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Agenda

Advancing economics in business

Economic evidence and the quantification of damages in competition cases in Spain

Recent court decisions offer new perspectives on private antitrust litigation in Spain. Although case law is currently limited, the variety of cases highlights the possibilities of private enforcement both as substitute and complement to public enforcement. Juan Delgado, Chief Economist at the Spanish competition authority (Comisión Nacional de la Competencia), and Eduardo Pérez Asenjo of the Chief Economist Team, present an overview of private enforcement cases in Spain, focusing on the methodology used to quantify damages and the role of competition authorities in this process

The number of private actions for damages by victims of competition law breaches is slowly on the rise in courts across Europe. Despite the stalled debate about the proposed Directive on Private Enforcement of EU Competition Law, there seem to be some developments in a number of countries. In the case of Spain, private enforcement case law is still limited but seems to be gaining ground. The appropriate legal framework is in place: both class actions (ie, collective actions where a number of parties potentially affected by a competition infringement join their efforts in one single filing) and stand-alone actions (ie, where it is not necessary to have a previous infringement decision by the competition authority in order to initiate a claim) are possible under the current legal framework.

For the first time since the adoption of the 2007 Competition Act, Spanish courts have recently granted civil damages to the victims of a cartel.[1] In addition to this milestone, damages have also been awarded in the context of vertical contracts and abuses of a dominant position. Case law is slowly increasing and court decisions are tending to become more sophisticated (even though the sample of cases is currently small).

In contrast to its equivalent in most other countries, the Spanish Competition Act provides a role to the competition authority, the Comisión Nacional de la Competencia (CNC), in the evaluation of damages. In particular, the Act establishes a cooperation mechanism between the courts and the CNC whereby courts can request non-binding opinions in private enforcement cases (and in other court proceedings).[2] Thus far, there has been only one case in which the CNC's opinion has been formally requested (as discussed below).

This article presents an overview of the main private enforcement cases in Spain, paying particular attention to the methodology used to quantify damages and how courts have considered economic submissions by the parties involved. In general, courts have awarded actual costs but have been reluctant to award lost profits. Recent cases appear to buck this trend but, given the small number of cases, it is still too soon to reach clear conclusions.

Cartels

The most significant case concerning Article 101 TFEU—which prohibits restrictive agreements—and its counterpart in Spanish legislation (Article 1 of the Spanish Competition Act 15/2007) concerned a sugar cartel. Following a decision by the CNC (later confirmed by the two upper courts), on October 9th 2009 a Provincial Court (a Court of Second Instance) overturned a lower court decision and mandated a sugar manufacturer to pay €1.1m in damages to nine producers of biscuits and confectionery which had paid higher prices for their main input due to the existence of the cartel.[3]

The Court of First Instance had denied both the existence of damages and the causal link with the infringement. However, the upper court accepted the

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existence of damages. Both parties made expert submissions on the calculation of damages. The claimant's calculation was based on the estimated costs of the firms that were members of the cartel. The damages were calculated as the share of the increase in price which did not correspond to the increase in the cartelists' costs. The defendant's submission merely refuted these estimates, while not offering an alternative valuation. The Court accepted the estimate submitted by the claimant (which was not made public) and awarded the damages claimed. It stated that the defendant's submission disqualified itself by claiming that there was zero damage, given that the competition authority and the Court of Appeal had both concluded that the cartel had caused severe damages (without quantifying those damages). The decision is under appeal.

Vertical contracts

There have been several cases concerning vertical contracts between oil companies and petrol stations. These cases reflected the competition concerns expressed by the European Commission regarding long-term supply agreements that might have created a significant foreclosure effect on the fuel retail market. Repsol, the Spanish oil and gas company, agreed to terminate such agreements.[4] Following this, several petrol stations made claims for compensation from Repsol for the lost profits during the period in which the contracts were in force.

In some cases, the nullity of such contracts was accepted by the courts, but damages were not awarded.[5] The reasons for not awarding damages were diverse: lack of adequate evidence of the magnitude of the damages; lack of causality between the infringement and the damages; errors in the formal proceedings; errors in the calculations of damages (in some cases the courts suggested that the claimant should start new proceedings); or an overly complex quantification calculation which also required a new proceeding.

