Spain

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LEGISLATION AND JURISDICTION

Development of antitrust litigation

1 How would you summarise the development of private antitrust litigation in your jurisdiction?

Private antitrust actions have traditionally been available under Spanish law, although, for various reasons, they have evolved slowly. A series of legal reforms were implemented to modernise the rules on private antitrust litigation at the national level. Therefore, Spain introduced specialist commercial courts and enacted new Competition Law No. 15/2007, which eliminated certain hurdles to bringing follow-on actions and brought Spanish law into line with Regulation (EC) No. 1/2003.

This type of litigation has become widespread since then, with a relatively high number of stand-alone nullity and damages actions and few, albeit significant, follow-on actions. Spanish courts, particularly the Supreme Court, have developed a growing and consistent body of case law applicable to such actions. Prior to the entry into force of Directive 2014/104/EU (Damages Directive), the Supreme Court had already interpreted several substantive issues in line with it.

It is expected that private antitrust litigation, and particularly follow-on claims, will continue to develop as a consequence of the recent transposition of the Damages Directive into Spanish law through Royal Decree-Law No. 9/2017. In addition, a specialist private antitrust litigation bar appears to be developing in Spain.

Applicable legislation

2 Are private antitrust actions mandated by statute? If not, on what basis are they possible? Is standing to bring a claim limited to those directly affected or may indirect purchasers bring claims?

Private antitrust actions are governed by the general civil law provisions contained in the Civil Code, whether based on non-contractual (tort) civil liability or contractual nullity, as well as the relevant substantive antitrust provisions under Spanish or EU law.

Indirect purchasers may bring private antitrust actions under general non-contractual liability principles of Spanish law. This is reinforced by the rule of the Damages Directive, included in article 72 of the Competition Law, entitling any aggrieved party to bring a claim. Such indirect purchaser claims are, however, uncommon.

3 If based on statute, what is the relevant legislation and which are the relevant courts and tribunals?

Relevant legislation

Private antitrust claims need to be based either on article 1902 of the Civil Code (non-contractual liability) or alternatively, and where applicable, articles 1300 and following of the Civil Code (nullity of contracts), in either case invoking the relevant antitrust provisions contained in the Spanish Competition Law (articles 1, 2 or 3) or the Treaty on the Functioning of the European Union (articles 101 and 102). In this regard, it is settled case law that antitrust civil liability claims are non-contractual in nature. Further, the substantive provisions of the Damages Directive have been incorporated as a new section of the Competition Law (articles 71 to 81).

It may also be possible to bring antitrust claims on the basis of the rules contained in Unfair Competition Law No. 3/1991 as opposed to article 1902 of the Civil Code. Although such claims are not the general rule, it is possible to bring a damages action under article 32(5) of the aforementioned Law, since article 15(2) of this Law deems any antitrust infringement as 'unfair', as *Conduit v Telefónica* confirmed (Commercial Court 5 of Madrid, judgment of 11 November 2005). These rules remain unaffected by the Damages Directive.

The applicable procedural rules are contained in Civil Procedure Law No. 1/2007. The new rules on access to evidence contained in the Damages Directive have been incorporated into article 283-bis(a) to 283-bis(k) of this Law.

Relevant courts and tribunals

The relevant courts are, at first instance, the commercial courts. Judgments of commercial courts may be appealed to the provincial appeal courts. Last, the Supreme Court hears appeals against judgments of the provincial appeal courts.

PRIVATE ACTIONS

Availability

4 In what types of antitrust matters are private actions available? Is a finding of infringement by a competition authority required to initiate a private antitrust action in your jurisdiction? What is the effect of a finding of infringement by a competition authority on national courts?

Private actions are available in all types of antitrust matters that generally come within the EU and Spanish antitrust rules (eg, vertical restraints, horizontal agreements, cartels, abuse of dominance, etc).

Previously, it was necessary for Spanish competition authorities to have found an infringement to exist before litigation could be brought

under Spanish antitrust law, although this requirement was removed when the current Competition Law came into force.

