Executive summary and overview of the national report for Spain

Section I – Summary of findings

The direct application of EC and national competition law by civil courts in Spain is a recent development.

The legal bases for actions for damages for breach of Articles 81 and 82 of the EC Treaty or Articles 1 and 6 of Law 16/1989, of 17 July, on Defence of Competition (**"CDL"**), (which mirror articles 81.1 and 82) are (i) Article 13.2 of the CDL, and (ii) Article 18.5 of Law 3/1991, of 10 January, on Unfair Competition (**"UCL"**), in conjunction with Article 1902 of the Spanish Civil Code (**"CC"**), which regulates liability in tort.

In practice, potential claimants have been discouraged by the interpretation given to Article 13.2 of the CDL by the Supreme Court, some Courts of Appeal and academic authorities, according to which an administrative decision of the Competition Court declaring the infringement of national competition rules is required before damages may be sought before the civil courts. Although this requirement should not apply to EC competition law, there are no cases of claims for damages based on breaches of the EC rules either.

Spanish civil courts have long shown a reluctance to apply EC and national competition law. The much-criticised Campsa ruling of 30 December 1993 by the Supreme Court, which stated that it was only the competition authorities, and not the civil courts, who were competent to apply EC and national competition rules in a "principal" manner and dismissed the plaintiff's claim, had the effect of dissuading parties from bringing actions before civil courts (as well as before arbitrators) where those rules would be relied upon. In this case, the claimant applied for an injunction in respect of an alleged abuse of a dominant position and also claimed damages.

However, in the Disa ruling of 2 June 2000, the Supreme Court applied EC competition rules for the first time in a direct way, although damages were not awarded since the claimant had not applied for them. Since the Disa ruling, civil courts (both the Supreme Court and the Courts of Appeal) have increasingly recognised the direct applicability of EC competition law and it may be expected that claims of this kind including claims for damages, will now arise more frequently as a result.

In most of the decisions we have examined, the claimant sought damages for breach of an agreement, and the defendant challenged that agreement by arguing that it was prohibited under Article 81 of the Treaty or article 1 of the CDL and therefore unenforceable (by means of an exception or a counter claim). Very few cases deal with Article 82 of the Treaty or Article 6 of the CDL. The party alleging the infringement only sought damages in one of those claims, and its claim was dismissed due to the lack of evidence of any damage caused. Therefore, there are no cases in Spain based on an infringement of Articles 81 and 82 EC or Articles 1 and 6 of the CDL in which damages were awarded, and it is not possible to provide information based on case law as to the economic models used by courts to calculate damages in anti-trust cases.

Section II – status quo and forthcoming reforms – action for damages

A. Legal Basis	
(i) Is there an explicit statutory basis?	Yes. Article 13.2 of the CDL and Article 18.5 of the UCL, in connection with Article 1902 of the Civil Code (which regulates general liability in tort).
(ii) Is this statutory basis different from other actions for damages?	To some extent yes as, according to the interpretation given to Article 13.2 of the CDL by the Supreme Court and some courts of appeal and authors, an administrative resolution of the Competition Court declaring the infringement of national competition rules is required before damages may be sought before the civil courts. Other authors believe that there are grounds to argue that Article 13.2 does not prevent an injured party from seeking damages before the civil courts prior to the administrative authority issuing its decision, or even in the absence of any administrative proceedings at all. As regards substantive and procedural requirements of actions for damages referred to in Articles 13.2 of the CDL and 18.5 of the UCL, general regimen for liability in tort applies (i.e. Article 1902 of the Civil Code).
(iii) Is there a distinction between EC and national law in this regard?	Article 13.2 of the CDL only refers to actions for damages based in the infringement of national competition law; therefore, in our opinion, a prior administrative decision should not be necessary to claim

