provide specific rules on cross-examination, which shall be conducted as direct examination.

15. How long does it typically take from commencing proceedings to get to trial? Is there an appeal process? How many levels of appeal are possible?

There are no specific public statistics for damages claims in antitrust cases. On average, proceedings before first instance courts in relation to competition damages claims may take up to 16 months to get to trial and a year and a half until the first instance judgment is issued. At second instance, the procedure can be extended by an average of 10 additional months. However, this depends largely on the specific court and the complexity of the matter.

Compared to other jurisdictions, the Spanish jurisdiction is characterised as one of the fastest, mainly due to the fact that Spanish procedural law does not have a strike-out mechanism or preliminary or mere declaratory judgments. Instead, everything is decided in the same judgment on the merits that the corresponding court issues.

Both the claimant and the defendant may challenge the first instance judgment by filing an appeal before the court of appeal of the province in which the court that

heard the case at first instance is based. Appeals can be submitted on either procedural grounds or substantive grounds, and the court of appeal is entitled to make a full review of the case. Judgments issued by the courts of appeal can be challenged through a cassation or extraordinary appeal on procedural and material matters before the Spanish Supreme Court, but only on specific grounds (i.e., without this being a third instance).

Although no permission to appeal before the Supreme court is required as such, short deadlines for filing the appeal must be met and the Supreme Court strictly controls the fulfilment of procedural requirements and has broad discretion to admit appeals

16. Do leniency recipients receive any benefit in the damages litigation context?

Not in the pre-Directive regime. In the post-Directive regime, Article 73 SCA states that an undertaking that has been granted immunity under a leniency programme will, in principle, only be liable for the damage caused to its direct or indirect customers or suppliers and not before other injured parties save for cases when these cannot obtain full compensation from the other undertakings, as we have explained in Question 4.

The provision also indicates that, in the context of contribution claims among the different participants in the infringement, the amount of contribution of an undertaking that has been granted immunity must in no case exceed the amount of the damage that it has caused to its own direct or indirect customers or suppliers.

17. How does the court approach the assessment of loss in competition damages cases? Are “umbrella effects” recognised? Is any particular economic methodology favoured by the court? How is interest calculated?

To assess the existence of damages and their amount, expert reports are used both by the claimants and defendants in most cases. These reports must establish the hypothetical counterfactual but-for scenario that would have existed in the absence of the violation of competition law. The European Commission offers guidance on different methods that can be used to assess damages in its Practical Guide on Quantifying Harm in Actions for damages based on breaches of Article 101 or 102 TFEU; and the Markets and Competition Commission is preparing its own guide on the subject, the draft of which is still in the approval phase (the second public consultation phase ended in November 2022).

When the reports submitted by the claimants do not comply with the requirements required by the Supreme Court in this type of cases (defined in its judgment of 7 November 2013 in the sugar cartel case), i.e. that the report provides “*a reasonable and technically-sound hypothesis based on comparable and non-erroneous data*”, the Spanish courts have usually resorted to judicial estimation. The Supreme Court in its recent and first judgments regarding the so-called ‘truck litigation’ that has arisen in Spain due to the decision of the European Commission in the Trucks Case AT 39824 on 19 July 2016, issued on 15 June 2023, has confirmed the possibility for judges to resort to judicial estimation considering the difficulty of quantification in these cases.

In the post-Directive regime, Article 76 SCA allows courts to judicially estimate damages where it is proved that the claimant suffered damages, but it is practically impossible or excessively difficult to quantify them.

Before the recent Supreme Court rulings, the CJEU issued two rulings in which it ruled on the possibility of resorting to a judicial estimation of the damages:

- The CJUE judgment cited above -that of 22 June 2022, Case C-267/20- decides on the temporary application of Article 76 SCA and indicates that is applicable to an action for damages which, although relating to an infringement of competition law which ceased before the entry into force of the Directive, was brought after that date and after the entry into force of the provisions transposing it into national law.
- The CJEU judgment on a request for a preliminary ruling from the Commercial Court number 3 of Valencia (Spain) (Case C-312/21) issued on 16 February 2023, which expressly states the conditions that must be met (and verified by the national court) in order to be able to resort to the faculty of judicial estimation of harm.

