Private Enforcement in Spain

Paul Hitchings[1]
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This article outlines the current state of private enforcement in Spain and affirms that private action, and competition law enforcement generally, is intensifying dramatically. Going on to focus on three recent court cases, the author emphasises the need to address one particularly critical factor for making private enforcement more predictable and manageable: guidance on assessment of economic evidence of damages.

1. Introduction.

There are signs that Spain has begun to take the prosecution of competition law infringements far more seriously. Companies cannot ignore these signs, save at their peril, and may discover that they present some effective business opportunities.

The new *Comisión Nacional de la Competencia* (CNC) with its new Leniency Programme[2] is becoming one of the most active competition authorities in Europe in the pursuit of cartels. The famous queues outside the CNC the day the Leniency Programme entered into force in 2007 and the subsequent string of dawn raids have taken up the front pages of the newspapers. Only last 12 November, the CNC sanctioned a cartel among insurers and reinsurers relating to mandatory construction insurance with fines totaling over €120 million.[3]

The Spanish Mercantile Courts, created in 2004,[4] and the Provincial Appeal Courts, are too dealing regularly with complex competition issues and showing an increasing understanding and discernment in their appraisal of the facts and arguments put before them. Just last October, the Valladolid Appeal Court handed down the first judgment upholding the award of damages against a cartel, the industrial sugar cartel (*Acor Case*).[5]

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[1] My thanks go, in particular, to Georges Siotis (one of the economists who worked with me on the Conduit case, discussed in this article) for his help on earlier drafts of this article.

[2] Both created pursuant to the Spanish Competition Act 15/2007 of 3 July.

[3] Decision 12th November 2009. *CNC v*s. *Asefa, Mapfre Empresas/Mapfre Re, Caser, Suiza/Swiss Re, Scor and Münchener.*

[4] Pursuant to Article 86.c of Organic Law 6/1985 of 1 July 1985, as amended by article 7 of Organic Law 8/2003 of 9 July 2003.

[5] Judgment of 9 October 2009 in Case 214/2009.

There are also a number of factors which facilitate this type of litigation in Spain, in particular in connection with matters affecting costs:

(i) pure contingency fee arrangements are permitted;[6]

(ii) costs are relatively limited when compared with other jurisdictions given that the process is quite simple and predictable and generally shorter;[7] and

(iii) the risk of the loser pays rule are low since lawyer's fees which can be recovered as costs are in practice limited by bar rules and are only payable in the event the claim is either completely upheld or completely dismissed.[8]

Against these considerations, there are undeniable limitations in certain aspects of the rules pertaining to evidence in Spain, such as the requirement that plaintiffs set out their case and produce all relevant documentary evidence at the moment of filing a writ, as well as the absence of general discovery.[9] Depending on the interests of a particular client, these limitations may be viewed as sensible requirements which avoid spurious or insufficiently founded claims or, alternatively, unnecessary procedural rigidity which impedes access to justice. Nevertheless, in anti-trust private enforcement actions these restrictions are not generally material, at least as regards the establishment of an infringement, given the primacy of administrative

[6] Judgment of the Supreme Court, 4 November 2008. The ruling stated that the contingency fee agreement cannot be considered dumping and its prohibition infringed the Spanish Antitrust Act since it impedes free agreement between lawyer and client. Furthermore, the decision underlined that professional associations and public administrations must submit to competition law.

[7] A first instance proceeding is likely on average to take around 18 months from the time of filing of the claim to judgment.

[8] For example, in the Antena 3 case, Antena 3 was awarded no costs at first instance despite having won almost every head of damage claimed and being awarded € 25.5 million instead of the € 34 million it claimed (see below).

[9] A claim may not be extended or modified after filing of the writ, subject to certain limited exceptions which can be invoked at the beginning of the pre-trial hearing (Art.s 400, 412 and 426 of the Spanish Civil Procedural Law, hereinafter "CPL"). The admission of private documents after submission of the initial writ is equally only permitted in limited circumstances (Art. 270, CPL). There is only very narrow discovery of specific identified documents held in the possession of the other party (Art. 329 CPL). Other measures are, nevertheless, available to assist parties in accessing evidence both before trial or during the process through requests for information formulated to third parties and administrations. These issues are not, however, developed in this article.

investigations, particularly as regards secretive cartel behaviour. That is, civil cases will invariably be follow-on actions.[10]

Arguably, then, the key current challenge in antitrust damages claims in Spain is the other key aspect of evidence in competition claims, the proof of damage. In this regard the coherent assessment of economic evidence is of vital importance.

The rest of this article focuses on this issue in the light of a number of recent decisions in the Spanish courts: namely, the decisions in *Antena 3, Conduit* and the aforementioned *Acor* decision*:*

(i) *Antena 3 vs. Liga Nacional de Fútbol Profesional.*[11] The first case is a clear example of the difficulties that can be found with proving anti-trust damages. It is a case under the old 1989 Spanish Competition Act concerning abuse of a dominant position and anti-competitive exclusivity arrangements relating to football broadcasting rights.

(ii) *Conduit vs. Telefónica de España.*[12] Given the involvement of my firm in this case, an abuse case concerning the liberalization of certain telecommunications services in Spain, we will analyse the economic analysis in this case in much greater detail. The case is, furthermore, the first and only example to date of a successful damages action before the new Mercantile Courts.

[10] The decisions of the CNC are not binding on civil courts and, hence, "follow-on" is not used in a strict sense here. Nevertheless, in practice, its decisions will have a vital impact on proceedings and, indeed, the Competition Act provides for the stay of civil proceedings pending the outcome of any investigation or appeal thereof (Art. 434 CPL, as interpreted recently by the Madrid Provincial Court in the *Ausbanc/Telefónica* case; Order of 21 July 2009). The same goes for European Commission decisions, with the added requirement of Art. 16 of Regulation 1/2003/EC which precludes a court adopting a resolution which contradicts a Commission decision.

[11] Judgment of 7 June 2005 of First Instance Court Nº 4 of Madrid, in Case 1438/2004 *Antena 3 de Televisión, S.A. vs. Liga Nacional de Fútbol Profesional*, overturned on appeal by judgment of 18 December 2006 of the *Audiencia Provincial de Madrid* (Section 25.bis).

[12] Judgment of 11 November 2005 of Mercantile Court Nº 5 of Madrid, in Case 36/2005 *Conduit Europe, S.A. vs. Telefónica de España, S.A.U.*, upheld on appeal by judgment of 25 May 2006 of the *Audiencia Provincial de Madrid* (Section 28).

(iii) *Nestlé España and Others vs. Acor.*[13] The last and most recent case to be analysed here is the first successful cartel damages action in Spain. It indicates a more flexible approach to damages claims, albeit also under the 1989 Spanish competition law regime.