	for damages for infringements of European competition law.
B. Competent court	
(i) Which courts are competent?	Civil courts are currently the competent courts to hear actions for damages based both in EC and national competition law.
(ii) Are there specialised courts for private enforcement of competition rules?	As of 1 September 2004, the newly created mercantile courts will be competent to hear actions for damages based in EC competition law, while civil courts will remain competent as regards claims based in national competition law (this criterion is not particularly logical).
C. Standing	
(i) Limitations on standing of natural or legal persons, including those from other jurisdictions?	The general rule is that those who appear before the courts as parties to the legal relationship in question or as being interested in the subject matter of the litigation will be considered to be legitimate parties to the action. Article 13.2 of the CDL grants standing to any person who may consider himself to have suffered loss. Article 19 of the UCL grants standing to any person who participates in the market, or whose economic interests are directly damaged or threatened by the unfair competition act.
(ii) What are the connecting factor(s) required with the jurisdiction in order for an action to be admissible?	Council Regulation (EC) 44/2001 of 22 December 2000 applies. As regards internal rules, Spanish courts shall be competent when the parties have submitted to their jurisdiction expressly or tacitly, and also when the defendant is domiciled in Spain. In the absence of these criteria, Spanish courts shall be competent when the obligation originates or is to have been performed in Spain (contractual obligations), or when the act or omission has taken place in Spain or both the party causing and the party suffering the loss in question have their main residence in Spain (non-contractual obligations).
(iii) Is there a possibility of collective claims, class actions, actions by representative bodies or any other form of public interest litigation?	Yes. Article 11 of the CPL allows for a form of "collective claim" and "class action" (please note that Spanish "collective claims" and "class actions" do not fully correspond with the definition of genuine collective claims and class actions contained in the comparative report). When the affected parties are a group of consumers or end-users whose members are readily ascertained or easily ascertainable, consumer and user associations, legally constituted entities and the groups of affected persons may claim for the protection of the collective interests of the former before a court. When the affected parties are an unascertainable group of consumers or end-users or one whose members cannot be easily ascertained, consumer associations which according to law represent general consumer interests may claim for the protection of the diffuse interests of the former before a court. Please note that this form of "collective claim" and "class action" are only available for the protection of the rights of consumers and end-users. There are no reported cases in Spain where a "collective claim" or a "class action" has been used in connection with an infringement of competition law.
D. Procedural and substantive conditions	
(i) What forms of compensation are available?	Damages and restitution of benefits (the latter only when contractual relationship exists between parties).
(ii) What are the other forms of civil law liability	None. Disqualification of Directors is not available under civil

(if any)?	law, however, such a possibility exists under criminal law.
(iii) Does the infringement have to imply fault?	In general terms, the infringement has to involve negligence or wilful misconduct for compensation to be available. In order to claim for annulment alone, fault is not required.
(iv) If so, is fault based on objective criteria?	Yes.
(v) Is bad faith (intent) required?	No.
(vi) Can negligence be taken into account?	Yes.
E. Rules of evidence	
a. General	
(i) Burden of proof and identity of the party on which it rests?	Burden of proof lies with the party which alleges a fact and wishes to obtain a benefit based on the existence of that fact.
(ii) Standard of proof	No special provision established. Most forms of evidence will be judged according to the rules of reasonable assessment.
(iii) Limitations concerning form of evidence	Forms of evidence are not limited under Spanish law. It provides an illustrative list of forms of evidence, but Court may use any other form of evidence which could be useful in order to achieve certainty on the issues under consideration in the proceedings.
(iv) Rules on (pre-trial or other) discovery within and outside the jurisdiction of the court vis-à-vis parties	In the course of the trial, each party may demand the disclosure by other parties of original documents not in its possession which relate to the issues under consideration in the proceedings or to the strength of the evidence to be adduced. The applicant should attach to the disclosure application a copy of the requested document, and if that is not possible, it should indicate as accurately as possible the content of the requested document, in order to identify it. Discovery, as defined in the comparative report, does not exist in Spain. The CPL does not expressly provide for the request of documents from the opposing party before the commencement of the trial as a general preliminary measure. Such a measure is foreseen, however, as regards unfair competition conduct (UCL). If there are reasonable grounds for believing that evidence may no longer be available at the moment of trial, an early assessment of evidence may be sought. If early assessment of evidence is made, the claimant has to serve its claim within two months thereafter.
(v) Rules on (pre-trial or other) discovery within and outside the jurisdiction of the court vis-à-vis third parties	A third party will only be obliged to disclose a document in its possession where the Court considers that the requested document is fundamental in order to reach a judgment.
(vi) Rules on (pre-trial or other) discovery within and outside the jurisdiction of the court vis-à-vis competition authorities (national, foreign, Commission)	Please see paragraph (iv) above.
b. Proving the infringement	