That said, following the transposition of the Damages Directive, final decisions of the Spanish competition authorities (both national and regional) bind Spanish courts, similar to the effect of European Commission decisions pursuant to Regulation (EC) No. 1/2003, while final decisions of other EU member states' competition authorities are prima facie evidence of an infringement. Additionally, the Supreme Court had already ruled that judgments confirming decisions of the Spanish competition authorities are binding and that non-final decisions are persuasive evidence (judgment of 9 January 2015, appeal 220/2013).

Required nexus

5 | What nexus with the jurisdiction is required to found a private action? To what extent can the parties influence in which jurisdiction a claim will be heard?

Claims may generally be brought in the commercial court with jurisdiction for the place where the defendant has its domicile, which in the case of corporations may be its registered office or main place of business. In the case of defendants who are not domiciled in Spain, the Supreme Court as clarified that the claimant may bring the claim before the commercial court with jurisdiction for the place where the harmful event took place or where it had its effects (order of 19 March 2019, appeal 23/2019).

With respect to joint infringements (eg, cartels), claimants may choose the court with jurisdiction over the domicile of any of the defendants. Contractual nullity claims may be brought in the court with jurisdiction for the place where the products were delivered or where the contract was principally performed.

When the defendants are located in different EU member states, pursuant to Regulation (EC) No. 44/2001, in tort cases actions may be brought in Spain if at least one of the defendants is domiciled in Spain or if the harmful event occurred in Spain or, in the case of nullity actions, the goods were delivered or the services were provided in Spain.

Restrictions

6 | Can private actions be brought against both corporations and individuals, including those from other jurisdictions?

Private actions may be brought against both corporations and individuals, including those from other jurisdictions, provided that they are directly liable for breaches of antitrust law.

PRIVATE ACTION PROCEDURE

Third-party funding

7 | May litigation be funded by third parties? Are contingency fees available?

Litigation may be funded by third parties in Spain, as there is no rule under Spanish law to the contrary. There is, in fact, a growing market for private antitrust litigation funding.

Likewise, the assignment and purchase of claims is lawful under Spanish law. It must be noted, however, that the sale of claims when the litigation is still ongoing may be subject to restrictions (for this purpose, litigation is deemed to be ongoing when the defendant has opposed the main claim). In this regard, according to article 1535 of the Civil Code, the defendant may, upon notice of the assignment and purchase of the claim, reimburse the assignee for the price paid for the assignment plus all legal costs and interest accrued since the sale of the claim, and therefore terminate the 'credit'. For these purposes, the Supreme Court has greatly expanded the concept of 'credit', which may encompass 'any obligation' (judgment of 31 October 2008, appeal 1429/2003). This may presumably be extended to tort actions and, particularly, private antitrust actions.

Contingency fees, including conditional fee arrangements, are currently available in Spain. The Supreme Court held that bar associations' prohibitions in this regard are contrary to antitrust law and therefore null and void (judgment of 4 November 2008, appeal 5837/2005).

Jury trials

8 | Are jury trials available?

Jury trials are not available under Spanish law in any civil proceeding.

Discovery procedures

9 | What pretrial discovery procedures are available?

Spain has transposed pretrial discovery procedures into article 283-bis(a) to 283-bis(k) of the Civil Procedure Law, in line with the Damages Directive. Accordingly, both claimants and defendants may request categories of documents in each other's possession or that of a third party, or relevant parts of the competition authority's case file, providing that such request is proportionate in general terms.

Access to documents may be requested prior to filing the claim, in which case the claim should be brought within 20 days or face payment of compensation and costs, also at the time of filing the claim, or at any time when the litigation is ongoing.

Other general pretrial discovery procedures remain applicable, although these are far more limited in scope according to the Civil Procedure Law and the interpretation of the Spanish courts. Prior to bringing a claim, claimants may request very specific documents through 'preliminary procedural steps' (articles 256 to 263). The parties may request specific documents at the preliminary hearing from each other (article 328), a third party (article 330) or certifications by public entities (article 332).

Admissible evidence

10 | What evidence is admissible?

The Civil Procedure Law sets out the generally available types of evidence, which includes documentary evidence (public or private documents), interrogation of parties, interrogation of witnesses, expert reports and, where applicable, judicial examination (article 299). Other types of evidence not included in that list are theoretically admissible.