1. ***Antena 3***

In 2004, Antena 3 claimed € 34 million in damages from the Spanish National Football League Association (LNFP) in a follow-on action pursuant to Art. 13.2 of Spanish Competition Act 16/1989.[14] Antena 3 based its claim on a decision of the then competition authority, *Tribunal de Defensa de la Competencia* (TDC), dated 10 June 1993, in which the authority held that the LNFP had infringed Spanish and EC competition rules in connection with the sale of football broadcasting rights in Spain from 1990.

1.1. Background to the claim

Antena 3 participated in a public tender organized by LNFP in June 1989 for the exclusive rights to broadcast Spanish football matches in the five seasons from 1989 to 1994. The tender was won by a company which, subsequently, ceded those rights to the Spanish Regional TV Channels. The LNFP reached further agreements in 1990 and 1991 whereby additional TV and radio broadcasting rights with regard to Spanish football were ceded pursuant to exclusivity arrangements to the Regional Channels, Televisión Española and, for pay-per-view, Canal Plus. Antena 3, and subsequently Tele 5 (the other national private TV channel at the time), filed a complaint against these arrangements before the competition authority. In 1993, the TDC adopted a decision declaring the existence of an abuse of dominant position and of restrictive agreements in contravention of the competition rules, fined LNFP a little less than € 1 million and declared that the infringements should cease.

The TDC decision was upheld on appeal by the *Audiencia Nacional* (first instance judicial review court) and, subsequently, by the Supreme Court (*Tribunal Supremo*).

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[13] Judgment of 20 February 2009 of First Instance Court Nº 11 of Valladolid, in Case 571/2007 *Galletas Gullón, S.A., Mazapanes Donarie, S.L. Nestlé España, S.A. and Others vs. Acor Sociedad Cooperativa General Agropecuaria*, overturned on appeal by judgment of 9 October 2009 of the *Audiencia Provincial de Valladolid* (Section 3)

[14] This provision precluded civil damages actions for infringements of the Spanish Competition Act (as opposed to EC law) except in the case of pure follow-on. That is, it was necessary for there to be a prior and final administrative decision (not subject to appeal).

The *Audiencia Nacional* concluded that, as a result of the practices of LNFP, "*Antena 3 and Tele 5 were being deprived of a substantial source of advertising revenue*".

1.2. The claim for damages

Antena 3 filed its follow-on claim before the Fourth First Instance Court of Madrid, over ten years after making its competition complaint, in 2004. Antena 3 claimed it had suffered loss of profit in the form of lost net advertising revenues which it would have earned had it not been deprived the corresponding football broadcasting rights. Antena 3 produced an expert's report which concluded that the damages inflicted were between € 34 and € 36 millions.

The expert report calculated the difference between what Antena 3 would have earned in advertising with football rights and what it actually earned during the reference period from alternative programming. The former amount (predicted net earnings) was calculated on the basis of:

(i) the estimated advertising revenues during football matches, figure which was based on a number of premises, such as the share of market Antena 3 would have achieved (set at one third) and the time during which each football match retransmission would have impacted advertising revenues (set at three hours); net of

(ii) the estimated cost of the football broadcasting rights absent the infringement, cost which was nominated "*reasonable price for football*" by the experts.

The difference between the two values (estimated net advertising revenues with football and real net advertising revenues without football) was then capitalized and that amount updated to fix the final damage suffered at the moment the writ was filed in 2004.

The LFNP filed two expert reports which concluded that Antena 3 had suffered no damage and, even, that the company had avoided a loss as a result of not being able to access football broadcasting rights.

1.3. The courts' findings

Both courts, at first and second instance, concurred that, by application of Art. 13.2 of the Competition Act, the infringement was, as a matter of law, established by the competition authority's decision and that the culpability of LNFP for those acts was implicit in that decision. The key question to be assessed by the civil courts in order to decide on the award of damages was, therefore, the proof of that damage.

Both courts concurred on the legal test to be applied (pursuant to the Supreme Court's jurisprudence on the matter). The loss of profit claimed had to based on a "but for" test – that is, what would have happened if it had not been for the harmful act - applying a criteria of probability: "*a certain objective probability which results from the normal course of events, generally and in the specific circumstances of the case*".[15]

The court of first instance went on to affirm that, in the case at hand, there was no doubt that in all probability the foreclosure of Antena 3 from the market for football broadcasting rights had caused the company a loss of profit. The judgment referred, *inter alia*, to the importance of football in Spanish television and to the clear declaration on the question of effects in the judgment of the *Audiencia Nacional*. That is, the court held that the existence of the harm had already been proven in the administrative law process, it only being necessary in the civil process to prove the amount of the damage caused (the quantum). The conviction that some harm had been suffered and that, therefore, some damage should be awarded seems to have informed very much the analysis of the first instance court.

The appeal court, by contrast, did not adopt this approach and, rather, in its assessment of the economic evidence, indicated that it shared the doubts of LNFP's experts as to whether Antena 3 would have earned higher revenues as a result of football-related advertising. This underlying doubt as to the existence of damage also seems to have influenced the appeal court's decision. Arguably, there may be an error in this since the court may, without explicitly intending to, have erred on the side of putting into question the very ruling (the finding of infringement of the competition authority) which it was being asked to apply. That is, by questioning the existence of damage it was ruling counter to the decision it was charged with applying under the Competition Act.

As to quantum, the first instance court, recognising with humility its lack of expertise in economic matters, nevertheless considered that the explanations of the experts of Antena 3 were reasonable and sufficiently clear and persuasive. As a result, the decision upheld the plaintiff's right to damages and ordered LNFP to pay Antena 3 €

[15] For example, judgments of the Supreme Court of 26 September 2002 and 14 July 2003.

25.5 million by way of the loss of profit suffered by the company (excluding only the two seasons of 1996/97 and 1997/98 from the damage calculation on the basis that Antena 3 had been able to broadcast certain weekday matches during that period).

By contrast, on appeal, the *Audiencia Provincial de Madrid* dismissed the claim entirely on the basis that Antena 3 had failed to prove the loss of profit claimed. The court's principal objection to the economic evidence produced by Antena 3 was that the "*reasonable price of football*" was a hypothetical figure which had no basis in the real market and was, indeed, seriously put into question by certain other market data which was available in the administrative proceeding or had been produced during the civil pleadings. The appeal court was of the conviction that the price of football rights would have been significantly higher than that calculated by Antena 3's experts. There were also other premises used in Antena 3's economic evidence which the court did not find convincing. In short, the court seemed to consider that the amounts claimed were far beyond what were realistically attainable and, indeed, the judgment raised serious doubts as to whether any damage was suffered at all by the television company. In this sense, the judges were rather more persuaded by the evidence of the defendant's experts, who (importantly) boasted some experience in the market for football broadcasting rights and who asserted that no loss had been caused to the television company.