(i) Is expert evidence admissible?	Yes. Experts' reports may be sought by the parties or by the Court *ex officio*.
(ii) To what extent, if any, is cross examination permissible?	Each party is entitled to cross-examine the other party and the witnesses summoned by it.
(iii) Under which conditions does a statement and/or decision by a national competition authority, a national court, an authority from another EU Member State have evidential value?	The Spanish Competition Court may issue a non-binding report on the merits and amount of compensation to be paid by the offending party for breach of Articles 1, 6 and 7 of the CDL, upon request by the competent court. This report will not be legally binding, but of persuasive value only (as will any other Competition Court resolution issued about the case under consideration). Principles established by the Supreme Court in two or more judgments are binding upon lower national courts. Decisions by an authority from another EU Member State will have the effect attributed to a Spanish public document where a specific law or international treaty recognises it as having such effect.
c. Proving damage	
(i) Are there any specific rules for evidence of damage?	In the trial four elements must be proved: i) an unlawful act or omission, ii) the existence of negligence or wilful misconduct, iii) quantifiable loss suffered by the claimant, and iv) a causal link between the negligent act or omission and the loss suffered.
d. Proving causation	
(i) Which level of causation must be proven: direct or indirect?	Spanish law only recognises damage which is shown to have been caused as a result of the unlawful act or omission and which is quantified. Normally the Courts only accept damage directly linked with the defendant's act or omission.
F. Grounds of justification	
(i) Are there grounds of justification?	Yes, for example fortuitous cases, force majeure, exercising of a right to which one is entitled, absence of negligence on the defendant's part, etc.
(ii) Is the 'passing on' defence taken into account?	As there are no specific rules relating to this question, according to general regime of liability in tort only the injury actually suffered by the plaintiff may be compensated. Therefore, if the plaintiff has "passed on" all or part of the inflated cost of products or services to is purchasers, then the court will take this into account and reduce the amount of compensation accordingly.
(iii) Are 'indirect purchaser' issues taken into account?	The CDL does not contain any provisions regarding the standing of "indirect purchasers" and there are no published cases in Spain in which the indirect purchaser issue has been addressed. In theory, indirect purchasers could claim damages, but they would have to prove that they themselves suffered the damage because the alleged higher price has been passed on to them by the intermediary. In practice, this will be hard to prove for indirect purchasers.
(iv) Is it relevant that plaintiff is (partly) responsible for the infringement (contributory negligence leading to apportionment of damages) or has benefited from the infringement?	Yes. Civil courts tend to reduce the level of damages if the plaintiff was also negligent and contributed to increase the loss by its own behaviour.
G. Damages	

a. Calculation of damages	
(i) What economic or other models are used by courts to calculate damage?	The CPL does not establish any specific economic system to be followed by experts when calculating loss for the purpose of civil proceedings, nor are there theoretical models or guidelines contained in the CDL to be used by courts. As we have not found any ruling awarding damages for an infringement of competition law, it is not possible to indicate with any certainty the financial models which might be used by the courts to estimate "but for" income and costs.
(ii) Are damages awarded for injury suffered on the national territory or more widely (EC or otherwise)?	There is no set rule excluding damage suffered outside the national territory.
(iii) Are ex ante (time of injury) or ex post (time of trial) estimates used?	When assessing damages in Spain, usually circumstances occurring both before the injury and after it are taken into account
(iv) Are there maximum limits to damages?	No.
(v) Are damages assessed on the basis of profit made by the defendant or on the basis of injury suffered by the plaintiff?	The general principle is that only the damage suffered by the claimant is to be taken into account for the purpose of calculating damages, irrespective of the profit made by the defendant.
(vi) Are punitive or exemplary damages available?	No.
(vii) Are fines imposed by competition authorities taken into account when settling damages?	No.
b. Interest	
(i) Is interest awarded from the date the infringement occurred, the date of the judgment or the date of a decision by a competition authority?	It depends on the specific case at hand. In case of restitution as a result of an agreement being declared null and void, the price paid for the goods together with interest, must be returned, and this interest is calculated from the date when the price was paid to the supplying party. In cases where the claimant is awarded damages, the judge will fix a lump sum; one of the elements taken into account to calculate the damages could be the interest accrued from the date the injured party paid the relevant amount under a prohibited agreement or from the date when he was unlawfully deprived of an amount which he should have received or incurred in the relevant costs.
(ii) What are the criteria to determine the levels of interest?	Interest rate will be that agreed by the parties and, in the absence of agreed rate, the legal interest rate, which is published annually in the Official State Bulletin. For procedural interest ("*mora procesal*") an annual interest rate equal to the legal interest rate plus two per cent will be used or, if relevant, the rate agreed between the parties or any special provision of law which may be applicable.
(iii) Is compound interest included?	No.
H. Timing	
(i) What is the time limit in which to institute	There is no time limit to apply for an agreement to be declared null and void, nor for a declaration that conduct