Evidence generally has to be submitted at the time of filing the statement of claim or defence (article 265). Expert reports may, however, be submitted at a later stage, providing that there are good grounds for this and their timely submission is notified, no later than five days prior to the preliminary hearing (articles 336 and 337).

Commercial courts decide on the admissibility of evidence at the preliminary hearing on the basis of a test of relevance and usefulness. Decisions not to admit evidence may be appealed to the same judge at the same preliminary hearing. Other parties may oppose the admission of evidence or the appeal on the same basis.

Additionally, the competent judge may voluntarily request the assistance of the competition authorities with any information in their possession, excluding leniency documents (article 15-bis of the Civil Procedure Act) or the relevant quantification criteria for the assessment of the damages claimed (article 76(4) of the Competition Act).

Legal privilege protection

11 | What evidence is protected by legal privilege?

Article 283-bis(b) of the Civil Procedure Law has incorporated the Damages Directive's rules on access to confidential information.

Evidence subject to legal privilege or professional secrecy is accordingly protected. In this regard, it is settled case law of the Constitutional Court that attorney-client communications are privileged. There are no specific rules on the legal privilege of in-house counsel.

The Civil Procedure Law generally provides that evidence obtained unlawfully is not admissible (article 283(3)), and therefore it cannot be voluntarily provided or requested from other parties. Other rules protecting the duty of legal privilege or professional secrecy relate to the testimony of parties (article 307) and witnesses (article 371), which Spanish courts have, however, interpreted restrictively.

Additionally, the use and dissemination of trade (or industrial) secrets is a criminal offence under the Criminal Code. There is no specific definition of trade secrets under Spanish law, although Spanish courts have developed a consistent body of case law in this regard. Trade secrets will be particularly protected during the course of civil proceedings once EU Directive 2016/943 is transposed into Spanish law.

Criminal conviction

12 | Are private actions available where there has been a criminal conviction in respect of the same matter?

Yes. However, antitrust infringements are not generally defined as criminal offences under Spanish law, with the exception perhaps of certain offences relating to market distortion.

Utilising of criminal evidence

13 | Can the evidence or findings in criminal proceedings be relied on by plaintiffs in parallel private actions? Are leniency applicants protected from follow-on litigation? Do the competition authorities routinely disclose documents obtained in their investigations to private claimants?

There is no prohibition regarding the use of evidence obtained in criminal proceedings in parallel private actions, as long as it has not been obtained unlawfully.

Information relating to both leniency applications and settlements are protected from follow-on litigation, following Spain's implementation of the Damages Directive. Article 15-bis of the Civil Procedure Law further precludes the Spanish competition authorities from providing information relating to leniency applications when intervening as an amicus curiae.

Spanish competition authorities do not routinely disclose documents contained in the case file to private claimants. However, the parties that filed a complaint with the Spanish competition authorities and were granted 'interested party' status under Spanish administrative law may have access to the case file. Private claimants may theoretically request access to the case file or at least its index under the Transparency Law No. 19/2013. In any event, claimants may request that the competent court order the competition authorities to disclose certain parts of the file pursuant to article 283-bis(i) of the Civil Procedure Law.

Stay of proceedings

14 | In which circumstances can a defendant petition the court for a stay of proceedings in a private antitrust action?

Various interlocutory applications made before the defence is filed may give rise to a stay of proceedings until any such application is allowed or rejected (eg, where the claimant applies to have another party joined to the proceedings albeit not as a defendant).

A defendant may request a stay of proceedings during the preliminary hearing when there is an ongoing parallel proceeding that may condition the outcome of the antitrust action. Under the Civil Procedure Law, such prejudicial issues may arise when there are ongoing criminal proceedings (articles 40 and 41), another civil action (article 43) or any other case allowed by law or where the parties agree to a stay (article 42). Further, article 434(3) provides that the competent judge may suspend the proceedings prior to delivering the judgment where there is an ongoing antitrust investigation by the European Commission or the Spanish competition authorities.

The court may stay the proceedings, presumably at the request of either party, for up to two years in case of consensual dispute resolution (article 81 of the Competition Law, transposing the Damages Directive).

Standard of proof

15 | What is the applicable standard of proof for claimants? Is passing on a matter for the claimant or defendant to prove? What is the applicable standard of proof?