The Court went on to indicate how it considered the assessment of damage should more properly have been carried out. It proposed, for instance, that the plaintiffs could have compared Antena 3's profitability during the period of the infringement with that of its competitors who had access to football rights during that same period. However, such a method for quantifying the damage sustained presents a problem from the perspective of economic theory, since data from the market during the time of the competition infringement would arguably have been vitiated by that infringement and, therefore, could not be used as a proper indicator of how the market should have performed or of the level of the economic damage suffered.

The assessment of the appeal court became the definitive ruling on the economic evidence in this case since the Supreme Court did not acquiesce to Antena 3's request for leave to appeal the judgment, issuing its order rejecting that request on 14 April 2009. The court based its decision on the consideration that Antena 3 was in practice seeking illegitimately to use the Supreme Court "*casación*" appeal to have the evidence retried for a second time.

2. *Conduit*

The Conduit case is the first case for breach of competition law to have been tried before the Mercantile courts and the first example of a successful stand-alone action. As such, it displays the huge advantages of the new private enforcement system, particularly in terms of the considerably shorter time periods to access justice.

Conduit, the Spanish subsidiary of a pan-European directory enquiry provider, filed a claim against Telefónica in January 2005 for damages for breach of EC competition law and of applicable telecommunications regulations. The claim alleged that Telefónica had impeded the launch of Conduit's directory enquiry (DQ) service[16] in Spain in 2003 causing the company damages.

Less than ten months after the filing of the claim, on 11 November 2005, the Fifth Mercantile Court of Madrid adopted its judgment upholding Conduit's claim. His Honour, Justice Arribas,[17] held that Telefónica had supplied deficient subscriber data to Conduit (constructive refusal to supply) and that the data was not of the same quality or completeness as the data provided by Telefónica to its own DQ services (discrimination). Justice Arribas held that these facts constituted a breach of applicable telecommunications regulations and an abuse of the company's dominant position. Finally, he awarded part of the direct damages claimed by Conduit. However, he rejected the claim for loss of profit entirely.

Both Telefónica and Conduit appealed the first instance judgment and, on 25 May 2006, the Appeal Court (*Audiencia Provincial de Madrid*) upheld the initial ruling, dismissing the appeals. The court confirmed the Mercantile Court's conclusion that the data was seriously flawed and that this impeded the normal development of competitive services, amounting, in practice, to a refusal to supply. Nevertheless, the Appeal Court also upheld the first instance ruling's rejection of the claim for loss of profit.

Conduit sought leave to appeal the decision on quantum to the Supreme Court and requesting an ECJ reference but leave was denied by order of 18 December 2008.

1.1. Background to the claim

[16] DQ is a service whereby a user, calling from a fixed or mobile telephone, can make enquiries concerning telephone numbers and certain other data relating to subscribers of telephone services.
[17] Now Magistrate in Section 28 of the Madrid appeals court.

Prior to the civil claim, Conduit had lodged a complaint with the national regulatory authority, the *Comisión del Mercado de Telecomunicaciones* (CMT). The complaint was upheld by the CMT by virtue of an interim measure resolution adopted on 26 June 2003, in which it found *prima facie* existence of the facts alleged by Conduit, and confirmed in a final decision of 13 November 2003. The CMT held that the data provided by Telefónica was incomplete and deficient (in contravention of regulatory requirements) and, furthermore, constituted a discriminatory practice, amounting, as such, to an abuse of its dominant position. The CMT underlined the fact that Telefónica's behaviour referred to an essential input for the provision of competitive services and that its refusal to provide fair and non-discriminatory access had the effect of distorting competition in the newly-liberalized DQ market impeding the ability of new providers like Conduit to compete effectively.

The direct consequences of the incumbent's action, according to the CMT, were twofold. First, it inflated Conduit's costs (as was recognised in the interim measure decision adopted by the CMT on 26 June). Secondly, it forced a deterioration in service quality. The June interim measure decision affirmed that this made it "*impossible to provide a directory enquiry service in adequate conditions*" and the November decision described the data as "*deficient for the carrying-on of the activity*".

This also had an assumed impact on customer satisfaction and, therefore, on demand for the service as recognised by the CMT's services in their report on the case in September 2003, stating that Telefónica's conduct:

> "*… has prejudicial effects on the market for directory enquiry services, and this is so because the availability and exactitude of data constitute critical factors for competition in the provision of these services to the public, especially with regard to the image that the customer can have of the service, as well as in relation to the consequent loss of revenues which it equally suffers owing to the reduction in enquiries.*" (My translation)

On 1 March 2006, on an appeal filed by Telefónica against the CMT's Resolution of 13 November 2003, the Spanish administrative court (*Audiencia Nacional*) held that the CMT had acted *ultra vires* by declaring the abuse of dominance (this being a faculty vested in the Competition Authority and the courts). However, it upheld the CMT's finding on the facts: i.e. Telefónica had, indeed, provided defective data loads and discriminated in favour of its own DQ operations.

1.2. Damages claim

1.2.1. The heads of damage

The claim filed by Conduit before the Fifth Mercantile Court of Madrid alleged that, by virtue of its illicit practices, Telefónica had caused the company damages. These damages were assessed and calculated by an independent expert report.[18]

According to that report, Telefónica's behaviour first raised Conduit's costs, for instance forcing it to spend money on alternative data sources. This is an instance of "raising a rival's direct costs" (RRDC). Second, it forced a deterioration in the quality of the service provided by Conduit ("forced QD"). RRDC affects costs, while forced QD affects demand. More precisely, forced QD results in an inward shift of the residual demand faced by the firm suffering the abuse.

The total amount of damages claimed in Court by Conduit was thus the sum of two magnitudes: "direct costs" plus "loss of sales due to forced QD". Given that it was this head that caused most difficulties with the Court, we will focus on the latter.

1.2.2. Computation of loss of profit

Conduit argued before the Mercantile Court of Madrid that the poor Telefónica data slowed response times and, most importantly, the information provided to Conduit's customers would often be incorrect or simply it would not be possible to provide the information requested. This impact on the quality of the service of Conduit, the degradation of its service, had an automatic knock-on effect: the loss of sales caused by users experiencing a poor service and, hence, deciding not to reuse it.