	proceedings?	infringes competition law. However, the time to ask for restitution is fifteen years from the date on which the judge declares the relevant agreement to be null and void. In the case of actions for damages based on non-contractual obligations, the injured party has to bring an action before the court within one year from the day when that party discovers the damage. Please note that some authors consider that, in the event a previous administrative procedure has been initiated, the one year period to file the action for damages should be calculated from the date the Competition Court (or the Court responsible for reviewing Competition Court decisions) gives a definitive decision on the infringement.
(ii)	On average, how long do proceedings take?	Although it is difficult to give a reliable estimate, according to a report published by the Madrid Bar Association in 2001, the average duration of the first instance stage was one year and four months (although differences of more than three years were found between different courts). On average the Courts of Appeal of Madrid took one year and five months to resolve an appeal: finally, the Supreme Court spent an average of three years to decide cases (please note that there are no precedents for claims for damages based on competition law infringements).
(iii)	It is possible to accelerate proceedings?	There are two type of proceedings: ordinary proceedings and oral proceedings (i.e. abbreviated or fast track proceedings); application of one or another depends on the amount of damages claimed. If this amount is higher than 3,000 Euro the proceedings must be of the ordinary kind; if lower, oral proceedings will be used. The duration of ordinary proceedings is longer than for oral ones.
(iv)	How many judges sit in actions for damages cases?	One judge in first instance courts, three judges in the court of appeal and six judges in the Supreme Court.
(v)	How transparent is the procedure?	Spanish civil proceedings are reasonably transparent because each party has to disclose the grounds and documents upon which it will rely in the case during the very first stage of the proceedings. After this moment, except in limited circumstances, the parties cannot introduce new grounds. Civil and mercantile courts shall deliver to the Competition Service copies of all decisions in which EC competition law has been applied.
I. Legal costs		
(i)	Are Court fees paid up front?	Only companies with a turnover of more than 6 million Euro in the last financial year are obliged to pay Court fees. The amount payable ranges between 90 and 6,000 Euro.
(ii)	Who bears the legal costs?	Each party must bear its own legal costs, although it will recover a part of them if the Court rules in its favour and orders its costs to be paid by the other party.
(iii)	Are contingency fees permissible?	Contingency fees in the strict sense (*quota litis*) are not permitted. It is possible to agree a minimum fee, which will be paid to the lawyer whatever the outcome at trial, and which may be increased depending on the "real and practical consequences" of the Court's decision.
(iv)	Are contingency fees generally available for private enforcement of EC competition law?	Please see section I (iii) above, since it depends on the kind of agreement between client and lawyer, not on the type of action.
(v)	Can the plaintiff/defendant recover costs?	The winner will recover a part of its costs if the Court orders its costs to be paid by the other party (this will

