SPAIN

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I. Introduction

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[1] of the Spanish Civil Code (**"CC"**), which regulates liability in tort. Liability in tort is based on the principle of the general duty not to cause harm to others and to compensate any damage caused ("alterum non laedere").

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[2] 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

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1 Article 1.902 of the Spanish Civil Code reads: "Any person who by an act or an omission involving fault or negligence causes damage or harm to another shall compensate the damage caused."

2 However, the Supreme Court did not explain the meaning of the expressions "in a principal way" and "in an incidental way". Some authors interpret that application of competition rules in a "principal way" takes place when the claimant invokes, as principal argument of his claim, an infringement of competition law, whilst they are "incidentally" applied when the defendant argues an infringement of competition law as a defence vis-à-vis the plaintiff's claim. Other authors consider that application of competition law in an "incidental way" occurs when the party invoking such an application asks the judge to extract the civil consequences arising from an infringement of competition rules, such as a declaration of annulment or the awarding of damages, in the framework of a private dispute, whilst application of competition law in a "principal way" occurs when the administrative authorities internally entrusted with the application of competition law declare an infringement of that law in protection of the public interests affected by the anti-competitive conduct.
The Supreme Court in the Campsa case seemed to use the same terms used by the Advocate General Mayras in BRT v. SABAM. Advocate General Mayras in BRT v. SABAM had drawn a somewhat ambiguous distinction between the application of E.C. rules "à titre principal" and "à titre incident". By this he meant that national authorities which had to apply those rules may be classified under two different headings: (i) those which, in pursuit of a general public interest, are designed to punish competition infringements by private undertakings and the judicial bodies (administrative courts) competent for the judicial review of their decisions ("à titre principal"), and (ii) those (civil courts) responsible for adjudicating over private claims ("à titre incident"). As has been said before, the ECJ was not impressed by the Advocate General's doctrine and ignored Mayras' terminology in as much as it recognised the basic idea of the existence of two different ways of applying E.C. competition rules. In other words, the Community judges retained the substance of the distinction between "public" and "private" enforcement of antitrust provisions, but did not believe that it was a matter of being "incidental" or "principal" (Fernández, Cani and González-Espejo, Paloma, *Actions for damages based on Community competition law: new case law on direct applicability of Articles 81 and 82 by Spanish civil courts*, European Competition Law Review (E.C.L.R.) 2002, 23(4), 163-171).

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 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.
We have found two cases (one of them did not finally lead to an award of damages), where the injured party sought damages, but the claims were formulated under the UCL rather than the CDL, and the court granted damages on the basis of the UCL. This lack of case-law is a consequence of the following:

a) Traditionally Spanish courts and arbitration tribunals have been reluctant to grant damages based on loss of profits (loss of profits require such a high degree of proof that only actual damages are usually awarded).
b) Spanish civil courts are not specialised in competition law nor familiar with economic models to estimate damages).
c) Class actions were not possible until recently.
d) Existence of Article 13.2 LCD (and its interpretation requiring a prior administrative decision in order to award damages for the infringement of national competition law).

II. Actions for damages - status quo

A. What is the legal basis for bringing an action for damages?

(i) Is there an explicit statutory basis, is this different from other actions for damages and is there is a distinction between EC and national law in this regard?

The legal bases for actions for damages for breaches of Articles 81 and 82 of the EC Treaty or Articles 1 and 6 of the 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 generally. Liability in tort is based on the principle of the general duty not to cause harm to others and to compensate any damage caused ("*alterum non laedere*"). This principle has been interpreted and developed by case law.
The civil (and mercantile) courts are the only authorities which are competent to grant damages.
According to Article 13.2 of the CDL, parties which have suffered loss may claim damages on the basis of acts prohibited by the CDL, once a final administrative or judicial resolution, as appropriate, has been given. This Article has commonly been interpreted in case law and by academics to mean that it is necessary to wait for a decision of the Competition Court (the administrative authority entrusted with the application of the CDL), and then any appeal to the courts responsible for reviewing Competition Court decisions. It is only after this process has been completed that, according to this interpretation, the injured party is free to bring civil proceedings for damages. This requirement qualifies as a procedural condition ("*condición de procedibilidad*") to bring a claim for damages based on an infringement of national competition law. This interpretation was upheld by the Supreme Court (*Tribunal Supremo*) in its decision of 30 December 1993 in the Campsa case[3] as well as by some Provincial Courts of Appeal (*Audiencias Provinciales*).
Article 13.2 of the CDL does not refer to damages claimed in respect of an infringement of EC competition law; therefore, a prior administrative decision

3 In the resolution of 30 December 1993 in the Campsa case, the Supreme Court considered that an action for damages based on an infringement of EC and national competition law must be preceded by a resolution of the European Commission or the Competition Court, as applicable, declaring the restrictive nature of the relevant agreement or practice. In this case, the court dismissed the action for damages as there had been no prior administrative resolution. It should be noted that this resolution is based on the former Law 110/1963, of 29 July, on the repression of practices restricting competition, and not on the CDL which is currently in force.

should not be necessary to claim for damages for such an infringement. However, some judicial decisions (e.g. the Campsa case) and certain authors have supported the interpretation that a prior administrative resolution is also a prerequisite for an action for damages based on an infringement of EC competition rules. There are strong reasons to argue that Article 13.2 of the CDL is not applicable as regards EC competition law, firstly, because Article 13.2 the CDL omits to mention EC law, and secondly, on the basis of the direct effect of the EC rules, a principle repeatedly underlined by ECJ case law and now supported by the new EC Regulation 1/2003. According to this, a prior administrative decision should not be necessary in order to claim damages for infringement of EC competition law.