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[18] See Martínez-Granado and Siotis, "*Sabotaging Entry: An Estimation of Damages in the Directory Enquiry Service Market*", forthcoming in the *Review of Law and Economics*, Berkley Electronic Press. This is an academic paper based on the expert evidence prepared for the case and which has been presented at: Université de Lausanne (DEEP-HEC), Université Libre de Bruxelles (ECARES), Universidad Carlos III de Madrid, Universidad del País Vasco, Universidad Autonoma de Madrid ((2008), the CEPR workshop on "*The Effectiveness of Competition Policy: Issues and Methods*" (Paris, 2005), the "*ACLE workshop on Forensic Economics in Competition Law Enforcement*" held at the University of Amsterdam (2006), the EALE meeting (Madrid, 2006), ACE workshop (Madrid, 2006), the Jornadas de Economía Industrial held in Barcelona in September 2006, and at the 2007 Conference on Research on Economic Theory and Econometrics (Naxos, Greece). An earlier version of this paper was circulated under the title: "*Computing Abuse Related Damages in the Case of New Entry: An Illustration for the Directory Enquiry Services Market*", CEPR Discussion Paper 5813, 2006.

In order to quantify the loss of profit suffered, Conduit's experts constructed a "*but for the abuse*" scenario. Since Conduit never operated in an abuse free context in Spain, it would not have been possible to use data pertaining to the Spanish market in order to build the "*but for*" scenario. Simply put, Spanish data could not be used for that purpose since it was vitiated by the abuse itself. The direct corollary is that any econometrics based on Spanish data did not permit causal inference, since the results reflected both normal economic forces as well as the effect of the abuse.

This is clearly established in official (or quasi-official) manuals that have been drafted to guide antitrust authorities on both sides of the Atlantic[19] and is, indeed, consistent with the Spanish Supreme Court's jurisprudence on loss of profit calculation.

Furthermore, given the abuse occurred precisely during the crucial moment of effective opening of the DQ market to competition in Spain in 2003, it would have been impossible to recreate that situation by analyzing the Spanish market on the basis of how the market performed two years later at the time of the trial in 2005, since the situations were not comparable and, in fact, Conduit had already exited the market.[20] In order to measure the amount by which Conduit's market share had been affected, the claimant had to look for a means to recreate a "normal" market situation (what would have occurred with its market share "*but for*" the unlawful behaviour).

The avenue chosen in the expert analysis to compute the loss of profit suffered by Conduit consisted in a combination of a "*yardstick approach*" and econometric modeling.[21] Specifically, the expert report used as a benchmark Conduit's experience on the UK market to build the "*but for*" scenario. That is, it took the UK market performance of Conduit as a yardstick for how it should have performed in the Spanish market. That market, the UK, also opened to competition in 2003 and in similar circumstances (albeit with fiercer competition).[22]

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[19] See, for example, Hall and Lazear (1994) in their definitive *Reference Guide on Estimation of Economic Losses in Damages Awards* for the US Federal Judicial Center (page 280).

[20] Conduit sold its business to Telegate in June 2005.

[21] See Connor (2006). These methods are expressly recognised in the Commission's Staff Working Paper accompanying the Green Paper at paragraphs 133 and 134.

[22] New 118 numbers were launched from early 2003 and the legacy 192 number of BT was withdrawn in August 2003. Conduit launched its own 118888 service in the UK almost simultaneously with its 11850 Spanish service. The adequacy of choosing the UK market is discussed in the report submitted to the court, was accepted by an independent economic expert appointed by the court and also by the first instance court itself which admitted "the possibility of taking the UK market as a reference", albeit disagreeing with the results of the comparison carried out by the report.

The expert report estimated two versions of a simple market share model, where Conduit's market share was determined by its relative price and its relative advertising, as well a series of time dummies.[23] With the estimates that were obtained from UK data, the expert report was able to predict Conduit's market share had abuse been absent in Spain. More precisely, it took the UK point estimates and Conduit's *observed prices and advertising* in Spain to predict an abuse-free market share. In this way, the report was able to measure the effect of forced QD *given the prices and advertising chosen by Conduit* in Spain.

The difference between the real result of Conduit's performance in Spain and what would have occurred in absence of abuse applying this model constituted a lower bound of the loss of market share attributable to the abuse and the basis for the calculation of the loss of profit suffered by Conduit and was the basis for the calculation of the loss of profit suffered by Conduit (difference between earnings given the difference in market share, observed and estimated).

1.3. Assessment of effects and causation by the Courts

The first instance court considered that Telefónica's abuse was a circumstance which "*impedes normal service development*" and was equivalent to a refusal to supply.[24]

The judgment observed that this practice produced a distortion of competition and, concretely, affected the competitiveness of Conduit (page 67):

> "*There is no doubt that the bad quality of the data supplied by the defendant initially affected the quality of the information service offered by the plaintiff via its 11850 number and that it could have affected its market share, to the extent to which a client unsatisfied with the information would with difficulty turn to that number again should they wish to use such service again*". (My translation)

Despite this, the court held that there were other factors which could have influenced the evolution of Conduit's market share more significantly and which should have been taken into account by Conduit's economic experts. These were, primarily, the lack of experience of Conduit's teleoperators attending the Spanish service and the lack of advertising spend. Justice Arribas also expressed his surprise at the amount that Telefónica's action had allegedly affected Conduit's services, causing a huge

[23] See Martinez Granado and Siotis (forthcoming, *Review of Law and Economics*) for a detailed exposition.
[24] Page 53 of the judgment.

impact on market share and revenues – this was a factor which clearly erred him on the side of caution.

For its part, the *Audiencia Provincial* underlined the gravity of Telefónica's actions in the context of the liberalization of the previously monopolized DQ market and given the "*significance for competitors of an essential service input*" such as the principal subscriber database. Nevertheless, it also upheld the first instance ruling's rejection of the claim for loss of profit. The appeal court concurred that there were other factors which explained Conduit's poor performance in Spain and concluded that the causal link between the competition law infringement (the abuse) and the damage had not been adequately proven.

The *Audiencia Provincial* adopted Telefónica's expert's thesis that in Spain and irrespective of price charged and the quality of the service (in particular, the information provided), a DQ provider's advertising spend explains completely the market share attained and, hence, the database defects has no real effect on the demand for a company's service and hence its market share. Telefónica's experts argued on the basic of market data that the only real, perceived factor which had an influence on market share was advertising spend: put simply, the higher the advertising spend, the higher the market share.

In its decision rejecting Conduit's request for leave to appeal, the *Tribunal Supremo* maintained, *inter alia*, that the appeal court was entitled to give greater weight to the evidence of Telefónica's expert over that of other experts that had intervened in the case and, furthermore, that the court's reasoning did not display any manifest error which merited review, noting that the proof of loss of profit requires "*absolute certainty as regards any deductions or probabilities employed, that is as regards the connection between the unlawful act and the loss of profit claimed*".

1.4. Possible inconsistencies in the economic analysis

With all due respect for what is perhaps not an easy task for civil judges, a number of errors of appreciation were arguably committed in the assessment of the evidence submitted on damages in this case. Some of these are addressed below.

