QUANTIFICATION OF DAMAGES FROM COMPETITION INFRINGEMENTS IN SPAIN[1]

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This note describes from a methodological point of view the existing jurisprudence on damage claims from competition infringements in Spain. The note starts with a brief introduction describing the Spanish legal framework, it follows with an overview of the main Spanish cases involving damage claims from competition infringements covering cartel cases, vertical contracts cases and cases of abuse of dominant position. The note concludes by describing the actual (and potential) role of the Spanish Competition Authority CNC in this context.

1.- Legal framework

Though in Spain there have not been many Court decisions regarding damage claims in the context of competition infringements, the legal framework in place is appropriate for this kind of private actions. First, the legal framework allows *class actions*, i.e., collective actions where a number of potential affected parties by a competition infringement join their efforts in one single filing. Second, the current legal framework also allows *stand-alone actions*, i.e., it is not necessary a previous administrative infringement decision by the Competition Authority in order to initiate a claim for damages before the Courts. Though not being excessively used in the past, it is expected that the number of private damage actions will increase considerably in the future. For the first time after the adoption of the 2007 Competition Act, Spanish Courts recently granted civil damages to victims of a cartel. In addition to this significant cartel case, damages have also been awarded in the context of vertical contracts and abuse of dominant position cases.

2.- Cartels

The most significant case concerning article 101 TFUE and its counterpart in the Spanish legislation (article 1 of the Spanish Competition Act 15/2007) concerned a sugar cartel. Following a decision of the Competition Authority, on October 9, 2009, a provincial court[2] (a court of second instance) overturned a lower court decision and mandated a sugar manufacturer to pay euro 1.1 million to nine firms which had been purchasing sugar at higher prices due to the existence of a cartel. The court of first instance denied both the existence of damages and the causality relation with the infringement. On the contrary, the upper court accepted the existence of damages. Both parties had made experts' submissions on the

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[2] Valladolid Provincial Court Nº 3, decision 261/2009, 09-10-2009.

calculation of damages. The Court accepted the estimate submitted by the claimant (which was not made public) and awarded the damages claimed. The decision is brief and does not argue why the plaintiff's damage estimates, and not the defendant's, were accepted. Also, the decision does not explain the reasoning used to determine the amount of the damages. The decision has been appealed.

3.- Vertical contracts

With respect to vertical contracts, there are several decisions in the context of the relation between oil companies and gas stations. In these cases, there was no previous decision of the Competition Authority. They were however initiated following a European Commission decision[3]. Gas stations requested the declaration of nullity of their vertical contracts with the oil companies, and claimed for damages for the *lost profits*. The nullity declaration was requested based upon the excessive duration of the contracts and the lower bargaining power of the gas stations versus the oil companies to negotiate the contract. In some cases[4], the nullity of the contract was accepted but damages were not awarded. The reason for not awarding damages was diverse: not proving adequately 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, which emplaced the claimant to start a new proceeding; or, on the contrary, a too complex quantification calculation which also required a new proceeding. Following this line, the Supreme Court, delivered in 2009 a decision[5] which declared the nullity of a vertical contract of this type and emplaced the parties to new proceedings to determine the quantification of the damages.

Notwithstanding, there is a decision in this context which awarded damages to the claimant[6]. The claimant, the owner of two gas stations in Majorca, submitted a formula to calculate the damages. This formula estimated the *lost profits* during the duration of the contract, i.e., the earnings the plaintiff could have obtained in the absence of the infringement. The formula compared the profits under two scenarios. On the one hand, the real situation, what happened actually; and on the other hand, what would have happened in the absence of the contract declared null (the counter-factual). The estimation of the earnings in the counter-factual scenario was based on the contract that the parties would have signed in absence of the null contract (based on other alternative contracts in the market), which determined the price margin (and thus the profits) of the gas stations. This proposal was submitted for consultation to the Spanish Competition Commission making use of the cooperation mechanism contained in the Spanish Competition Act 15/2007, article 25 c. The CNC examined the proposal and considered, with some minor comments, that the principles underlying the proposal were essentially correct. The judge declared the contract null, and accepted the damages estimation awarding the requested damages compensation to the

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[3] 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).

[4] 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.

[5] Supreme Court Civil Section Nº 1, decision 460/2009, 30-06-2009.