Even as regards claims based on Spanish competition law, there may however be grounds for the view 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, for the following reasons:

(a) Article 13.2 of the CDL grants the injured party a right to seek damages after an administrative procedure, but it does not state that damages "can only be claimed" or "shall be claimed" after a final administrative resolution has been issued. However, this interpretation is not held by the majority of the authors.

(b) Article 13.2 of the CDL should be interpreted in the light of the current CDL and not according to the position under the old Law 110/1963, of 29 July, on the repression of practices restricting competition. Article 13.2 closely follows Article 6 of Law 110/1963, which provided that:

> "the party suffering loss from a restrictive practice declared as prohibited by the Competition Court may file a claim for damages before the civil courts within one year from the date when the decision of the Competition Court is no longer open to challenge".

The Explanatory Note ("Exposición de Motivos") relating to Law 110/1963 justified the need for a prior administrative resolution to claim for damages by stating that:

> "once there is an administrative resolution declaring the existence of a restrictive practice, the various courts shall then resolve upon the civil, criminal, employment or administrative consequences arising from that declaration, without risk of interference from any potential suspension of the various proceedings (…). The Competition Court's declaration that a restrictive practice is contrary to the public economic interest represents a legal presumption for subsequent jurisdictions (…). The facts which the Competition Court declares to be proved (…) must not be revised".

Pursuant to Article 10 of former Law 110/1963, the Competition Court had exclusive jurisdiction to declare the existence of infringements of national competition rules and to order injunctions, and it was also entitled to declare prohibited agreements as null and void. Therefore, former Article 6 (equivalent to current Article 13.2 of the CDL) could not be interpreted in another way: a prior administrative decision was necessary to claim for damages before the civil courts. However, as the current CDL does not contain a similar article stating that the Competition Court does have "exclusive" jurisdiction to issue declarations and injunctions, Article 13.2 of the CDL may permit a different interpretation (i.e. no prior resolution is necessary to bring an action for damages) despite its literal wording, in line with the new era and the principles established by Regulation 1/2003.

(c) Even if Article 13.2 of the CDL does in fact establish a Competition Court resolution as a prerequisite to an action for damages, we consider that in certain cases the injured party could circumvent this obstacle and base its claim on Article 15.2 of the UCL in connection with Article 18.5 thereof, or Article 5. According to Article 15.2 of the UCL, the mere infringement of rules regulating competition is deemed an unfair act: Articles 81 and 82 of the Treaty and Articles 1 and 6 of the CDL are obviously rules regulating competition, and their infringement would therefore constitute an unfair act. Furthermore, Article 5 of the UCL sets out a general provision by which the acts that are objectively contrary to good faith are rendered unfair and anti-competitive, provided that the acts are carried out in the market for

the purpose of competing. Under Article 18.5 of the UCL, the party suffering loss from or threatened by an unfair act may claim for damages if the party carrying out the relevant act has acted with negligence or wilful misconduct. This way is, in fact, the most suitable option to seek damages before civil courts.
However, it is not clear that this route can be followed in all circumstances.

B. Which courts are competent to hear an action for damages?

(i) Which courts are competent?

Civil courts are currently the competent courts to hear this type of action, as well as proceedings relating to the application in general of Articles 81 and 82 of the Treaty and Articles 1 and 6 of the CDL. It should be remembered that the Competition Court does not have jurisdiction to award damages because is not a "true" jurisdictional body but an administrative one.
However, by virtue of the amendments recently introduced in the Organic Law 6/1985, of 1 July, on Jurisdictional Power, the Mercantile Courts ("*Juzgados de lo Mercantil*"), a special, newly created category of civil court, will be the competent courts to resolve proceedings relating to the application of articles 81 and 82 of the EC Treaty and its derived legislation, amongst other matters (article 86 *ter* of Organic Law 6/1985, on Jurisdiction)[4].
These specialist courts will be fully operational as of 1 September 2004 (under the Second Final Disposition of Organic Law 8/2003). However, this same Law also provides for the eventuality that the Mercantile Courts may not be ready by that time by providing that until such moment as they become operational, all matters attributed to them by Organic Law 8/2003 will be dealt with by the civil courts of first instance.
However, article 86 *ter* of Organic Law 6/1985, on Judicial Power, only attributes to the new Mercantile Courts the competence to resolve proceedings relating to articles 81 and 82 of the EC Treaty, and not those relating to articles 1 and 6 of the CDL. The granting of jurisdiction to the Mercantile Courts was added by the Senate in the final stage of the legislative procedure, as it was not in the wording of Organic Law 8/2003 as originally drafted. The lack of a reference to national competition law was therefore maybe due to an oversight on the part of the legislator.
In any event, this selective allocation of jurisdiction leaves to the conclusion that, in principle, civil courts retain exclusive competence for the application of national competition rules.
In our opinion, this is not a particularly logical approach, as two different types of court, mercantile and general civil, shall be competent to resolve claims based on EC competition rules and national competition rules respectively. It would have been desirable for the legislator to also give the Mercantile Courts jurisdiction to resolve actions based on national competition rules: If the Spanish legislator considered that EC competition law would be better enforced by specialist courts, there is no clear reason for leaving the application of national competition law in the hands of the non-specialist civil courts. Furthermore, there are practical reasons for entrusting the application of national competition rules to the Mercantile Courts, such as the fact that a claimant will normally base its action on the infringement of both EC and national competition rules.
The approach followed by the legislator is even more absurd taking into account that Mercantile Courts shall also be competent to resolve claims based on the UCL and they may have to apply competition law when the claimant alleges an infringement of competition law as the reason to base the action for unfair competition.
In any event, decisions of the civil and mercantile judges can be appealed, in the very last instance, before the civil section of the Supreme Court. This mechanism will allow the Supreme Court to harmonise the case law.