		happen when the arguments of the losing party are totally dismissed, unless the case raises serious doubts as regards the facts or the application of the relevant law).
(vi)	What are the different types of litigation costs?	Recoverable costs include, among others: i) a part of the fees corresponding to the solicitor and barrister, ii) expenditure relating to witnesses and experts, iii) compulsory deposits made with the Court when lodging an appeal, etc.
(vii)	Are there any national rules for taxation of costs?	Costs will be taxed by a judicial agent. These costs may be challenged by the parties and the Court will make a final decision on the taxation of costs without the possibility of further appeal.
(viii)	Is any form of legal insurance or legal aid available?	In Spain a legal entity or individual may subscribe for an insurance policy for legal representation and for an insurance policy for civil liability. According to the Insurance Contract Act 50/1980, the insurer company will be exempted from paying if the insured event was caused because the insured acted in bad faith. Legal aid is only available for natural persons who have insufficient means to bring a claim (although public interest associations and foundations can also benefit from legal aid). Legal aid is available for all cases, including matters which are brought before civil courts. Although Spanish law does not explicitly mention competition claims, it should be understood that legal aid covers this type of claim.
(ix)	What are the likely average costs in an action brought by a third party in respect of a hard-core violation of competition law?	The costs will vary greatly depending on the amount claimed from the defendant and on the extent to which appeal procedures are pursued.
J. General		
(i)	Are some of the answers to the previous questions specific to the private enforcement of competition rules?	Yes. Article 13.2 of the CDL seems to require a prior final administrative decisions in order for the injured party to seek damages before the civil courts for infringement of national competition law. This prerequisite prevents him form bringing an action for damages directly before the civil courts, in contrast to most other actions for damages.
(ii)	If the answer to the previous question is yes, in what way do they differ from general private enforcement rules?	See paragraph J.(I) above.
(iii)	EC competition rules are regarded as being of public policy. Does that influence any answers given?	No.
(iv)	Are there any differences according to whether defendant is public authority or natural or legal person?	Yes. If the defendant is a "public administration" in the meaning of Article 2 of Law 30/1992, then the action to claim damages should follow a different procedure: firstly, it should be filed before the administrative instance; the decision passed by the competent administrative authority may be then appealed before the contentious-administrative courts (and not the civil courts).
(v)	What are the key differences, if any, from region to region within the Member State as regards damages actions for breach of national or EC competition rules?	There are no such differences from region to region, by the time being.

(vi)	Is there any interaction between leniency programmes and actions for claims for damages under competition rules?	Lenience programmes do not exist in Spain.
(vii)	Please mention any other major issues relevant to the private enforcement of EC competition law in your jurisdiction	Recent trends show that the Supreme Court and the Courts of Appeal are more and more willing to apply EC competition rules directly (and also national competition rules), without referring the case to the competition authorities.
(viii)	Please provide statistics about the number of cases based upon the violation of EC competition rules in which the issue of damages was decided upon	There are no cases based upon the violation of EC or national competition law in which the issue of damages was decided upon.
Section III: Means to facilitate private enforcement of Articles 81 and 82 EC		
(i)	Which of the above elements of claims for damages as applied in each Member State and accession country provide scope for facilitating the private enforcement of Articles 81 and 82 EC?	Private damages actions have played a very limited role in the enforcement of EC and national competition law before Spanish courts.
(ii)	How could that be achieved?	Some measures could be adopted in order to facilitate damages actions: - abrogation of Article 13.2 of the CDL - make clear that the Competition Court is not a pre-court authority to which the injured party needs to turn to before filing a claim in the civil jurisdiction - granting competence to the mercantile courts to apply national competition law in addition to EC competition law - including in the CDL an express provision on the types of actions which a claimant may bring against the offending party, including injunctions and interim measures, as expressly recognised in the UCL - granting the commercial courts similar collaboration mechanism to those granted by Article 15 of Regulation 1/2003 in respect to the European Commission - etc.
(iii)	Are alternative means of dispute resolution available?	Yes, arbitration qualifies, in principle, as an alternative means of dispute resolution in this field. In our opinion, under Spanish law, arbitrators should be entitled to resolve disputes relating to agreements which contain a valid arbitration clause and give rise to EC or national competition issues.
(iv)	If so, to what extent are they successful?	Unfortunately the arbitration cases we have found do not award damages for the infringement of competition law.