[6] Palma de Mallorca Mercantile Court of First Instance Nº 2, decision 15/2009, 03-03-2009.

claimant (the court restricted the compensation period to the ten previous years, reducing the time period proposed by the claimant). The final compensation awarded was euro 218 958.

4.- Abuse of dominant position

There are two major cases of abuse of dominant position where damages were awarded[7] in which the defendant was the former telecommunications monopolist, Telefónica. The first case related to the provision of leased lines to competitors. The case was initiated after an infringement decision of the Competition Authority (later confirmed by an upper Court) for unjustified delay in the supply of leased lines to its competitor 3C. The claimant's expert submission estimated the profits the company would have earned in case Telefónica had not committed the infringement and thus had supplied the lines in due time. To calculate such lost profits, 3C made some assumptions regarding the average duration of the delay, the supplied lines, the average number of terminals the plaintiff could have installed 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 new more conservative estimate to calculate the final compensation for the damages.

The second case was related to the supply of data for telephone directory services. The claim was initiated after a decision of the 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's estimate of the damages which were divided in two categories: on the one hand, additional expenses Conduit had to incur because of the infringement, and on the other hand, the profits that Conduit could have earned in the absence of the infringement. With respect to the costs incurred by the claimant, the poor quality of the data supplied by Telefónica forced Conduit to hire external services to fix the data, and also to dedicate more of their own resources (and those of its parent company) than necessary had the data been correct. Both actual extra costs, external and internal, were quantified by the plaintiff's expert submission and finally awarded by the Court. To calculate the *lost profits*, Conduit estimated the market share the company would have reached 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 it also operated. However, the judge challenged such assumption since the conditions of the British market for Conduit, where it had been operating for longer, were far different from the new Spanish market where Conduit was a newcomer attempting to enter the market. Moreover, the judge refused the causality connection between the infringement and the damages. It argued that there were other elements such as advertising expenditure, human capital and knowledge of the market which determined the market share of the entrant more than the quality of the data. Therefore, the judge refused to award any amount as *lost profits.* The amount awarded was euro 639 000.

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[7] Madrid Provincial Court Nº 28, decision 73/2006, 25-05-2006, and Madrid Provincial Court Nº 25, decision 235/2007, 08-05-2007.

In a similar decision[8], the Madrid Court of First Instance only awarded as private damages the actual costs incurred by the claimant and denied the *lost profits* in the data processing industry. Following a decision of the Competition Authority (later confirmed by an upper Court) which fined the company 3M for abusing its dominant position imposing anticompetitive conditions to one of its direct competitors in the sale of an essential input. Both the claimant and the defendant submitted expert documents. The judge refused the assumptions used to estimate the *lost profits* in the claimant's submission because they considered a higher number of years and more contracts than the ones in 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 euro 194 089.

Although not awarding damages, there is also an interesting case which deserves comment[9]. A TV channel, Antena 3, asked for private damages to the Spanish Football Association (LNFP) for abusing its dominant position in managing football broadcasting rights. A decision of 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 in euro 34 to 36 million due to advertising *lost profits* for being excluded from the broadcasting of football matches. The Court of First Instance accepted partially the demand and awarded euro 25.5 million. This decision was appealed (surprisingly by both parties), and the upper Court revoked the previous decision and awarded no damages. Finally, the Supreme Court did not accept the defendant's appeal on procedural grounds. The Court did not accept the claimant´s expert document 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 and unrealistic. Based on this and other minor points, the Court dismissed the claim.

5.- Role of the CNC

Article 25 c) of the Spanish Competition Act 15/2007, establishes a cooperation mechanism which allows the Spanish judges to request advice from the CNC in the quantification of damages. As stated before, the only case in which the CNC advice has been required was one in which the owner of two gas stations in Majorca, submitted a formula to calculate its lost profits[10]. In this occasion, the CNC examined the claimant's formula proposal and considered, with some minor comments, that the principles underlying the proposal and the proposal itself were essentially correct. The judge declared the contract null, accepted the formula and awarded the damages claimed.

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[8] Madrid Court of First Instance Nº 71, decision 01-06-2007.
[9] Final instance: Supreme Court Civil Section Nº 1, Auto 14-04-2009; second instance: Madrid Provincial Court Nº 25bis, decision 18-12-2006, and first instance: Madrid Court of First Instance Nº 4, decision 07-06-2005.
[10] Palma de Mallorca Mercantile Court of First Instance Nº 2, decision 15/2009, 03-03-2009.