4 These amendments have been introduced by Organic Law 8/2003, of 9 July, on Bankruptcy Reform.

(ii) Are there specialised courts for bringing competition-based damages actions as opposed to other actions for damages?

Please see part B (i) above in relation to the newly created Mercantile Courts.

C. Who can bring an action for damages?

(i) Which limitations are there to the standing of natural or legal persons, including those from other jurisdictions?

Whereas the role of the competition authorities is to protect general interests and objectives as part of the public regulation of the economy, the role of the courts is limited to relationships and disputes between private persons endowed with private rights. If those persons are able to argue that their legitimate rights and interests have been affected or damaged by a breach of competition law (whether EC or national), they may file a claim in the civil courts for damages.

The general principles on standing apply when a person brings an action in the civil courts based on EC or national competition rules. The general rule set out in Article 10 of Law 1/2000, of 7 January, on Civil Procedure (**"CPL"**), 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 ("*titulares de la relación jurídica u objeto litigioso*"). In addition, Article 13.2 of the CDL grants standing to seek damages caused as a result of an infringement of national competition law to any person who may consider himself to have suffered loss. Finally, 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. The unjust enrichment action based on the infringement of the UCL can only be brought by the holder of the legal position violated.

Where a party seeks for an agreement to be declared null and void under Article 81.1 of the Treaty or Article 1.2 of the CDL, standing will generally be conferred by virtue of its being a party to that agreement. However, even a third party may apply for such a decision to the extent that the agreement in question qualifies as a nullity which is incapable of being rectified (*"nulidad absoluta"*), although he had not suffered any damage. The judge could also apply those Articles *ex officio* pursuant to Article 6.3 of the Civil Code and thereby declare the agreement to be null and void. The same reasoning is applicable on the basis of Article 6.3 of the Civil Code in respect of an abusive agreement imposed by the party which has a dominant position: the injured party may ask for the nullity (or inapplicability) of the agreement or the relevant provisions be rendered void by the abusive character, and he may also claim for damages.

Where a party wishes to bring a claim for damages for loss resulting from a prohibited agreement or practice or from an abuse of a dominant position according to EC and/or national competition rules, standing will be conferred on that party by virtue of its being an injured party under the general rules on liability in tort contained in Article 1902 of the Civil Code and related case law. The claimant would have to show that the defendant's anti-competitive conduct caused him to suffer loss, as well as satisfy the other requirements set out in paragraph E(a)(i) below.

(ii) What connecting factor(s) are required with the jurisdiction in order for an action to be admissible?

The claimant will normally adduce that a given agreement or clause is null and void under Articles 81.1 (or Article 1 of the CDL) or that a given course of conduct is prohibited under Article 82 of the EC Treaty (or Article 6 of the CDL) by relying on Articles 6.2 and 1300 and following of the Civil Code, and may also claim for damages under Article 13.2 of the CDL, and Article 18 of the UCL, in connection with Article 1902 of the Civil Code.

We shall examine which courts would have jurisdiction in relation to these types of claims.

Rules of jurisdiction under Council regulation (EC) 44/2001 of 22 December 2000

If the court case has an international dimension and involves, for example, parties domiciled in different Member States, the rules determining which Member State has jurisdiction are laid down in Council Regulation (EC) 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of civil and commercial judgements. Regulation 44/2001 is applicable in these cases due to its being binding in its entirety and directly applicable in all Member States in accordance with the EC Treaty. We refer to Articles 2 and following of Regulation 44/2001 in this regard.

Rules of jurisdiction under national law

The general rule laid down by Article 22.2 of Organic Law 6/1985, of 1 July, on Jurisdiction, is that the Spanish courts shall be competent when the parties have submitted to their jurisdiction whether expressly or tacitly, and also when the defendant is domiciled in Spain.
In the absence of the above criteria, Spanish courts will also have jurisdiction in the situations set out under article 22.3 of Organic Law 6/1985, which includes:

(a) in relation to contractual obligations, Spanish courts will be competent when those obligations originate or are to have been fulfilled in Spain;
(b) in relation to non-contractual obligations, Spanish courts will be competent when the act or omission has taken place in Spain or when both the party causing and the party suffering the loss in question have their main residence in Spain.

The CPL contains specific rules on the territorial jurisdiction of civil courts, i.e., rules determining the allocation of jurisdiction among the civil courts within the Spanish territory which indicate which is the appropriate court to turn to. Articles 50 and 51 of the CPL set out the basic rules.

(iii) Is there a possibility of collective claims, class actions, actions by representative bodies or any other form of public interest litigation?

The CDL does not contain any specific provision on the standing of classes, groups or representative bodies to file an action for the annulment of an agreement or a claim for damages before the civil courts based on an infringement of EC or national competition law.
The legal framework for "class actions" and "collective claims"[5] in Spain stems from Article 11 of the CPL. As a general rule, consumer and user associations are entitled to bring actions to protect the rights and interests of their members and of the association itself, and those pertaining generally to consumers and end-users (Article 11.1 of the CPL).
Articles 11.2 and 11.3 provides that:

(i) The parties which are entitled to claim for the protection of "collective interests ("intereses colectivos")" before a court (when those affected by an act causing loss are a group of consumers or end-users whose members are readily ascertained or easily ascertainable) are:
    (A) consumer and user associations;
    (B) legally constituted entities which have as their purpose the defence or protection of consumers and users; and
    (C) groups of affected persons (in such cases the members of the group would have to represent at least half the total number of affected persons).
(ii) The parties which are entitled to claim for the protection of "diffuse interests ("intereses difusos") (when those affected by an act causing loss are an unascertainable group of consumers and end-users or one whose members cannot be easily ascertained) are consumer associations which according to law represent general consumer interests ("representativas").