There are no specific rules in Spanish law regarding the applicable standard of proof for either direct or indirect purchasers, the only requirement being that the claimant sufficiently proves its claim and the damages alleged.

However, the Competition Law has incorporated the presumptions contained in the Damages Directive. Therefore, article 75 of the Competition Law has incorporated the irrefutable presumption that final decisions of the Spanish competition authorities are binding and a rebuttable presumption regarding decisions of competition authorities of other EU member states. In addition, under Regulation (EC) No. 1/2003, Spanish courts cannot contradict findings of infringements by the European Commission.

Claimants typically have to determine the existence of harm and its quantification, notwithstanding the applicability of general presumptions in certain cases (such as the res ipsa loquitur doctrine) and the rebuttable presumption that cartels cause harm incorporated into article 76 of the Competition Law. Courts are able to estimate the amount of the harm in case such proof is almost impossible or excessively difficult to calculate.

Defendants have the burden of proving the passing on of overcharges. Conversely, indirect purchasers can allege the existence of passing on when they prove that the defendant has infringed competition law, the infringement resulted in overcharges to the direct purchaser, and it acquired the goods subject to such overcharges.

Time frame

16 | What is the typical timetable for collective and single party proceedings? Is it possible to accelerate proceedings?

There is no typical timetable in either case. In addition to the statutory deadlines, any timetable essentially depends on the court's caseload and the complexity of the case (particularly in cartel litigation). While several stand-alone cases have been resolved relatively quickly, with first instance judgments issued in less than one year, recent cases are taking longer to be decided.

In principle, defendants have to file their defence within 20 days from being notified of the statement of claim. In the case of collective proceedings coming within the category of 'diffuse (indeterminate) interests' proceedings may be further suspended for up to two months. The proceedings may be further suspended as a consequence of preliminary objections raised by the defendant prior to filing its defence or at the preliminary hearing and the subsequent opposition by other co-defendants or claimants.

Further, parties have 20 days to appeal the judgment after its notification, which other parties may oppose within 10 days.

Limitation periods

17 | What are the relevant limitation periods?

Spanish law has incorporated the minimum five-year period for private antitrust actions foreseen in the Damages Directive, which replaces the former general one-year period applicable to tort actions (article 74(1) of the Competition Law). Contractual nullity cases continue to be subject to the general five-year limitation period that applies to such actions under Spanish law.

The trigger for the limitation period is reasonable knowledge of the unlawful conduct, the damage caused and the identity of the infringer, as per article 74(2) of the Competition Law following the transposition of the Damages Directive. Prior to the introduction of this rule, in *Céntrica v Iberdrola*, the Supreme Court had already interpreted the general rules on the triggering of the limitation period in line with the Damages Directive (judgment of 4 September 2013, appeal 2120/2011).

Claimants may send a potential defendant a letter or fax setting out the claim to interrupt the limitation periods, which are restarted (article 1973 of the Civil Code).

Appeals

18 | What appeals are available? Is appeal available on the facts or on the law?

Appeals are available in respect of interlocutory decisions (to the same court), the admissibility of interim measures (to the higher court) and judgments (to the superior court).

Judgments issued by the commercial courts may generally be appealed on the facts and on the law to the provincial appeal courts. In turn, judgments of the provincial appeal courts may be further appealed to the Supreme Court only on points of law, subject to strict admissibility criteria. These appeals concern breaches of either procedural rules or on the merits. In the latter case, where the quantum claimed is less than €600,000, the legal issues at stake must be sufficiently important to justify the Supreme Court's intervention. In practice, the Supreme Court does not allow most appeals to proceed.

COLLECTIVE ACTIONS

Availability

19 | Are collective proceedings available in respect of antitrust claims?

Collective proceedings are generally available in respect of any civil claim that concerns consumers. In the absence of any rule to the contrary, this applies, at least in theory, to antitrust claims.

Spain has not adopted any legislative measures in line with the EU Commission Recommendation of 11 June 2013 on collective redress, which covers, among others, antitrust claims.

Applicable legislation

20 | Are collective proceedings mandated by legislation?