1.4.1. Damages resulting from inflated costs

Conceptually, the recognition that Conduit incurred direct costs inexorably leads to the conclusion that total damages resulting from these inflated costs were larger than these direct costs. Indeed, as a matter of economic theory, the lost profits resulting

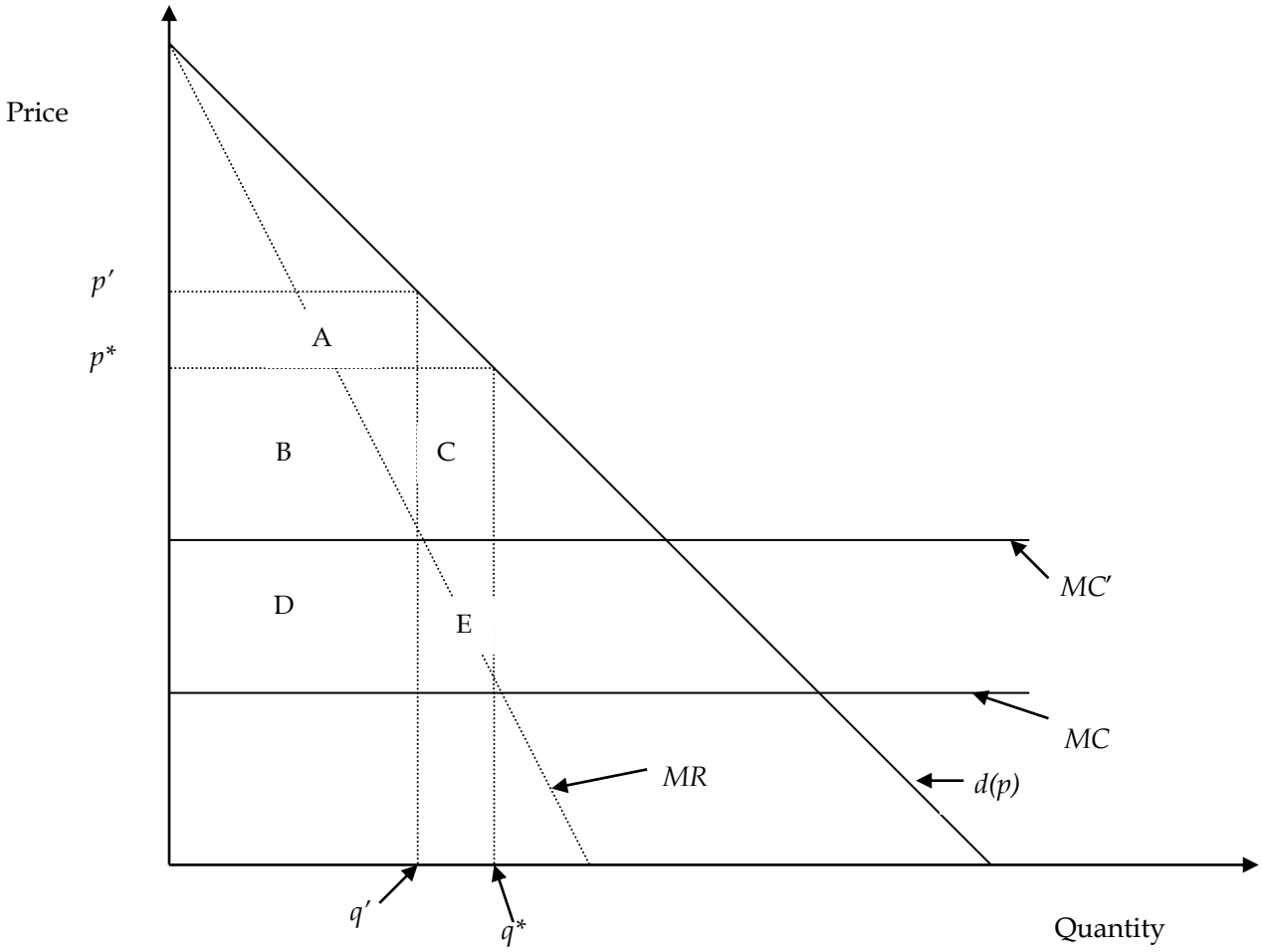
from an abuse are always larger than the direct costs that can be imputed to the incumbent's actions. Save for the polar cases of Bertrand competition with no capacity constraints or perfect competition, firms face a downward slopping residual demand curve.

Suppose constant marginal costs MC, and that a firm faces the residual demand depicted in Figure 1.[25] In the absence of abuse, the firm would earn gross profits equal to BCDE. If its costs are increased to MC', profits dwindle to AB. The "direct damage" is equal to the quantity produced under abuse times the increase in costs, that is D. Even if the firm manages to recover D through the courts, it still suffers a net loss, as A<CE. This always holds, since profit maximization in the absence of abuse implies that BCDE>ABD.[26]

[25] Assuming constant MC is an accurate and accepted description of the industry. Still, the conclusion would be exactly the same with alternative marginal cost schedules.

[26] For a more detailed explanation, see Martinez Granado and Siotis (forthcoming, Review of Law and Economics).

Figure 1: Effect of cost raising strategies on the injured party



In other words, basic microeconomic theory simply says that the effect of an abuse resulting in inflated costs generates damages that are always greater than the "direct cost" itself. Essentially, the higher cost of an input has an effect on profitability in addition to increased costs because it adversely affects sales (either by reducing demand or reducing production).[27] This point did not apparently have any bearing on the courts' analysis of the case.

1.4.2 Damages resulting from offering a lower quality service

As noted above, it was established by the courts that the problem of faulty data affected the quality of Conduit's service. Given the price and advertising chosen by Conduit this must have led, *ceteris paribus*, to a lower volume of sales as compared to an abuse-free situation. Quite simply, it is not possible to reconcile the existence of forced QD and the absence of any effect on the volume of sales.

Telefónica and its experts argued that the low market share achieved by Conduit was the result, principally, of its limited advertising effort. That is, Conduit achieved a lower market share in Spain than other companies simply because it spent less on advertising. This is what we would call a *simple correlation*: larger advertisers achieve a larger market shares. The damage calculation presented by Conduit, however, looked at *conditional correlations*: given a specific advertising effort, what market share ought Conduit to have been achieved in Spain (as compared to that which it actually achieved in the abuse situation). The fact that the damage estimations *were obtained conditional on* Conduit's advertising behaviour appears to have been overlooked or misunderstood by the courts.

The appeal court arguably also erred in its endorsement of the Telefónica expert evidence. First, that report used Spanish data to base its reasoning. As mentioned above, if an abuse has been committed (a fact recognized by both courts), the Spanish market data is vitiated by the abuse itself and it cannot be used to make any sound casual inferences. Second, that expert report maintained that no infringement had actually been committed by the defendant, something which perhaps should have discredited that evidence before the court.[28]

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[27] This principle is recognised in the Commission's Green Paper Staff Working Paper: "*128. A damage due to overcharge can consist of two parts, the damage due to the infringement (i.e. the higher price paid due to the cartel), but also lost profits due to the fact that the purchaser might have bought fewer input goods or services, e.g. for production purposes, and thus made less profit as he only could produce and sell fewer products*" (Staff Working Paper which accompanied the *Green Paper on damages actions for breach of EC antitrust rules* of 19 December 2005).