"Class actions" and "collective claims", as referred to by Article 11.3 and 11.2 of the CPL, respectively, are only available for the protection of the rights of consumers and end-users who, for example, have suffered loss as a result of anti-

5 Please note that the terms "class actions" and "collective claims" are used here for convenience purposes only, as they do not fully correspond with the terms "class actions" and "collective claims" defined in the comparative report.

competitive behaviour (i.e. consumers or end-users of the products or services of a company which has abused its dominant position by raising prices, or by forming a cartel), provided that the requirements set out in Article 11 of the CPL are met.

Other types of affected groups (e.g., an association formed by the defendant's competitors, distributors or customers which are not consumers or end-users), cannot rely on Article 11 to bring a class action. If the parties suffering loss, who are not consumers or end-users (i.e. competitors, distributors or customers of the offender), wish to bring a claim, they will have to do so individually by granting powers of attorney to the same barrister for the latter to represent them jointly in the proceedings (this is the case in "joint actions", as defined in the comparative report). Then in this case, the judgement will only affect the injured parties which are represented during the proceedings, and not all those persons who did or could have elected to participate in them.

With regard to the type of loss caused, Article 11 of the CPL could be considered to be intended only for those cases where the group of affected consumers or end-users has suffered physical or moral injury (for example, disease or death caused by defective products), and not economic loss. Our view however is that Article 11 of the CPL does not limit the availability of "class actions" and "collective actions" in this way.

Under the CPL, in "class actions" and "collective claims" any award that is made, is made in respect of each individual claimant and not in respect of the class or group as a whole. Following the judgment made in respect of the "class action" or "collective claim", each applicant must then apply to the Court: (a) to be recognised as a member of the class or group; and (b) to quantify individual damages. This is the main difference between Spanish "class actions" and "collective claims" and genuine class actions and collective actions, as defined in the comparative report[6].

There are no reported cases in Spain where a consumer and user association, or a group of consumers or end-users, has collectively claimed damages suffered as a result of an infringement of EC or national competition rules and therefore the ability to do so remains unexplored. Equally, there are no reported cases in Spain of claims filed by other affected groups.

D. What are the procedural and substantive conditions to obtain damages?

(i) What forms of compensation are available?

As to the possibility for a party to an agreement to bring an action for damages against its counter-party, it is necessary to distinguish between two different approaches:

(a) When the relevant agreement has been declared null and void by a civil judge on the grounds of being contrary to Article 81 of the Treaty or Article 1 of the CDL, the relevant statutory provisions are Articles 1300 and following of the CC. These articles provide for remedy of restitution as if the agreement had never existed, since the nullity operates ab initio[7]. An order means that each party has to return to the other anything for restitution received by virtue of the agreement, such that both parties are restored to the positions they would have been in if it had never been entered into (statu quo ante) [8].

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6 In the case of "genuine" class actions, as defined in the comparative report, any damages resulting from the action will be awarded to the members of the class as a whole i.e. individual awards will not be made to the different members of the class although each will be entitled to a part of the award. In the case of genuine "collective claims", as defined in the comparative report, any award resulting from the action will be made to the group as a whole, i.e. individual awards will not be made to the different members of the group. Therefore, although in a first phase Spanish "class actions" and "collective claims" resemble a class action or collective claim (as it aims to protect groups of identified (or unidentified) individuals), the second phase involves awards being made to individuals.

7 In the ruling in the Courage case dated 20 September 2001, the ECJ stated that "the principle of automatic nullity can be relied on by anyone, and the courts are bound by it once the conditions for the application of Article 85(1) are met and so long as the agreement concerned does not justify the grant of an exemption under Article 85(3) of the Treaty (…). Since the nullity referred to in Article 85(2) is absolute, an agreement which is null and void by virtue of this provision has no effect as between the contracting parties and cannot be set up against third parties (…). Moreover, it is capable of having a bearing on all the effects, either past or future, of the agreement or decision concerned".

8 When a party is obliged to repay or return something as a result of a declaration that an agreement is null and void, and restitution *in natura* is not possible because that something has been ruined or spoiled, it must pay such

(b) It is possible that, in addition to the remedy of restitution pursuant to Articles 1300 and following of the CC, the party suffering loss may wish to claim for damages from the infringing party on the basis of Article 1902 of the CC which regulates liability in tort.

It stands to reason that a third party which has no contractual relationship with the infringing party will only be able to claim for damages under Article 1902 of the CC, in conjunction with Article 13.2 of the CDL and Article 18 of the UCL, and not for restitution.

Forms of compensation available in the context of liability in tort are compensation for damages suffered by the injured party, whether in the form of actual damage ("daño emergente") or loss of profits ("lucro cesante") (see paragraph E) d) i) below).

The Spanish CPL only foresees the possibility of publication of information relating to the breach of law or judgments when the specific act provides for this (i.e. Unfair Competition Act, Trademarks Act, Patents Act, Advertising Act, etc.). The regulation does not expressly foresee this measure in cases of competition law infringements, although it cannot be discharged that the Court grants it if the claimant applies for it and argues its request reasonably.

(ii) Other forms of civil liability (e.g. disqualification of directors)?

Under Spanish law there are no forms of civil liability in relation to competition infringements other than liability for damages.

Please note that the directors of a company which has infringed competition law may incur criminal liability. According to the Spanish Criminal Law, in extreme cases, the representatives of a company which have tried to fix prices in the market or leave the market short of necessary goods or raw materials with the intention of causing significant harm to consumers or altering prices, may be sentenced to imprisonment for a term of between six months and five years. The Court may also impose upon the representatives sanctions involving the privation of a certain right, if the exercise of that right was related to the offence committed (e.g. disqualification from public office or from a certain profession). According to the Spanish Companies Law, a person who was disqualified from a public post or found to have committed a serious infringement of the rules relating to companies will be disqualified from being a director of a company.

