

Considerations concerning the implementation of the EU competition law damages directive in Spain

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1. As the Spanish authorities gear up for the implementation of Directive 2014/104/EU (“the Directive”),³⁴ this article assesses its possible impact on certain areas of Spanish law. While many of the concepts in the Directive are very familiar or already well dealt with in Spain, the Directive offers a welcome opportunity to create some greater transparency and effectiveness in Spanish procedure with the particular beacon of the new disclosure provisions.

I. Disclosure

1. *Inter partes* and third party disclosure

2. The Directive provides for the possible disclosure of evidence from defendants and third parties.³⁵ This is a significant novelty.

3. Spanish Civil Procedure Rules (“CPR”) currently provide for disclosure of information in two specific moments. First, so-called “preliminary diligences” allow claimants to request information from defendants or third parties prior to filing a claim in order to prepare their claim.³⁶ Secondly, after exchange of pleadings, parties may request disclosure of specific documents at the pretrial hearing.³⁷

4. These mechanisms are in practice used only to a limited degree and, in our opinion, are insufficient to satisfy the aims of the Directive. Competition law damages actions are frequently multi-party proceedings, and disclosure for such proceedings would be relatively unmanageable in the framework of existing preliminary diligences. Furthermore, preliminary diligences are currently only open to claimants and not to defendants (which would not permit disclosure related to pass-on, for example); claimants must provide a bond; and jurisdiction is not seized for the purposes of the Brussels Regulation³⁸ (permitting and maybe even provoking so-called “torpedo” actions in other Member States).

* The views set out in this article are personal to the authors and do not necessarily represent the views of Cuatrecasas, Gonçalves Pereira.

³⁴ Directive 2014/104/EU of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union [2014] OJ L 349/1.

³⁵ *Ibid.*, Article 5.

³⁶ Article 256 et seq. of the Spanish Civil Procedure Rules, *Ley de Enjuiciamiento Civil* BOE-A-2000-323 (with amendments).

³⁷ Article 328 CPR.

³⁸ Regulation 1215/2012/EU on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

Neither preliminary diligences nor document exhibition requests at the pretrial hearing in fact permit requests for categories of documents as required by the Directive—both have, indeed, been narrowly interpreted by courts. Accordingly, we consider that the Directive requires the introduction of a specific procedural reform in Spain.

5. An approach which could be adopted would be to permit and require disclosure requests at the pleading stage, with the possibility of a specific disclosure hearing prior to the pretrial hearing. The following is a possible outline for the process although a number of variations could be considered:

- Parties would exchange pleadings containing their requests for disclosure from the other party and any third parties.
- The Court would notify third parties with their requests.
- After exchange of pleadings, the judge would call a disclosure hearing, unless there were no opposition to the requests and a disclosure timetable agreed.
- All parties would have the opportunity to make submissions at the hearing and the judge would assess the requests on the basis of the factors listed in the Directive.³⁹
- After ruling, the judge would set the disclosure timetable.
- *Inter partes* disclosure costs would normally be considered costs of the proceedings and parties should not be required to post a bond.⁴⁰
- If a dispute arises as regards the execution of disclosure orders, parties could seek a motion from the judge.
- Once disclosure is finalized, the judge would set a date for the pretrial hearing.
- Claimants would then be required to file their economic expert report five days prior to the hearing while the defendants would only be required to announce it at the hearing and then present the report five days prior to trial.⁴¹
- The proceedings could then be normally conducted pursuant to the CPR.

39 Article 5.3.

40 A different approach may of course be warranted for third party disclosure. Further, the specific costs of disclosure may require a specific new rule in the Spanish bar guidelines used by courts to tax costs.