Collective proceedings are mainly regulated in article 11 of the Civil Procedure Law. Supporting legislation may be found in the Consumers and Users Defence General Law approved by Royal Legislative Decree No. 1/2007 as regards representative consumers associations. In addition to damages, injunctive relief may be sought in collective actions (eg, a declaration of the unlawfulness of the alleged harmful event).

Under Spanish law, collective actions fall under two distinct categories depending on how specific the harmful event is. Actions may relate to 'collective interests' when the group of affected consumers is easily identifiable (article 11(2) of the Civil Procedure Law). In contrast, actions concern 'diffuse (indeterminate) interests' when the group of affected consumers is not determinable or is very difficult to determine (article 11(3) of the Civil Procedure Law).

There is no clear-cut division between 'collective' or 'diffuse' interests. This needs to be assessed on a case-by-case basis and in view of the relevant case law. In any event, such a distinction is only relevant for the purposes of determining the standing to bring a claim.

21 | If collective proceedings are allowed, is there a certification process? What is the test?

There is no specific certification process applicable to collective actions similar to the US class action model. However, collective actions are subject to certain procedural requirements on standing.

Actions falling under the category of 'collective interests' may be brought by either:

- an association of consumers and users;
- an entity constituted for the purpose of defending such consumers and users; or
- the group of affected persons that represents most of the latter. In this case, the claimant has to notify individually each member of the group.

Actions relating to the 'diffuse interests' category may only be brought by an association of consumers and users, but on condition that it is determined to be sufficiently 'representative', which must be proved and assessed on a case-by-case basis.

In either case, there are certain 'publicity criteria' to ensure that most affected consumers are joined to the proceedings (article 15 of the Civil Procedure Law). In the case of 'collective interest' actions, each affected consumer needs to be individually notified. By contrast, in the case of 'diffuse interests' actions, the court clerk will publish the order allowing the claim to proceed in the territory where the alleged harmful event took place.

Certification process

22 | Have courts certified collective proceedings in antitrust matters?

By analogy with the certification process, there has been at least one precedent in which the procedural requirements described above were tested.

The Commercial Court 4 of Madrid preliminarily accepted the standing of Ausbanc as a representative of the 'diffuse interests' of consumers affected by Telefónica in a follow-on action based on the European Commission Decision of 4 July 2007 in *Wanadoo v Telefónica* (COMP/38.784). During the proceedings, Ausbanc was struck off the State Registry of Consumer Associations. The Provincial Appeal Court of Madrid ruled that this amounted to a loss of 'representative association' status and, therefore, that it lacked standing to sue on behalf of the consumers on question (order of 30 September 2013, appeal 158/2013). The claim was discontinued.

Opting in/out

23 | Can plaintiffs opt out or opt in?

Collective actions under Spanish law fall under the opt-in category. Any affected consumers may request to intervene at any time of the proceeding, from the publication of the court order on the admission of the action up to enforcement of the judgment. This, however, has no retroactive effect.

Judicial authorisation

24 | Do collective settlements require judicial authorisation?

There are no rules on the procedure relating to the judicial authorisation of collective settlements. Therefore, the general procedure for individual settlements applies.

National collective proceedings

25 | If the country is divided into multiple jurisdictions, is a national collective proceeding possible? Can private actions be brought simultaneously in respect of the same matter in more than one jurisdiction?

Spain is not divided into multiple jurisdictions. Accordingly, under the 'court first seized' rule, an action cannot be brought in respect of the same claim and the same parties before another Spanish court.

Collective-proceeding bar

26 | Has a plaintiffs' collective-proceeding bar developed?

No.

REMEDIES AND LIABILITY

Compensation

27 | What forms of compensation are available and on what basis are they allowed?

Claimants are entitled to seek damages under Spanish law, which are limited to actual loss in addition to loss of profit and interest according to settled case law (also article 72(2) of the Competition Law, transposing the Damages Directive). It is theoretically possible, albeit difficult, to claim non-financial damages.

As regards quantification of damages, the Supreme Court set out the basic requirements that the expert reports of both claimants and defendants should include in *Nestlé & Ors v Ebro Foods* (judgment of 7 November 2013, appeal 2472/2011).