The CJEU states that the judicial estimation is only acceptable when, after harm has been accredited, the quantifications is objectively impossible or excessively difficult. It also states that the Directive establishes the means to correct any hypothetical situation of initial information asymmetry between the parties by using the procedural instruments provided in article 5 of the Directive and its transposition norms. So, In the case that the claimant becomes unable to prove its case because it submitted inappropriate expert evidence (despite having access to the procedural tools that

would have allowed it to correct it) "*it is not for the national court to take the place of the latter or to remedy its shortcomings*".

In application of this CJUE judgment, the Supreme Court, in the above- mentioned judgments, establishes that the claimant's evidentiary effort must be assessed without incurring a hindsight bias considering the information available to the claimants at the time of filing their claim and also taking into account the proportionality between the amount of the claim and that effort required. With this reasoning, the Supreme Court departs from the CJEU's criteria allowing the national court to remedy the claimant's inactivity.

"*Umbrella effects*" have been recognised in Spain by the Provincial Court of Madrid in its judgment of 19 May 2022 (according to the CJEU's judgment of 5 June 2014 (Case C-557/12, *Kone*) concerning the decennial insurance cartel. This confirms that claims can be brought for purchases made from undertakings that did not participate in the infringement.

18. How is interest calculated in competition damages cases?

Interest is applicable from the date damages were suffered as a means to bring them to present value and guarantee full compensation. Furthermore, delay interest (two points higher than the legal interest) also applies from the date of the judgment up until the payment is made.

19. Can a defendant seek contribution or indemnity from other defendants? On what basis is liability allocated between defendants?

In the pre-Directive regime, under Article 1145 CC the defendant who paid damages has the right to claim a contribution from the other infringers' corresponding part. A similar rule is now included in Article 73 SCA, already mentioned.

As regards the basis for allocation, Article 1145 CC merely refers to the "part that corresponds to each one," while Article 73 SCA provides that liability should be allocated "based on [the undertaking's] relative liability for the harm caused."

20. In what circumstances, if any, can a competition damages claim be disposed of (in whole or in part) without a full trial?

In Spain, everything is decided in a single procedure culminating in a full trial (and a judgment on the merits). Occasionally, no trial is held before the judgment is made – either because all the evidence to be adduced is documentary evidence (which is not common in competition litigation) or because the parties have not requested the expert's examination or the taking of any other evidence to be done orally at trial (and the court does not consider it necessary). This is not common either.

However, a competition damages claim may be disposed of without a full trial if the opposing parties reach agreement.

In this procedure, the parties can file a settlement agreement with the court so that it can be properly certified. Agreements are certified unless they are contrary to the law or affect the rights of third parties. The settlement has the same effect as a judgment and the signing parties may file an application for execution before the competent court to seek their compensation in accordance with the terms of the settlement agreement.

21. What, if any, mechanism is available for the collective settlement of competition damages claims? Can such settlements include parties outside of the jurisdiction?

Under the SCAP, there is no specific procedure to settle collective actions; nor are there any relevant judicial precedents or scholarly publications that properly address this issue. This causes significant uncertainty as to the feasibility of settling collective claims in Spain.

In the absence of a specific procedure, the general rule for settling individual claims described in Question 20 will in principle apply.

Directive 2020/1828 expressly recognises the possibility of collective claims being settled, and conditions the validity on the authorisation of the settlement by the court or administrative authority. Otherwise, it will continue to hear the action taken as if the parties reached no settlement agreement.

22. What procedures, if any, are available to protect confidential or proprietary information disclosed during the court process? What are the rules for disclosure

of documents (including documents from the competition authority file or from other third parties)? Are there any exceptions (e.g. on grounds of privilege or confidentiality, or in respect of leniency or settlement materials)?

The Directive has introduced a new disclosure regime targeted specifically to competition damages claims. This regime is established in Article 283 bis SCPA, which states that, subject to fulfilling certain requirements, claimants and defendants can request disclosure of evidence addressed to defendants, claimants, third parties and competition authorities. This provision is applicable to all competition damages claims, regardless of the relevant substantive regime.

Disclosure requests may be made before a claim has been filed or 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:

- submit a reasoned justification for the request for documents; and
- define 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 pertinent competition authority, subject to certain restrictions.