41 Article 337 CPR.

2. Disclosure by NCAs

6. Claimants will be able to request information contained in NCAs' case files.⁴² Although the Directive provides that this should be the last resort, it is foreseeable that the State (CNMC) and the Autonomous Communities Competition Authorities' (together, the "Spanish NCAs") involvement in follow-on damages actions will increase. It will hence be advisable for Spanish NCAs, in time, to set up internal mechanisms to deal with: (i) the reception of disclosure orders; (ii) the review and redaction of disclosable information; and (iii) the issuance of opinions on, *inter alia*, *inter partes* disclosure of administrative files during ongoing investigations, proportionality of disclosure requests and quantification of harm.⁴³

7. It may be advisable for Spanish NCAs to adapt the organization of case files to take into account possible disclosure categories in civil proceedings. For instance, this could involve dividing the case file into: (i) documents which are never disclosable; (ii) documents disclosable after a decision is issued; and (iii) documents which are always disclosable, as well as taking into account confidentiality issues.

3. Confidentiality

8. National courts should have effective measures at their disposal to protect confidential information.⁴⁴ Currently the CPR allow Spanish courts to declare the confidentiality of a judicial case file as well as holding confidential hearings.⁴⁵ However, these measures may prove insufficient under the scope of the disclosure foreseen in the Directive as there may be cases in which sensitive information may need to be kept confidential even from the parties. To comply with the Directive, Spain may need to implement confidentiality rings into its legislation. Confidentiality rings are court orders which preclude ring members, generally in-house and external counsel, and maybe experts, from disclosing the information accessed to persons outside the ring or using it for purposes other than the civil proceedings. This mechanism has been successfully used in damages litigation in England and is referred to in the preamble of the Directive.⁴⁶

9. Current sanctions for failure to comply with disclosure or confidentiality orders provided under the CPR would need to be adjusted to ensure that they are effective, proportionate and dissuasive.⁴⁷ Further, the possibility to draw adverse inferences or dismiss claims or defences in such cases will need to be expressly accounted for.⁴⁸

42 Article 6. This possibility already exists in Spain, although in restricted procedural terms (Art. 15bis.2 CPR).

43 Article 17.3.

44 Article 5.4.

45 Articles 138 and 140 CPR.

46 Recital 33.

47 Article 247 CPR.

48 This may already be possible by virtue of Articles 217.7 and 329 CPR. However, such an important issue should advisably be regulated expressly.

II. Effect of NCA decisions

10. To ensure the efficiency and effectiveness of damages actions, the Directive establishes that, once a decision adopted by a NCA has become final, the nature of the infringement as well as its material, personal, temporal and territorial scope should be deemed to be irrefutably established for the courts of the Member State in which the decision has been adopted and, at least, be *prima facie* evidence of the infringement in the courts of other Member States.⁴⁹

11. Current Spanish Supreme Court case law has clarified that findings of fact in administrative proceedings will be given effect by civil courts, which may only deviate from the legal interpretation given to these findings if such interpretation is explicitly and adequately reasoned.⁵⁰ However, a legislative provision may still be advisable to clarify the precise terms of the Directive.

III. Nature and extent of liability

1. Joint and several liability

12. Joint and several liability is the rule for joint infringements of competition law in Spain. However, by virtue of the Directive joint and several liability will now be statutory (“*solidaridad propia*”). As a result, and according to Article 1974 of the Spanish Civil Code and consolidated Supreme Court case law, interrupting limitation for one defendant will, in principle, now have the effect of interrupting limitation vis-à-vis the other co-defendants.

2. Pass-on defence and indirect purchasers’ standing

13. Infringers will be liable for the harm caused to both their direct and indirect purchasers under Spanish law.⁵¹ This is already the case under Spanish law although the authors are unaware of any indirect purchaser claims.

14. The Spanish Supreme Court has clarified that the pass-on defence is allowed as a matter of Spanish law and that, on the basis of consolidated EU case law on reimbursement of indirect taxes, the burden of proving

pass-on lies with the infringer.⁵² This is the position of the Directive. The Spanish Supreme Court also imposes the burden on infringers to prove the absence of volume effects as a result of the passing-on of overcharges. The issue of volume effects is as yet insufficiently treated at either EU or national level in our opinion and will be a matter for debate.