It stated that the claimant's expert report must provide a technically well-founded methodology based on a reasonable and testable hypothesis (eg, the existence of a cartel) and accurate and verifiable data, comparing the 'actual situation' (the price and loss of sales data) with the 'counterfactual analysis' (a 'but-for' scenario).

The defendant's expert report must not be limited to criticising the methodology of the claimant's expert report, but must also provide an accurate, alternative and better-founded quantification of damages. An unreasonable hypothesis is sufficient for the defendant's expert report to be found to be unreliable.

Other remedies

28 | What other forms of remedy are available? What must a claimant prove to obtain an interim remedy?

Claimants may seek interim remedies. Article 727 of the Civil Procedure Law sets out a non-exhaustive list of these, including the freezing of assets, the deposit of goods and, particularly, injunctions.

Claimants must meet three requirements to obtain interim remedies:

- arguable case (fumus boni iuris), that is, showing a 'prima facie' good case (notwithstanding the eventual decision on the merits) based on well-founded data, arguments and evidence;
- irreparable harm (periculum in mora), proving that a delay may hinder the effectiveness of an eventual judgment, although interim measures will not be granted in the event of acquiescence; and
- provision of sufficient security that may compensate the possible loss suffered, the amount of which will be determined by the judge in view of the circumstances of the case and the claimant's application.

Interim measures have been requested in private antitrust actions, although so far, they have not generally been successful, for instance in *Pedro León v Liga de Fútbol Profesional* (Provincial Appeal Court of Madrid, order of 10 July 2015, appeal 41/2015) or *Ryanair v Aena* (Alicante Provincial Appeal Court, order of 19 January 2012, appeal 833/2011), in which case the Spanish competition authority intervened as amicus curiae at the request of the court.

Punitive damages

29 | Are punitive or exemplary damages available?

Punitive or exemplary damages are not available under Spanish law. This is reinforced by article 72(3) of the Competition Law, implementing the Damages Directive.

Interest

30 | Is there provision for interest on damages awards and from when does it accrue?

Claimants may request interest on damages at the time of filing the claim, together with actual loss and loss of profit, to accrue from the date of loss (article 1109 of the Civil Code). In respect of private antitrust actions, the Supreme Court held in one of the sugar cartel cases, *Nestlé & Ors v Acor*, that interest on damages must be adjusted in line with the appropriate discount rate to reflect the present value of the damage claimed, namely the Bank of Spain's official legal interest rate (judgment of 8 June 2012, appeal 2163/2009).

Additionally, if the defendant fails to pay the damages awarded in the judgment, claimants may request 'procedural interest' accruing from that date and higher that the statutory interest rate (article 576 of the Civil Procedure Law).

Consideration of fines

31 | Are the fines imposed by competition authorities taken into account when setting damages?

Fines are not taken into account in civil proceedings when setting damages.

Conversely, the compensation of damages prior to the enforcement decision by the Spanish competition authorities may be regarded as mitigating factor when calculating fines.

Legal costs

32 | Who bears the legal costs? Can legal costs be recovered, and if so, on what basis?

The 'loser-pays' rule applies in Spain under the Civil Procedure Law. The winning party is generally entitled to recover all legal costs from the losing party, providing that it succeeds as regards all heads of its claim or defence or, in accordance with the Supreme Court's settled case law, at least substantially. In the event of reasonable doubt relating to matters of law or fact, each party shall bear its own costs. Costs may also be ordered against those litigating in bad faith.

Legal costs comprise, inter alia, lawyers' fees, expert fees and deposits (article 241 of the Civil Procedure Law). Legal costs need to be sufficiently proved and then submitted to the court clerk who will determine the eventual amount. However, it must be noted that court clerks generally take into account the non-binding criteria of the bar associations when calculating such amounts. If the losing party challenges the assessment of the court clerk if it considers the legal costs to be undue

or excessive, the court clerk may, in the latter case, request an opinion from the relevant bar association.

Joint and several liability

33 | Is liability imposed on a joint and several basis?

Joint and several liability in respect of private antitrust actions has been incorporated into article 73 of the Competition Law, in similar terms to those contained in the Damages Directive. This includes certain limitations for small and medium-sized enterprises (unless they led the cartel or had previously breached antitrust law) and full recipients of leniency with regard to their own direct and indirect purchases or sales, unless it is not possible for the claimant to claim compensation from another co-defendant.

