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Spain

COMPETITION LITIGATION

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

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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 101 TFEU) or on Spanish law (Articles 1 and 2 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) is to be relied on. This regime will be referred as the "post-Directive" regime.

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.

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.

Also, they 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. 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.

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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 and Article 74 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.

As indicated in the preliminary remarks, one of the matters covered by the judgment of the CJUE of June 22, 2022, ruling on the request for a preliminary ruling from the Provincial Court of Leon (Spain) (Case C-267/20) is the one related to the Directive's provision on limitation.

The CJUE 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.

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. Competition damages claims are heard by commercial courts.

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

A defendant domiciled in other EU Member states, in a Lugano Contracting State or in other countries may be sued before Spanish courts if the harmful event occurred in Spain (Article 7(2) of the Brussels Regulation, 5(3) of the Lugano Convention and Article 22 quinquies (b) of the LOPJ). If the act that caused the damage (i.e. the infringement) took place in Spain, the court of the place where the harmful event occurred may assert jurisdiction over the case. In addition, if harm (e.g. the economic loss arising from higher price levels or predatory pricing) was suffered in Spain, Spanish courts can also assert jurisdiction. According to CJEU case law, if the Spanish market was affected, the place where the harmful event occurred must be somewhere within the Spanish (affected) market. If the damage is caused through direct sales from an infringing party (not through the effect of higher price levels in a market), the claimant may sue in Spain if this is the place where it is domiciled. Last, if damages are claimed by indirect purchasers, claiming higher price levels in a market, the claimant may sue before the courts of the place of the dealer's establishment in which the claimant bought the product or service.

If one of the defendants is domiciled in Spain, and the

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other co-defendants are domiciled in an EU Member State (or a Contracting State to the Lugano Convention 2007), the international judicial competence with respect to all defendants will be determined applying the provisions of Regulation (UE) No. 1215/2012 (the Brussels I Regulation). Spanish courts will have jurisdiction over the Spanish-domiciled defendant according to article 4(1) of the Brussels I Regulation (or article 2(1) of the Lugano Convention). The Spanish-domiciled defendant may be used as the anchor defendant to join into the proceedings the other defendants that are domiciled in other EU Member States or States that are a party to the Lugano Convention (see article 8(1) of the Brussels I Regulation and article 6(1) of the Lugano Convention). The nexus between the action against the Spanish-domiciled defendant and the other defendants must be such that it should be expedient or necessary to hear all the claims in the same proceedings to avoid the risk of irreconcilable judgments resulting from separate proceedings. Hence, the Spanish court in this joined proceeding would be competent to hear the claim for damages in jurisdictions where the Spanish-domiciled defendant has committed the infringement. It is unclear whether these courts could hear claims for damages that arose in other jurisdictions within the EU (or Lugano) countries, or in third countries, unless it is proved that it would be necessary to hear the claims together with the Spanish-based damages claims in order to avoid the risk of irreconcilable judgments resulting from separate proceedings. We submit that joinder is unlikely to be permitted in these cases.

If the defendant is domiciled outside the EU or a Contracting state to the Lugano Convention, it may be joined in as a co-defendant together with a Spanish-domiciled anchor defendant if the connection between the action against the Spanish anchor and the action against the defendant domiciled in a third State makes it advisable to join them, according to Article 22 ter (3) of the Spanish Judiciary Law (**LOPJ**). Although the standard for joinder used in the Spanish statute is less stringent than the one required by the Brussels I Regulation and the Lugano Convention, the outcome is likely to be the same, even with respect to a joinder or a co-defendant to claim damages that occurred in countries outside the EU or Lugano Contracting States.

The jurisdiction of Spanish courts against a defendant domiciled in the EU or a Lugano Contracting State may also be founded in Article 7(5) of the Brussels I Regulation (or Article 5(5) of the Lugano Convention) if the infringement arises out of the operation of a branch, establishment or agency opened by the defendant in Spain. The same basis of jurisdiction is available with respect to defendants domiciled outside the EU or Lugano Contracting State if they open a branch, establishment, or subsidiary in Spain under Article 22 quinquies (c) of the LOPJ.

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. While Spanish courts have started applying such a presumption, this possibility has not yet been confirmed by the Supreme Court and it remains to be seen what it will rule on this matter.

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 recent 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.
- For damages claims governed by the SCA, in

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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.

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 and knowledge of the administrative decision is necessary.

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 could be used to bring class actions in this field, albeit only for consumer claims.

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 claimant has passed on the overcharge resulting from the anticompetitive behaviour is with the defendant, which can request the claimant or third parties to disclose the necessary evidence (please refer to Question 21 on disclosure requests).

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.

Usually the parties designate their own experts but, as stated in Article 339 SCPA, theoretically each party could request the court to designate a judicial expert. 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).

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. The parties

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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.

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?

On average, proceedings before first instance courts in relation to competition damages claims can take up to 16 months to get to trial and a year and a half until the first instance judgment is issued. However, this depends largely on the specific court and the complexity of the matter.

Both the claimant and the defendant may challenge the first instance judgment by filing an appeal before the corresponding court of appeal. 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 before the Spanish Supreme Court, but only on specific grounds (i.e., without this being a third instance).

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, and they are relied on by courts. 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.

While Spanish courts have resorted to judicial estimation in a significant number of competition damages claims, the Supreme Court still has not confirmed these judgments, and it remains to be seen what it rules on the matter.

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. As indicated in the preliminary remarks, the recent CJUE judgment cited above -that of 22 June 2022, Case C-267/20- expressly deals with the matter and indicates that the faculty to judicially estimate the damage under Article 76 SCA 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.

"Umbrella effects" have been recognised by the Provincial Court of Madrid in its judgment of 19 May 2022 and by the Commercial Court nº 2 of Madrid in its Judgment of 9 June 2020 concerning the decennial insurance cartel.

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.

18. Can a defendant seek contribution or

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indemnity from other defendants? On what basis is liability allocated between defendants?

In the pre-Directive regime, Article 1145 CC states that 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.

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."

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

A competition damages claim may be disposed of without a full trial if there is no evidence to be taken at the trial; for instance, if no examination or cross-examination of witnesses and experts is required and/or admitted.

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

Spanish law does not provide for collective settlement rules. Therefore, the same rules and principles that apply to settlement in individual actions will apply to collective settlement if and when these actions are joined.

21. 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.

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.

Access to evidence contained in a file of a competition authority is 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).

22. 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). It must be noted that there is currently a preliminary ruling request pending before the CJEU 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 which might alter the current criteria.

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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 are calculated according to pre-established criteria in proportion to the amount in dispute.

23. 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. There are currently no specific restrictions in this regard.

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.

24. 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.

Not an obstacle but a characteristic 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.

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

The most significant developments may be the likely increase of damages claims due to the currently positive environment contributing to their success in Spain and the increasing participation of funding third parties, among others.

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