15. The Directive requires that national courts be able to act in a way so as to try to avoid contradictions arising out of actions at different levels of the supply chain. Spanish courts shall take due account of judgments in related cases (without such judgments having the effect of *res judicata*) and, where appropriate, they may consider the possibility of consolidation of similar claims brought at different levels of the supply chain by direct and indirect purchasers.⁵³ It may also be worth considering increasing the existing publicity mechanisms around these cases.⁵⁴

IV. Limitation

16. The Directive will extend the one-year limitation period provided under Spanish law for competition law damages actions to at least five years.⁵⁵ Spanish consolidated Supreme Court case law arguably follows the Directive’s approach to the *dies a quo* already, as it requires victims to have knowledge of all the factual and legal elements of the claim and be in a position to quantify the total extent of their losses.⁵⁶

17. Action taken by Spanish NCAs (and judicial review courts) is to have the effect of interrupting limitation.⁵⁷ What is meant, as a matter of Spanish law, by the NCA “taking action” should be defined.⁵⁸ In addition, Spanish NCAs will need to be mindful that their investigations interrupt limitation periods and may consider stating in their press releases when their actions produce or stop producing such effects.

18. To avoid satellite litigation, careful attention will also need to be paid to regulating the transition to the new limitation regime taking into account the temporal provisions of the Directive.⁵⁹

49 Recital 34 and Article 9.

50 Spanish Supreme Court judgment of 7 November 2013, ECLI:ES:TS:2013:5819.

51 Articles 13 and 14.

52 Judgment of 7 November 2013, footnote 17 above.

53 Consolidation is regulated under 74 et seq. CPR and satisfaction of the requirements therein would need to be considered on a case-by-case basis.

54 Article 16.3 of the Spanish Act, 15/2007, of 3 July, for the Defence of Competition, BOE-A-2007-12946, already provides that admissions of damages claims be notified to the CNMC and publication of such information may be worth considering.

55 Article 10.3.

56 Among others, Spanish Supreme Court judgment of 8 March 2013, ECLI:ES:TS:2013:836.

57 Article 10.4.

58 This is currently an issue in Germany, where German law provides for the suspension of limitation during investigations but the status of the Bundeskartellamt investigations is not always clear.

59 Article 22.

V. Settlements

19. In order to promote the extrajudicial settlement of claims, the Directive requires claims to be reduced by the settling co-infringer's "share of harm." Such automatic "claims reduction" involves a change to the current position under Spanish law,⁶⁰ albeit in practice such results could already be achieved by contract. Procedurally, it may also be necessary to introduce a specific provision in the CPR for such claims reduction to be effected in proceedings (at any stage before judgment). As no doubt is the case in other countries, what impact the Directive rules will have on current contribution law will certainly require careful and detailed study.

20. In addition, the Directive provides that a settlement may be taken into account as a mitigating factor when assessing fines in the related administrative proceedings if the settlement is reached before a competition authority has issued its decision.⁶¹ This is already the case under the Spanish Competition Act, but it is a provision which is scarcely used or even discussed. Consideration of what means could be used to promote its use should therefore form part of the Spanish implementation debate.

VI. Conclusion

21. Spanish law and procedure offers already a suitable, competent and relatively low cost platform for the litigation of private damages claims. There is good and clear case-law in this area (including Supreme Court rulings). The level of activity in Spain for competition litigation has indeed been quite high. Nevertheless, it is also true that this activity has been focussed on claims for nullity or claims arising out of abuse of dominance, whereas cartel claims have been few in number. The implementation of the Directive offers an opportunity to improve procedural mechanisms in particular with regard to the evidence of damages. These mechanisms may, furthermore, have more wide-reaching consequences for damages claims in Spain if, as is possible, the Spanish legislature looks to use the implementation of the Directive as an opportunity for exploring developments of the civil procedure more broadly. ■

⁶⁰ Spanish Supreme Court judgment of 21 December 2000, ECLI:ES:TS:2000:9493.

⁶¹ Article 18.3.