(iii) Does the infringement have to imply fault? If so, is fault based on objective criteria? Is bad faith (intent) required? Can fault be taken into account?

According to the general regime for claims for damages based in Article 1902 of the CC, the infringement has to involve negligence (fault) or wilful misconduct (bad faith).

It is debatable whether Article 13.2 of the CDL allows liability to be established without the existence of negligence or wilful misconduct on the part of the undertaking carrying out the prohibited agreement or practice. On the one hand, Article 13.2 does not expressly require fault or wilful misconduct, as other Articles do[9]. However, the second paragraph of this Article adds that "*the rules governing the substance and procedure of actions for damages are those laid down in the civil law*".

Under Spanish law, it is a general principle that in order for liability to arise without the need for fault or wilful misconduct, there must be express provision to that effect in the relevant Law. Our view is that, since no such express provision is made in Article 13.2, liability thereunder is to be based on the general regime on liability in tort under Article 1902 of the CC. Article 1902 requires the existence of fault or wilful misconduct on the part of the party causing the damage. However, this requires some clarification. Civil courts tend to adopt a modern approach to non-contractual liability, which has moved it closer to the type of liability

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amount as represents the perceived benefit and value which the thing had at the time when it was ruined or spoiled, together with the interest calculated from such date.

9 For example, the UCL expressly provides that claims for damages can only be made if the party carrying out the unfair act has acted with negligence or wilful misconduct.

("*responsabilidad objetiva*") based on the allocation of risk created by the relevant activity rather than an allocation of blame to the parties involved. Even so, the requirement of culpability has not been entirely removed: It is still necessary to establish fault on the part of the defendant in order for liability to arise. The Supreme Court's interpretation of this modern approach to non-contractual liability is that simple negligence[10], which means any failure, however slight, to meet a high standard of care, is sufficient to hold the defendant liable. As regards certain activities which imply risk or which require a higher standard of care, courts tend to consider that the burden of proof in relation to fault lies with the defendant, who has to prove that he acted with the required standard of care.

Although it has been never considered by the Courts, it is reasonable to think that in certain violations of competition rules (e.g. abuse of a dominant position) fault is implied, since these forms of conduct usually imply an unquestionable intent.

Fault is assessed according to objective criteria: it must be proved that the defendant failed to exercise the standard of care which an ordinary person of full age and capacity would have exercised, taking into account the circumstances surrounding the persons involved, including the time and the place.

In order to claim for the annulment of an agreement alone, the infringement does not need to involve fault, and the defendant may even have acted in good faith and with due care.

E. Rules of evidence

(a) General

(i) Burden of proof (covering issues such as rebuttable presumptions and the shifting of the burden to other party, etc.)

There is no special provision under Spanish law with regard to the burden of proof in competition-based claims for damages. Therefore, under general principles, the burden of proof lies with the party which alleges a fact and wishes to obtain a benefit based on the existence of that fact (Article 217 of the CPL).

This provision is in accordance with article 2 of Regulation 1/2003, which states that the burden of proving an infringement of article 81.1 or 82 shall rest on the party alleging the infringement. The rules relating to procedures before the competition authorities also establish that the infringement of competition law must be actively proved.

In the case of non-contractual actions for damages, the claimant must prove the following four elements:

1) an unlawful act or omission;
2) the existence of negligence or wilful misconduct (with regard to the burden of proof for this element, please see paragraph D.(iii));
3) loss suffered by the claimant which is quantifiable; and
4) a causal link between the negligent act or omission and the loss suffered.

The CPL establishes that the Court shall bear in mind the degree of access which each party has to relevant evidence (Article 217.6 of the CPL). This means that the criteria mentioned above will have to be approached in the light of the respective ease with which the parties are able to prove certain facts (e.g. a distributor may not be able to prove the existence of a certain agreement between its supplier and another similar supplier due to its lack of access to the relevant evidence).

(ii) Standard of proof

There is no specific legal provision with regard to the standard of proof required in actions for damages based on infringements of competition law.

According to the CPL, most forms of evidence will be judged according to the rules of reasonable assessment ("*reglas de la sana crítica*"). These provide that, as a general rule, the Court is free to consider whether or not a piece of evidence convinces it as to the existence of a given fact. Only when evaluating documents

10 The court does not always use the term "negligence", but often refers to the failure to act with a high standard of care.

and oral evidence does the law provide certain criteria which must be followed by the Court:

1) Facts alleged by a party shall only be accepted as true if that party was personally involved in them, if the facts are entirely detrimental to it and if they are not contradicted by other pieces of evidence.
2) Public documents will stand as incontrovertible evidence of any fact or situation documented in them, the date on which they were documented and the identity of the people who took part in the documentation.
3) Private documents will have the same evidential weight as public documents if they are accepted by the parties as being authentic. If such authenticity is not accepted by the parties or otherwise proved, the Court will assess them freely, according to the rules of reasonable assessment.

Facts can also be proved through the use of presumptions. Under this approach, an uncertain fact ("*hecho presunto*") can be taken or assumed to be true if the existence of another certain fact ("*hecho cierto*"), with which the first is linked, is established. Presumptions can be legal or judicial. Legal presumptions are established by law, and can be incapable of being rebutted ("*iuris et de iure*") or capable of being rebutted ("*iuris tantum*"). Judicial presumptions are those made by the Court. In order to arrive at a judicial presumption, the Court must consider that between the uncertain fact and the true fact there exists a clear and direct link, and must explain its reasoning clearly in the judgment.