A recent decision concerning two petrol stations in Majorca awarded damages to the claimant.[6] The claimant submitted an estimation of the lost profits for the duration of the contract—ie, the earnings it would have obtained in the absence of the infringement based on the comparison of two scenarios:

- on the one hand, the actual situation;
- on the other, what would have happened in the absence of the contract that was declared null (the counterfactual).

The estimation of the earnings in the counterfactual scenario was based on the contract that the parties would have signed in the absence of the null contract (based on alternative contracts existing in the market), which determined the profit margin of the petrol stations.

The proposal was submitted for consultation to the CNC, making use of the cooperation mechanism contained in the Spanish Competition Act 15/2007. The CNC examined the proposal and considered, with some minor comments, that the underlying principles were essentially correct. The judge declared the contract null, and accepted the damages estimation, awarding the requested damages compensation to the claimant (the court restricted the compensation period to the previous ten years, thereby reducing the time period proposed by the claimant). The final compensation awarded was €218,958.

Abuse of a dominant position

In two of the main cases of abuse of a dominant position where damages were awarded, the defendant was the former telecoms monopolist, Telefónica.[7] The first case relates to the provision of leased lines to competitors, and was initiated following an infringement decision by the CNC (later confirmed by an upper court) for unjustified delay in the supply of leased lines to one of its competitors, 3C Communications. The claimant's expert submission estimated the profits the company would have earned had Telefónica not committed the infringement and supplied the lines in a timely fashion.

To calculate such lost profits, 3C Communications made a number of assumptions regarding the average duration of the delay, the number of lines supplied, the average number of terminals it could have installed in the absence of the abuse, and the net earnings per terminal and day. The court determined that the average duration of the delay and the average number of terminals contained in the claimant's estimate were too high, and decided to use a more conservative estimate to calculate the final damages.

The second case relates to the supply of data for telephone directory services.[8] The claim was initiated after a decision by the Spanish telecoms regulator. The infringement consisted of the initial refusal to supply data, and then the supply of poor-quality data to a competitor in the business of telephone directory enquiries. In this case, the claimant, Conduit, submitted an expert estimate of the damages, which were divided into two categories:

- additional expenses Conduit had to incur because of the infringement;
- the profits that Conduit could have earned in the absence of the infringement—ie, the lost profits.

With respect to the costs incurred by the claimant, the poor quality of the data supplied by Telefónica for use in providing the directory service forced Conduit to hire

external services to fix the data, and also to dedicate a larger share of its own resources (and those of its parent company) than would have been necessary had the data been correct. Both actual extra costs, external and internal, were quantified by the claimant's expert submission and finally awarded by the court. The amount awarded was €639,000.

To calculate the lost profits, Conduit estimated the market share that the company would have achieved in the Spanish market had Telefónica supplied the correct data in due time. In order to do so, Conduit's expert submission compared the Spanish market with the British market where Conduit also operated. However, the court challenged this assumption since the conditions of the British market, where Conduit had been operating for longer, were far different from those in Spain where it was a newcomer attempting to enter the market. The court found that the experience and expertise of Conduit's staff in Great Britain was a factor that was not present in the Spanish market. Moreover, the court refuted the causal link between the infringement and the damages. It argued that there were other elements aside from the quality of the data—in particular, the advertising expenditure required to make the consumer aware of Conduit's telephone directory number—which determined the market share of the entrant. Therefore, the judge refused to award any amount as lost profits.

In a similar decision relating to the data-processing industry, the Madrid Court of First Instance awarded as private damages only the actual costs incurred by the claimant and denied the lost profits.[9] These damages were awarded following a decision by the CNC (later confirmed by an upper court), which fined the company in question, 3M, for abusing its dominant position by imposing anti-competitive conditions on one of its direct competitors in the sale of an essential input—a type of software used in public hospitals to gather data from patients' medical files. Both the claimant and the defendant submitted expert documents. The judge refuted the assumptions used to estimate the lost profits in the claimant's submission because they considered a greater number of years and more contracts than the ones for which the infringement had been proved, and because the cost estimates did not realistically reflect the cost structure of the claimant's business. The amount awarded was €194,089.