[28] We will return to this point in the *Acor* case below. An interesting contrast can be drawn.

Furthermore, it is very hard to uphold the appeal court's contention that market shares are solely driven by advertising from an economic perspective. Obviously, other factors, such as price and quality of service, have a bearing.

As a possible explanation for Conduit's poor performance on the Spanish market, the Courts also accepted Telefónica's second argument, namely that Conduit had hired poorly trained personnel and that it lacked experience on the Spanish market. The claim of the lack of experience in the Spanish market was based on conjecture rather than direct evidence and, on the facts, it was surprising that this evidence was deemed sufficient by the courts.[29] Nevertheless, even if, for the sake of argument, it were assumed to be the case that Conduit's personnel were worse prepared for liberalization than its competitors, this would not invalidate the central claim; namely, that Conduit *lost sales because of forced QD*. In the best of cases, it would *reduce but not eliminate* the amount of sales lost because of forced QD. Put another way, poor and incomplete data would impede the service in all events and cause a loss of calls and therefore of profit.

1.4.3. Search costs

One final point which had an essential bearing on the damages assessment is the existence of search costs. The existence of search costs means that any abuse that occurs during launch has permanent effects. Despite the fact that their existence is recognized in both judgments, the long-term implications for the performance of Conduit and, therefore, the level of damage do not seem to have been adequately appreciated.

Liberalised DQ services were new to Spanish consumers in 2003. A single regulated number (1003) was replaced by various 118XY numbers. These new 118XY services were allowed to provide value-added services (such as call connection or SMS information delivery), quality levels were unknown and, finally, prices levels (and differences thereof) were also new. In short, consumers had to incur search costs in order to obtain information regarding these new offers. For an average consumer, these search costs are low in absolute value, but very large compared to the potential savings to be achieved by incurring them. As is well known, this is the trade-off facing consumers: it is not the absolute value of search costs that matters, but whether it is worth incurring them. As pointed-out by the British National Audit

[29] For instance, Conduit was an experienced DQ provider in Europe, training for call center staff is fairly limited, and all services, but Telefónica's, were starting anew in Spain in 2003.

Office (2005), expenditure on DQ services is a very low proportion of income; as a consequence, the savings to be achieved by looking for the best offer are minute when compared to total income.[30]

The importance of adopting a dynamic approach when search costs are present is stressed by NERA's (2003) report to the UK's Office of Fair Trading (OFT) and Department of Trade and Industry (DTI). In its words:

> "***When assessing an abuse of dominance investigation with switching costs, the importance of taking a dynamic approach cannot be overstated*** *(our emphasis). (…) Competition in markets with switching costs can often be divided into a 'phase 1' and a 'phase 2'. In phase 1, firms price low to build a customer bases, whilst in phase 2, they concentrate on 'milking' their installed customer base and price high."*[31]

Further, the report notes that the ability of firms to extract rents is inversely proportional to the competitiveness of the market during 'phase 1'.

In short, the time profitably to build a market share is during the launch phase, when customers have not yet chosen a brand to patronise. Building a customer base at a later stage is unlikely to be profitable, since it is much more costly to induce customers to switch to a new brand as opposed to simply maintaining them. The direct corollary is that an abuse that weakens a rival during the launch phase (e.g. by a combination of RRDC and forced QD) *will have long lasting effects*. In terms of lost profits, the effect of the abuse will continue to be felt *even after* costs and quality are at their "normal" levels.

The existence of relatively high search costs was recognised in both judgments in the Conduit case. Nevertheless, the tremendous impact that Telefónica's infringements had on Conduit's business in Spain because of this was perhaps not so well understood. Indeed, the courts were clearly surprised by the size of the alleged impact on the plaintiff's business and perhaps as a result were excessively cautious.[32]

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[30] *Directory Enquiries: from 192 to 118*, Report by the Comptroller and Auditor General, National Audit Office, 18 March 2005.

[31] The discussion is framed in terms of switching costs; the same conclusions hold in the presence of search costs.

[32] *"It is a notorious fact known by any consumer that the market for directory enquiries, as affirmed in the plaintiff's expert report, is characterized by the existence of "search costs" or, put in a way that can be understood, that no consumer will employ time and much less money to search for the best offer between competitors when he has to locate a directory enquiry number, given the reduced price of the service and the*

1.5. Concluding remarks

It is notable in the Conduit case that the courts set a very high standard of proof for establishing damage, standard which was furthermore endorsed by the Supreme Court, albeit in an order on leave to appeal not on a full review of the appeal.

Arguably, the Conduit case is one where, *prima facie*, the existence of damage in the form of loss of profit is obvious and implicit in the findings of abuse. It was established in the case both by the regulator and the courts that the infringement in question affected an essential facility and the refusal to supply would have affected, and did affect, the new entrant's service (hence regulation was necessary in the first place). This analysis accords perfectly with established competition doctrine of the European Commission, as set out in its Article 82 Guidance Paper: (i) the degradation in the supply of a product or service is a typical example of a constructive refusal to supply; (ii) particularly serious refusals to supply are those that are likely to eliminate competition in a downstream market and cause consumer harm and such consequences can be presumed to exist where a regulator has intervened to impose a regulatory obligation.[33] All these tenets were met in this case.

Evidently, the task of proving causation and harm in a civil claim is that of the parties that allege it, together with their advisers and experts, and such a fundamental legal requirement must be cherished and protected. However, it is surprising, against the presumption that harm would clearly have been caused and in fact probably was caused, that economic evidence with certain critical flaws (as identified above) should have been granted such weight as to rebut that presumption and be preferred over econometric evidence complying with recognized practice and methods, which furthermore confirmed predictions based on economic theory and has since been blessed by the highest peer review.[34] What at least invites reflection for both practitioners and judges as regards the tools that can be used for assessing and adjusting damages is that, on the particular facts and bearing in mind the evidence produced, the result of the case should have been nil damages for loss of profit.

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tiny percentage it represents of his income, much less so given the price changes." (pages 69-70 of the first instance judgment).

[33] *Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings*, 9 February 2009.

[34] Indeed, as noted in footnote 19 above, the economic analysis used by Conduit's experts has further survived the test of time and the most thorough and reputable peer review.

3. ***Acor.***

The Acor case may note a point of inflection in the assessment of economic evidence of damage. It remains to be seen whether it is a case that will be followed. It certainly displays some particularities which may limit its general application. It was, first, a cartel case, unlike the two just analysed, and one concerned with direct loss rather than loss of profit. It was also a follow-on case under the 1989 Spanish competition regime. Finally, it referred to a peculiar market with a very high level of sector-specific regulation. Nevertheless, it constitutes an example of a distinct and interesting approach to economic evidence. I certainly wait with interest to see what the Supreme Court may have to say about this case if there is an appeal.