Although the general rule under Spanish law is several (proportionate) liability, joint and several liability is theoretically possible under the Supreme Court doctrine applicable to infringements where it is very difficult to determine the allocation of liability among debtors, such as, in principle, cartel claims.

Contribution and indemnity

34 | Is there a possibility for contribution and indemnity among defendants? How must such claims be asserted?

Joint and several defendants are generally entitled to bring claims against co-infringers as a matter of Spanish law in accordance with article 1145(2) of the Civil Code. This is reinforced by article 73(5) of the Competition Law, implementing the Damages Directive, which includes the limitation of contribution claims for leniency applicants to the damages caused to their own direct or indirect purchasers or suppliers, or in the case of other purchasers or suppliers, to their own relative liability.

Contribution claims need to be brought only after the judgment or settlement, as otherwise it is impossible to determine the main amount. Spanish law does not foresee the exercise of contribution claims during the same proceedings as the principal claim.

Contribution actions are time-barred after five years according to the general limitation period for obligations according to article 1964 of the Civil Code.

There are no known precedents regarding contribution claims in private antitrust actions.

Passing on

35 | Is the 'passing on' defence allowed?

The passing on defence is now expressly regulated in articles 78 to 80 of the Competition Law following the transposition of the Damages Directive, although the Supreme Court already accepted the possibility of raising this defence in *Nestlé & Ors v Ebro Foods* (judgment of 7 November 2013, appeal 2472/2011). In that case, the defence was ultimately rejected for lack of sufficient proof.

Other defences

36 | Do any other defences exist that permit companies or individuals to defend themselves against competition law liability?

Defendants may also raise a number of objections regarding their standing to be sued. As long as there is no binding enforcement decision, they may contend that they did not participate in the alleged infringement. Parent companies may also make allegations that rebut the presumption contained in article 71(2)(b) of the Competition Law, implementing the Damages Directive, that they participated in the alleged conduct. Additionally, defendants may deny the existence of any damage or causal link and, where applicable, rebut the presumption that cartels cause harm.

Defendants have the burden of proving the claimant's failure to mitigate the damages, as held by the Supreme Court in *Hidrocantábrico v Iberdrola* (judgment of 4 March 2015, appeal 41/2013).

Alternative dispute resolution

37 | Is alternative dispute resolution available?

Alternative dispute resolution is available in respect of private antitrust actions, including arbitration and mediation. Arbitration Law No. 60/2003 and Mediation Law No. 5/2012 do not exclude antitrust claims. Despite the public policy nature of antitrust law, as confirmed by the Court of Justice of the European Union in *Eco Swiss*, that could give rise to the risk of the award being unenforceable, it is settled case law that arbitrators have a duty to apply mandatory antitrust rules (Madrid Provincial Appeal Court, order of 18 October 2013, appeal 66/2013).

Additionally, the national Spanish competition authority can act as an arbitration tribunal in any type of matter within its competence, including antitrust law claims, pursuant to article 5(1)(b) of Law No. 3/2013.

We are unaware of alternative dispute resolution mechanisms having been used to settle antitrust claims.

UPDATE AND TRENDS

Hot topics

38 | Are there any emerging trends or hot topics in the law of private antitrust litigation in your country?

The *Trucks* cartel case has popularised private antitrust litigation in Spain, adding up to the ongoing *Paper Envelopes, Construction Insurance* and *Milk Buyers* cases. Thousands of claims have been brought throughout Spain, including outside of more traditional jurisdictions such as Madrid and Barcelona, giving rise to a lively academic and judicial debate regarding a wide number of procedural and substantive issues, most of which remain unsettled.

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The latest first instance judgments rendered in both the *Paper Envelopes* and *Trucks* cases evidence a judicial split among commercial courts concerning the applicable standards of proof of harm and causation. While some courts seem to favour a more traditional approach to the law of damages and to evidentiary burdens, other courts stress the applicability of the principle of effectiveness and/or other general presumptions in pre- and post-Damages Directive cases involving information asymmetry. Provincial courts and eventually the Supreme Court are expected to clarify any interpretative gaps in this regard.