There are no legal presumptions established by law as regards anti-trust matters either in the CDL or in the CLP or other regulations. As regards judicial presumptions, the general rule will apply i.e. the Court hearing a competition based damages action is free to accept any uncertain fact if it considers that a certain fact is duly established and is linked to the former.

The standard of proof required for the granting of injunctions is lower than the general standard. The applicant has to prove (i) that there is "appearance of good right" (*fumus boni iuris*, i.e. that the application is based on solid arguments), and (ii) that there is a risk that the final decision will not, without an interim remedy, be able to be enforced (*periculum in mora*).

The standard of proof required in civil proceedings is not the same as in criminal proceedings. According to the Spanish Constitution, in criminal proceedings the "presumption of innocence" (*presunción de inocencia*) must always be applied (i.e. every person charged with a crime is presumed innocent until proved guilty), which implies also that the principle *in dubio pro reo* is applicable. However, according to case law from the Supreme Court and Constitutional Court, those principles are not applicable to civil damages actions.

(iii) Limitations concerning form of evidence (e.g. does evidence have to be documentary to be admissible. Which witnesses can be called, e.g. the CEO of a company? Can evidence/witnesses from other jurisdictions be admitted/summoned?)

Evidence does not have to be documentary to be admissible. Under Spanish Law, forms of evidence are:

1) Examination of the parties.
   Where one of the parties is a legal entity, its legal representative at trial will designate as the individual to be examined that person who, in the name and on behalf of the company, took part in the conduct under consideration in the proceedings (e.g. a CEO, a director, an employee, etc.). If this person is no longer with the company, he may be summoned as a witness.
   Where one of the parties is a public entity, it has the right to be examined through a written questionnaire, which may also be answered in writing.
2) Public and private documents.
   Under Spanish law, the following are public documents: (i) judgments, orders and procedural documents relating to judicial proceedings of all kinds, and records of the same issued by the court secretaries; (ii) documents duly authorised by a public notary; (iii) documents duly authorised by a commissioner for oaths ("*Corredor de Comercio Colegiado*"); (iv) documents and details registered with the Land Registry or the Commercial Registry; (v) certificates issued by civil servants with

legal capacity to testify in the performance of their duties; and (vi) documents kept on state and public authority files and records, which are issued by civil servants as evidence of the decisions and proceedings of such state bodies and public authorities.

Any other document, even though it may be produced by a public authority (such as reports from the competition authorities), will not be considered a public document from a procedural law perspective.

If a piece of evidence cannot be brought before the Court in time due to the fault of one party, the Court may penalise it with a fine of between 60 and 600 Euro, unless that party proves that there was no fault, or may reject the evidence altogether (if it was proposed by the defaulting party).

According to the CPL, a foreign public document will have the effect attributed to a Spanish public document where a specific law or international treaty recognises it as having such effect. It will also be afforded public document status if (i) it has been issued in accordance with the legal conditions required in the country of origin for it to serve as incontrovertible evidence at trial, and (ii) it has been duly apostilled and complies with any other necessary requirement for it to be considered authentic in Spain.

3) Expert's reports.

   Please refer to paragraph E) 3) ii) below.

4) Inspection by the Court.

   The Court may examine anything which could be useful towards the resolution of the case, whether in the form of an object or premises. In the latter case, the Court will be able to enter, if necessary, any premises or land once it has issued the corresponding judicial authorisation, which should set out the reasons for such entry and be proportionate and not arbitrary in nature.

5) Examination of witnesses.

   Any person which may have knowledge of the issues under consideration in the proceedings may be summoned to testify in trial. The parties may propose as many witnesses as they consider appropriate, although (i) each party will only be able to recover the costs (see paragraph I) (iv) below) of three witnesses for each issue in dispute, and (ii) if three or more witnesses have testified on a certain fact, the Court may consider that there is no need to hear the testimony of any further witnesses.

   When a witness is bound by a duty of confidentiality as regards certain facts or circumstances he will invoke his right not to give evidence because of his duty of confidentiality, and the judge will rule on this according to law.

   Both individuals and legal entities may be summoned as witnesses and, if so summoned, are obliged to testify.

6) Recorded words, sound and images are also admissible, as well as instruments which enable the recording and identification or representation of words, data, figures and mathematical calculations carried out for accounting purposes or otherwise.

7) Any other form of evidence not expressly identified in the CPL which may allow the court to reach certainty on significant facts.

   The list of forms of evidence is not closed, but only illustrative. Therefore, the Court may use any other form of evidence not expressly mentioned in the CPL which could be useful in order to achieve certainly on the issues under consideration in the proceedings.

   According to the law, the Court will not accept any evidence which is irrelevant or unconnected to the purpose of the trial. All other evidence will, in principle, be accepted by the judge.

   When deemed necessary, the Court will ask foreign Courts to take evidence in order to use it in the trial (examination of foreign witnesses, inspection by the foreign Court, examination of foreign documents, etc). If the evidence is located in other Member States (with the exception of Denmark), the procedure to be followed will be that contained in Council Regulation (EC) No 1206/2001 of 28 May 2001 on co-operation between the courts of the Member States in the taking of evidence in civil and commercial matters. If the foreign court is not in the EU but there is an

International Treaty on this issue signed with the relevant country, the procedure established thereunder will be followed. If no International Treaty has been entered into, the principle of reciprocity will be adopted (the foreign court will assist the Spanish Court to take the relevant evidence as long as the Spanish Court does the same when asked for similar assistance).