3.1. Background to the case

The sugar cartel case is, of course, well known. The particular facts of the Spanish damages case are as follows. Nestlé España and eight other Spanish confectionary companies sued Cooperativa Acor, a Spanish sugar producer, for its participation in an industrial sugar cartel that fixed prices during the period February 1995 to September 1996. Like the Antena 3 case, this was a follow-on action under the 1989 Competition Act based on a decision adopted quite some years before by the Spanish Competition Authority, the then TDC,[35] which had subsequently been confirmed by rulings of the *Audiencia Nacional*[36] and the Supreme Court.[37]

It should be noted that the TDC had not discovered evidence to link Acor definitively to the cartel in its initial period and, therefore, the cooperative was not attributed liability, and therefore not fined, for initial sugar price increases agreed in the months of February and April 1995. Rather, Acor was sanctioned for its participation in further price collusion from September 1995 onwards, which consisted in minor price increases and a maintenance of existing price levels avoiding the passing-on of cost savings, for example in relation to regulated storage tariffs.

3.2. Decision of the court of first instance of Valladolid

[35] Decision of 15 April 1999.
[36] Judgment of 4 July 2002.
[37] Judgment of 26 April 2005.

On this occasion, the court at first instance rejected the claim for damages. The court first considered that in a follow-on case, as a matter of law, Acor could not be held liable for acts for which it had not been held liable in the administrative law proceeding. As a result, the defendant could not be held liable for damage caused by the price uplifts agreed during the initial period of the cartel, February and April 1995. This assertion, as a matter of law, certainly holds considerable force, although it is difficult to analyse properly on the facts without a far greater understanding of the case. In all events, this first ground of the decision was important since the initial price increases were the most material increases agreed by the cartel.

The Eleventh Court of First Instance of Valladolid went on to assess the other three subsequent acts (as of September 1995) of the cartel which had been specifically identified by the TDC in its 1999 decision. The court maintained that any damage, to be recoverable, would have to have generated the corresponding unjust enrichment for the cartel members. Not only would the plaintiffs need to show that they would have paid a certain sum of money less for sugar had it not been for the cartel but the court would need equally to be persuaded that the cartel members would have made an equivalent sum less had it not been for their collusion. Such affirmations were made, it seems, without any specific authority.

In all events, the court was not persuaded that the acts from September 1996 had had such an impact or at least not a sufficiently detectable impact. The court was particularly unpersuaded by the main argument basing the claim for harm with respect to the second period of the cartel (when Acor's direct involvement had been proven) since, rather than referring to an agreed increase of sugar prices, it referred to the fact that the price of sugar should have fallen more than it did. Applying its premises with regard to the need to show unjust enrichment, the court was particularly adverse to awarding damages for this aspect of the claim since it could not perceive the illegal gain that had arisen for Acor.

In conclusion, the court did not consider Acor could be held liable for the main price increase agreements reached by the cartel members parties before its (proven) participation in the cartel and therefore only considered valid the claim based on the price increase which had been agreed between September 1995 and July 1996 and, in turn, rejected that claim on the basis that the damage was minimal and insufficiently proven.

3.3. Court of Appeal judgment

The Court of Appeal of Valladolid quashed the judgment of the court of first instance, granted the full amount claimed (€ 1.1 million), plus interest from the date the claim was filed, and ordered Acor to bear the cost of the proceedings, including legal costs and experts' fees.

The decision of the Court of Appeal adopted a very interesting point of departure. Concretely, the Valladolid *Audiencia Provincial* maintained that the existence of damage could not be questioned at this stage. It is worth citing the judgment on this point:

> "*If the Competition Tribunal (confirmed by the Audiencia Nacional and the Supreme Court) has declared that the damaged caused by the defendant was extremely grave, what we have to do is to assess economically such graveness, and what we cannot say is that the administrative rulings are binding and then provide that the infringement has caused no damage.*" (My translation)

The extent this statement of principle influenced the court's assessment of the economic evidence of damage cannot be understated. Indeed, it provoked a fundamentally different position to that of the first instance court (and, for that matter, to that we have seen in the appeals courts in the Antena 3 and Conduit cases).

In assessing the weight to give to the economic evidence produced during the pleadings, the Court of Appeal decided that the expert´s report filed by Acor should be completely dismissed as evidence. That report had concluded that the plaintiffs had suffered no damage at the hands of the cartel. The Court considered that a report containing such a conclusion could not be taken into account in a follow-on case. Again, the reasoning of the court merits citation:

> *"The expert report [of Acor], filed with the defence, disqualifies itself on its own when it reaches the conclusion that the carrying out by Acor of restrictive practices has not caused any harm to the plaintiffs. That is to say, despite the fact that in three rulings by different tribunals it is expressly stated that the horizontal price-fixing has caused a very serious harm, particularly by affecting the price of products with which they had to compete in other countries … now the defendant's expert understands that these very serious damages should be*

> *valued in 0 euros. In other words, the fact that the price of any product on the market is altered in one way or another has no consequences at all. There is no impact at all. For this reason, we understand that the expert´s report filed by the defendant is contrary to the rulings issued by the Competition Tribunal, the Audiencia Nacional and the Supreme Court. It's as if we were executing a judgment and when, after a very long process in which it has been declared that important damages and losses have been caused, the time for assessment of such damages comes, we ruled that those important damages acknowledged in the previous binding decisions and which were qualified as serious should be assessed in 0 Euros. The calculation of the amount of damages could be higher or lower but they could never be said to be nil*". (My translation)

On the question of the period prior to September 1995, the court agreed that it would not be possible in a follow-on case to find Acor liable for the period prior to that in which it had actually been found to have participated in the cartel. Nevertheless, the court found as a matter of fact that the price applied by Acor in September 1995 incorporated all the previous price rises and, therefore, the effect on the plaintiffs at that moment was the same.

The court went on to consider the economic expert report filed by the plaintiffs to assess the damage suffered: the difference between the price that the products would have had in a competitive market unaffected by the cartel and the price actually paid by the plaintiffs. The court's reasoning in this part of the judgment is sparse in the extreme, but also has the benefit of being very simple. The court essentially took the assessment set out in the plaintiffs' expert report on board. The Court of Appeal acknowledged that the calculation of the damage was a complicated task and considered that the calculation carried out by the expert was a reasonable one. Again, it is simplest to refer to the words of the court themselves:

> *"The fact that there are great difficulties in [the damage] assessment does not mean that it is not possible. The expert of the Plaintiffs made an assessment that we judge appropriate and that leads us to grant the amount claimed."* (My translation)

3.4. Pass-on

Both Courts –First Instance and Appeal- made it clear that pass-on could be used as a defence. However, neither applied it.