Article 283 bis b) rules the access to confidential information when it is considered pertinent, and it provides a set of measures to guarantee confidentiality such as limiting the persons allowed to examine the evidence or elaborating redacted versions.

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.

Access to evidence contained in a file of a competition authority is specifically regulated in Article 283 bis i). Documents from the so-called “grey list” -(i) information prepared by a natural or legal person specifically for the proceedings of a competition authority; (ii) information that the competition authority has drawn up and sent to the parties in the course of its proceedings; and (c) settlement submissions that have been withdrawn- can only be disclosed when the administrative proceedings are concluded, while disclosure of documents from the “black list” must never be granted. These are leniency statements and settlement submissions.

Disclosure requests can also rely on other general provisions of the SCPA: 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).

23. Can litigation costs (e.g. legal, expert and court fees) be recovered from the other party? If so, how are costs calculated, and are there any circumstances in which costs recovery can be limited?

As a general rule and according to Article 394 SCPA, litigation costs are imposed on the party that has all its pleas materially rejected. However, if the court finds that the case involved serious legal doubts related to facts or the application of the 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 (unless one party has litigated with bad faith). The CJUE in it above-mentioned judgment -that of 16 February 2023, Case C-312/21- it also ruled on the compatibility of Article 394.2 SCPA with the right to full compensation of a person harmed by anti-competitive conduct, as referred to in Article 101 TFEU and confirmed that both rules are compatible.

Litigation costs generally include the fees of the lawyers, court agents (*procuradores*) and experts, as well as judicial fees. For the purposes of the taxation of the legal costs, the fees of the lawyers and court agents have traditionally been calculated according to pre-established criteria published by the different local BAR associations and in proportion to the amount in dispute. However, these rules have been declared contrary to competition law and there is currently a great deal of debate in Spain on how legal costs should be calculated going forward.

24. Are third parties permitted to fund competition litigation? If so, are there any restrictions on this, and can third party funders be made liable for the other party’s costs? Are lawyers permitted to act on a contingency or conditional fee basis?

Funding of litigation is permitted under Spanish law but

has not been specifically regulated so far. It works as another mechanism for aggregating claims. To date, this is yet to be explored to any significant degree in Spain. In this vein, Directive 2020/1828 binds member states to promote measures to avoid conflicts of interest when the filing of a collective claim is subject to third-party funding.

Third funding parties cannot be made liable for the other party's costs unless they formally participate in the legal proceedings (as claimants).

In Spain, lawyers can act on a contingency or conditional fee basis.

25. What, in your opinion, are the main obstacles to litigating competition damages claims?

There are no major obstacles. From a practical point of view, however, the fragmentation of follow-on litigation arising from the same administrative decision into multiple (sometimes, thousands of) similar cases, makes it difficult to hold trials long enough to properly analyze complex expert reports. The fact that many different commercial courts (not exclusively dedicated to competition cases) can hear the claims contributes to a disparity of criteria and to a lack of efficiency in the handling of cases either.

Not an obstacle but a characteristic challenge of the Spanish judicial procedure, it should be pointed out again what has already been indicated in Question 2 regarding the importance of preparing the case properly from the beginning due to the strict time limits to present allegations and submit documentation and evidence.

26. What, in your opinion, are likely to be the most significant developments affecting competition litigation in the next five years?

Damages actions arising from anti-competitive conduct are gaining prominence on the national scene due to the implementation of Directive and the above-mentioned 'truck litigation'. There are a multitude of civil proceedings open throughout the country's commercial courts relating to this case, as well as to similar cases such as those arising from other administrative sanctions in the milk, passenger cars and Euribor markets.

Taking in to account this landscape, the most significant developments may be:

- the likely increase in damages claims due to the positive environment contributing to their success in Spain and the speed of the Spanish proceedings in comparison with other jurisdictions;
- the relatively low costs of litigation compared to other jurisdictions; and
- the increasing participation of funding third parties.

The transposition of Directive 2020/1828 on collective claims has likely further contributed to this increase.

Contributors

María Pérez Carrillo
Partner
maria.perez@cuatrecasas.com

Esther de Félix Parrondo
Partner
esther.defelix@cuatrecasas.com

Pepa Aróstegui Chapa
Associate
pepa.arostegui@cuatrecasas.com