(iv) Rules (pre-trial or otherwise) regarding discovery, within and outside the jurisdiction of the court, to:

- **Defendants.**
- **Third parties.**
- **Competition authorities (national, foreign, Commission).**

During the proceedings, each party may request the production 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 document, or if this is not possible, it will indicate as accurately as possible the content of the requested document, in order to identify it. 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. The CPL does not foresee the possibility that the courts apply ex-officio for the production of a document, however, they could exceptionally request it as a "final measure"[11]. According to the law, the Court may grant the disclosure application if it is relevant and connected to the purpose of the trial (please see section E (a) (iii) above).

If one of the parties fails without justification to produce a document after being ordered to do so, the Court, in view of the rest of the evidence adduced, may attribute evidential value to a simple copy produced by a party which applied for the disclosure of a document in original form or, if no copy of any kind is provided, to the submissions of the applying party as to the content of the document in question. Alternatively, the Court may issue a specific request ("*providencia*") formally requiring the party in default to submit the requested documents to the court, when this measure is deemed appropriate in view of the characteristics of the relevant documents, the rest of the evidence adduced, the nature of the claims of the party which applied for the disclosure and the arguments invoked to support them. In Spain, the protection of business secrets is not explicitly mentioned as a grounds for refusal to disclose.

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, therefore "discovery" does not exist in Spain, as defined in the comparative report. However, such a measure is foreseen as regards unfair competition conducts (UCL). Please note that we were involved in a case where a party requested pre-trial disclosure of a contract without express legal basis for such a request and the judge granted this as preliminary measure.

According to the CPL, if there are reasonable grounds for believing that evidence may no longer be available at the moment of trial, an early assessment of evidence or measures to secure evidence may be sought. If early assessment of evidence is made, the claimant has to serve its claim within two months thereafter, otherwise the evidence will cease to be valid.

If the claimant bases its action on the UCL, before serving the claim it may apply to the court for a preliminary hearing on facts which, from an objective viewpoint, are indispensable for the preparation of the trial.

Evidence obtained through discovery in countries where it is recognised will be admissible in Spain unless an individual's constitutional rights were infringed by the taking of the evidence.

(b) Proving the infringement

(i) Is expert evidence admissible?

11 In exceptional cases courts can also obtain evidence at its own request if evidence provided by parties yields insufficient certainty on the facts under consideration ("final measures").

Expert evidence is one of the forms of evidence recognised in the CPL. Each party may obtain experts' reports on the issues under consideration and may request the oral examination of the experts in order to clarify, if necessary, the content of their reports before the Courts. Parties can attach expert reports to their claim/defence, indicate that such report(s) will be presented as soon as practicable or even apply for the appointment of an expert by the Court (one will be appointed if the Court considers it relevant and appropriate).
In addition, during the first hearing in the ordinary procedure or the single hearing in the oral procedure, each party can apply for the appointment of an expert by the court. In this case, the court may appoint an expert[12] and ask it to prepare a report if: (i) technical knowledge is necessary; (ii) the court considers it relevant and useful to have an expert's report; (iii) both parties agree upon the object of the report; and (iv) both parties agree to accept the report issued by the expert appointed by the court. Finally, the appointment of an expert may occur if the court considers it appropriate to use this "final measure".
Although the CPL does not establish it expressly, it is reasonable to think that the judge will give less weight to a report of an expert appointed by one of the parties than to a report issued by an expert appointed by the court.
Experts' reports may be sought either from an individual or from a legal entity. In the context of claims for damages, experts are usually instructed by the parties in order to prove and quantify the loss caused.

(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. Cross-examination takes place after the party, or the witness summoned by it, as the case may be, has been examined by its own counsel.

(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?

Article 13.3 of the CDL establishes that "*when so required by the competent judicial body, the Competition Court may issue a report on the origin and amount of the compensation that the parties responsible for the activity prohibited by articles 1 (collusive agreements), 6 (abuse of dominant position) and 7 (distortion of free competition by acts of unfair competition) of the present Act must pay to the plaintiffs and third parties that may have been harmed as a result of such acts*".
It should be noted that, according to article 13.3, the Competition Court is not obliged to issue a report, but only entitled to do so, and that any report issued is not legally binding on the court, but of persuasive value only.
Notwithstanding the above, decisions by a national competition authority, a national court (except for those from the Supreme Court) or an authority from another EU Member State will be assessed by the court according to the rules of assessment explained in paragraph E) (a) (ii) above for private and public documents and paragraph E) (a) (iii) for foreign public documents. Principles established by the Supreme Court in two or more judgements are binding upon lower national courts.
As regards the value of trial decisions of the Commission, we refer to the Notice on co-operation between national courts and the Commission in applying Articles 85 and 86 of the EEC Treaty (93/C 39/05), to Council Regulation (EC) 1/2003 and to the draft Commission notice on the co-operation between the Commission and the courts of the EU Member States in the application of articles 81 and 82 EC.

(c) Proving damage

(i) Are there any specific rules for evidence of damage?

Please refer to paragraph E.(a)(i) above.

12 In practice, the expert is chosen at random from list of experts held by court.

According to Article 219 of the CPL, when a claimant demands the payment of an amount (in our case, damages), it must prove the damage, quantify it exactly and provide all necessary information to enable the court to arrive at a figure by way of damages by means of a pure arithmetical calculation. If the claimant does not comply with these requirements, the court will not give an order for damages, even if it considers the existence of loss to have been proved.
According to the new CPL, as a general rule it is not possible to have partial judgments whereby the existence of damages is determined and the assessment of quantum takes place later. This is only admitted in cases of group actions issued when defending interests of consumers and users, where it is not possible to determine initially the amount corresponding to each individual affected who was not himself a party to the claim but who was in fact represented by the Association or Group which acted as claimant.

(d) Proving causation

(i) Which level of causation must be proven: direct or indirect?