The court of first instance suggested that the burden of proving pass-on may not have been so much the defendant's but rather that it was for the plaintiffs to show that they had not been able to pass on. The court argued that it was a common fact of the normal functioning of markets that an increase in the cost of a raw material would increase the price of the final product and, furthermore, the plaintiffs had privileged access to the information on this question. This is certainly a controversial statement of economics by a court and not apparently substantiated by any specific legal doctrine or authority. Nevertheless, on the evidence the court of first instance considered that there had been no pass-on.

For its part, the court of appeal did not enter into any express assessment of pass-on. It limited itself to noting the issue but proceeded, as already indicated, to take fully on board the analysis of the plaintiff's expert report (having discarded that produced by the defendant).

4. Conclusions.

There are perhaps three simple, but significant, observations we can usefully make having finished this brief review of recent Spanish case-law and its treatment of the question of proving and quantifying damages:

a) The rigorous use of economic theory and practice is essential in competition cases

Economic analysis is an integral part of competition law analysis and this is increasingly so. For instance, just to take an example, the Commission's Article 82 Guidance Paper reflects the importance of economic quantitative analysis in the review of exclusionary abuses.[38]

We are accustomed to see courts at EU, and increasingly national, level reviewing competition authority intervention on the basis of whether it interprets economic evidence correctly. Another Telefónica case is a case in point for Spain: "*Planes Claros*". In 2000, Telefónica was fined 8.4 million € (a record at the time) for abuse of dominance. The core of the accusation was Telefónica launched a massive advertising campaign to impede the entry of its first competitor in fixed line

[38] At paragraph 21.

telephony, Retevisión, the central material proof being a Telefónica briefing to its advertising agency which explicitly requested the development of an advertising campaign aimed at introducing doubts on the quality of Retevisión's offer. The Supreme Court quashed the decision[39] on the basis that there was insufficient evidence of negative effects on the market. Analysing the evidence, the Supreme Court did not consider Telefónica's advertising campaign was anticompetitive. On the contrary, it noted that it resulted in lower prices for consumers. Second, it considered that the mere existence of an intention was insufficient to prove that an abuse had taken place and it considered that Telefónica's behaviour was a legitimate response to entry. Third, it analysed whether that particular advertising campaign could have constituted a barrier to entry and concluded that it could not. Finally, it noted that the alleged abusive behaviour had no effect on the market.

This decision, and many others, show a clear concern for applying economic theory, and the empirical predictions that are derived from it, correctly. This is vital, too, in the analysis of civil claims of course.

b) Damages assessment in these cases can be very complex and is not an exact science

In its White Paper on private antitrust enforcement, the European Commission has emphasized that the calculation of damages is complex. Courts must therefore rely on complex economic expert evidence in assessing damage.

Such evidence cannot furthermore be "exact". Exactitude is not possible, as the damages assessment refers to a situation that has never been observed. So, a national court, that has found that a claimant had been harmed by the defendant's infringement of the competition rules, cannot exclude damages simply because the claimant cannot prove sufficiently precisely the amount of the harm suffered. Such "rules of nature" may need to be particularly heeded by judges and jurisprudence in asserting how the criteria established for proving damage should be applied in these cases.

c) The need for transparent rules on the assessment of economic evidence

Despite the foregoing, economic evidence needs of course to be assessed by judges. And it needs to be assessed pursuant to coherent and clear rules. Certain discriminating objective criteria can, and should, be employed by judges to assess the validity of economic models. For example, we can venture some fairly

[39] Judgment of 6 June 2006.

uncontroversial but nevertheless important criteria: (i) the "but for scenario" should be plausible; (ii) it should be supported by and coherent with economic theory; and (iii) "experts" should have adequate credentials.

The need for clear and accepted guidelines for the judiciary to follow is, in my view, paramount.

Damien Neven[40], a leading world expert in competition economics and current Chief Economist in DG COMP of the European Commission, notes that:

> *"As the US experience suggests, validation of economic evidence is helped by a clear set of rules which forces the economic experts to state "fully and in a timely manner" the economic reasoning and the facts on which they rely. This is enforced in a code of conduct (the Reference Manual on scientific evidence used by Federal Courts) which incorporates the standards set by the Supreme Court in the Daubert decision."*

Such rules do not currently exist in Spain, or in many EU countries for that matter. The Commission is currently working on producing guidelines on damages assessment in competition cases for national judges[41] and has already provided some guidance on the methods that can be used for assessing damages in its Green and White Papers. Furthermore, it is hoped that the Spanish Supreme Court will soon take the opportunity to make known its position and help to develop and clarify Spanish jurisprudence on damages assessment and its particular application to these types of case.

Quoting Neven again[42]:

> *"Of course, the amount and quality of evidence that needs to be adduced in order to make a finding will depend on* ***priors that are informed by economic principles and accumulated evidence****. As Lord Hoffman famously said in Rehnam, "more convincing evidence is required to conclude that is was more likely than not that the sighting of an animal in a park was a lion that it would*

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[40] Damien J. Neven, 2006, "*Competition economics and antitrust in Europe*", Economic Policy, CEPR, CES, MSH, vol. 21(48), pages 741-791, October.

[41] Oxera was awarded the contract to produce the underlying expert report which will form a basis for these guidelines in December 2008 and that report is on the point of being published. We expect the Commission's guidelines to follow in the course of 2010.

[42] Damien J. Neven, 2006 "*Competition economics and antitrust in Europe*", Economic Policy, CEPR, CES, MSH, vol. 21(48), pages 741-791, October.

> *to satisfy the same standard of probability that the animal was a dog".* (Emphasis in bold)

These types of facile principles are, perhaps surprisingly in the context of complex and data intensive competition cases, fundamental to good adjudication. Without it being possible to make any sensible judgment on the *Acor* ruling (without being privy to the expert reports), it is noticeable that the brief and simply stated position of the Valladolid Appeal Court comes closer than any analysed here to Lord Hoffman's analogy: that is, given the economic predictions regarding the effect of the infringement and the econometric evidence that supported these predictions, the Court accepted the claim "*that the sighting of an animal in a park was a dog*" on the basis that it probably was a dog and not a lion after all!

In the current context of a heightened intensity of competition law enforcement in Spain and a relatively favourable procedural environment, as well as the prospect of further improvements under the future proposed Directive, simple guidance from the European Commission and Supreme Court of Spain of the type identified here is particularly important. Given thatthere is no question that private enforcement litigation has arrived and, in my opinion, the conditions are already in place for it to boom, it is a particularly critical time for such guidance to be provided: potential litigants need it if they are sensibly to evaluate the outcome of upcoming private actions.