In another interesting case (although damages were ultimately not awarded), a TV channel, Antena 3, claimed private damages from the Spanish Football Association (LNFP) for abusing its dominant position in managing football broadcasting rights. A decision by the competition authority (later confirmed by the two upper courts) declared that the LNFP had abused its dominant position by signing long-term contracts with other TV channels and excluding Antena 3. Antena 3 estimated the damages at €34m–€36m due to advertising lost profits resulting from being excluded from the broadcasting of football matches. The Court of First Instance accepted the demand in part and awarded €25.5m.[10]

The decision of the Court of First Instance was appealed (surprisingly by both parties), and the upper court revoked the previous decision and awarded no damages.[11] The upper court did not accept the claimant's expert damages estimate because it was based on a subjective and theoretical scenario which did not correspond to reality. The main point was that the price Antena 3 took as reference in calculating the counterfactual was too low. Based on this and other minor points, the court dismissed the claim. Ultimately, the Supreme Court did not accept the defendant's appeal on procedural grounds.[12]

However, in March 2010, a Court of First Instance awarded more than €30m damages for abuse of a dominant position in the same market for football broadcasting rights.[13] The decision arose from a stand-alone action (since there was no prior decision by the CNC) by a cable TV operator, Cableuropa, against the owners of these rights, AVS and Sogecable. The claimant, which acquired the rights from the owners, claimed that the effective price paid from 2003/04 to 2008/09 implied an abuse of the defendants' dominant position since, despite market conditions proving that the price paid was excessive, the owners of the rights refused to reduce the price.

Since there was no prior decision declaring the anti-competitive conduct, the Court of First Instance had first to determine the existence of an infringement. It declared that the defendants had abused their dominant position in the distribution of football broadcasting rights by charging unfair and excessive prices—ie, prices that were far higher than the economic value of the rights.

Both parties submitted expert estimates on the calculation of damages. The claimant estimated the economic value of the rights based on its underlying costs, and concluded that the effective price paid was far higher than necessary to cover all the risks incurred by the defendants. In addition, the claimant compared the defendants' profits with those of similar entities managing football broadcasting rights in the UK, and concluded that profits were far higher in Spain. The defendants' submission criticised the claimant's damages estimate, arguing that the costs were underestimated; however, the Court accepted the estimate submitted by the claimant (which was not made public) and awarded the damages claimed. The decision is under appeal.

Conclusions

Private actions in the context of competition infringements are still in their infancy in Spain. The legal framework in place seems adequate. A number of recent court decisions concerning cartels and abuses of a dominant position offer good expectations for further development of private enforcement of competition law in Spain. In such decisions, courts have applied antitrust law directly and have used the concept of lost profits to evaluate the damages arising from the infringement (unlike previous cases where only the costs actually incurred were awarded). The advisory role of the CNC could provide consistency to the process and help courts to evaluate complex economic analysis submitted by parties in the absence of substantial case law.

Juan Delgado and Eduardo Pérez Asenjo

[1] Valladolid Provincial Court Nº 3, decision 261/2009, 09-10-2009.
[2] Article 25 c) of the Spanish Competition Act 15/2007.
[3] Valladolid Provincial Court Nº 3, decision 261/2009, 09-10-2009.
[4] Commission Decision of 12 April 2006 relating to a proceeding pursuant to Article 81 of the EC Treaty (Case COMP/B-1/38.348 — Repsol CPP).
[5] See Madrid Mercantile Court of First Instance Nº 1, decision 523/2006, 07-03-2006; Madrid Provincial Court Nº 14, decision 318/2007, 09-02-2007; Bilbao Mercantile Court of First Instance Nº 2, decision 22/2007, 22-02-2007, or Madrid Provincial Court Nº 28, decision 59/2007, 08-03-2007.
[6] Palma de Mallorca Mercantile Court of First Instance Nº 2, decision 15/2009, 03-03-2009.
[7] Madrid Provincial Court Nº 28, decision 73/2006, 25-05-2006, and Madrid Provincial Court Nº 25, decision 235/2007, 08-05-2007.
[8] For a thorough analysis of the case, see Siotis, G. and Martínez-Granado, M. (2010), 'Sabotaging Entry: An Estimation of Damages in the Directory Enquiry Service Market', *Review of Law & Economics*, **6**:1, Article 1.
[9] Madrid Court of First Instance Nº 71, decision 01-06-2007.
[10] Madrid Court of First Instance Nº 4, decision 07-06-2005.
[11] Madrid Provincial Court Nº 25bis, decision 18-12-2006.
[12] Supreme Court Civil Section Nº 1, Auto 14-04-2009.
[13] Madrid Mercantile Court of First Instance Nº 7, decision 64/2010, 07-03-2010. The quantity is not definitive since the corresponding damages for two of the seasons will be determined on executing the decision.