Spanish law does not distinguish between direct and indirect causation, but only recognises damage which is shown to have been caused as a result of the unlawful action or omission, whether directly or indirectly, and which is quantified.
Article 1106 of the CC distinguishes between two types of damage in respect of which compensation may be payable, actual damage ("*daño emergente*") and damage in the form of the loss of profits ("*lucro cesante*"). Please refer to paragraph G.(a)(i).
There is no express provision under Spanish law with regard to the assessment by the Courts of causation. Courts tend to adopt two theories: (i) the *condictio sine qua non* test (the defendant's conduct will be considered to be the cause of the damage if, without the conduct in question, that damage would not have arisen), and (ii) the adequate causality theory (an act or omission will be considered to be the cause of damage if the damage is a "natural, adequate and sufficient consequence" of that act or omission). The second approach is the one more commonly adopted by the Courts and implies the existence of a direct link between the cause and the damage.
The causal link must always be proved by the claimant. However, if the defendant alleges the existence of possible causes of the claimant's loss other than its own conduct, the defendant will bear the burden of proving those other causes.
To the extent that multiple causes attributable to different persons are proved to have intervened in causing the damage, liability will be shared by the relevant persons jointly (if the degree of contribution of each cause cannot be established) or proportionally (if it can).

F. Grounds of justification

(i) Are there grounds of justification?

The defendant may argue that the damage is not attributable to it, for example:
(A) because the act or omission causing the damage was not due to its negligence or wilful misconduct, as it acted with the level of care expected of it, given the surrounding circumstances at the time when the action was carried out. Please take into account that courts usually impose a more exacting standard of care on undertakings;
(B) because the action or omission was fortuitous (fortuitous cases consist of unforeseeable events and events that cannot be avoided by the defendent) or because there was a case of force majeure (cases of force majeure refer to external elements which render performance impossible). It seems unlikely that these defences could apply in cases of infringement of competition rules; or
(C) because the agent was exercising a right to which he was entitled, provided that there was not an abusive exercise of that right.

Case law has in certain instances limited the damages payable by either applying Article 1103 of the CC (applicable also to contractual liability) by analogy, or for reasons of equity under Article 3 of the CC, when the damage was unforeseeable,

when the negligence of the defendant was slight and was not the principal cause of the loss, or when the damage was disproportionate to the foreseeable damage in view of the defendant's failure to meet the necessary standard of care (i.e. the result would be grossly unfair on the defendant).
Consent of the plaintiff will only be accepted as justification if (i) it has not been granted by the weaker party to a contract, and (ii) it has not been granted once the damage was known by the injured party. However, until now, this justification has not been applied for in any claim for damages based on competition infringement.

(ii) Are the "passing on" defence and "indirect purchaser" issues taken into account?

As there are no specific rules regulating liability for damages for breaches of EC and national competition law nor any case law in which damages have been awarded, the general rules on damages based on liability in tort are applicable.
Damages are awarded by the courts as compensation for loss suffered by a claimant, provided that the amount of that loss is duly evidenced during the proceedings. Only the injury actually suffered by the plaintiff may be compensated.

Therefore, if a claimant has "passed on" all or part of the inflated cost of products or services to its purchasers and has thereby limited its loss, then the court will take this into account and reduce the amount of compensation accordingly, or even dismiss the claim for damages due to the lack of evidence of the damage effectively suffered. Otherwise, the award of damages for loss not actually suffered could cause the claimant to be unjustly enriched.
There is no presumption that higher prices have been passed on. Under general principles, the defendant arguing such a defence would have to show that the claimant "passed on", and the claimant would have to prove that the damage existed, as the burden of proof lies with the party which alleges a fact and wishes to obtain a benefit based on the existence of that fact (Article 217 of the CPL).
Spanish law does not contain any provisions regarding the standing of "indirect purchasers". An analysis of the particular circumstances of the case at hand would need to be carried out in order to determine whether a company further up the distribution chain (often the manufacturer) could be sued by indirect purchasers (usually the consumers), or whether only the intermediary party from whom they purchased the product could be sued by them (i.e., their immediate distributor).
In theory, indirect purchasers could claim damages, but they would need to prove that they themselves suffered the damage because the alleged higher price has been passed on to them by the intermediary, as there exists no presumption that the higher prices have been passed on.
Where indirect purchasers suffering loss are unsure which entity ultimately carried out the anti-competitive conduct, or what degree of responsibility is attributable to each of the entities participating in the distribution chain, they would normally sue both the manufacturer and the distributor or the seller from whom they acquired the product, and will ask the judge for the appointment of an expert to prepare a report assessing this issue. If the court considers that the damage has been caused by two or more entities, the amount of damages to be paid shall be divided between all liable companies according to what the court finds reasonable in view of the evidence and the degree of each company's responsibility. In certain circumstances, for example, where it is not possible to determine the degree of participation of each company), the court may declare the involved companies jointly liable.
In practice, this is very difficult to establish, as indirect purchasers (consumers and users) will not normally have the necessary information to determine whether an increase in prices or a reduction in the offer is due to anti-competitive behaviour on the part of the manufacturer alone, or on the part of both the manufacturer and the distributor in cases where the overcharge was passed on.
To our knowledge, there are no published cases in Spain in which the indirect purchaser and the passing on defence issues have been addressed.

(iii) Is it relevant that the plaintiff is (partly) responsible for the infringement (contributory negligence leading to apportionment of damages) or has benefited from the infringement? Mitigation?

Yes. Civil courts tend to reduce the level of damages if the claimant was also negligent ("concurrencia de culpas") and contributed to increase its loss by its own behaviour. For example, a judge might consider that the claimant's own irrational or misjudged pricing policy was the predominant cause of his business failure. Furthermore, there is a general principle which requires that the injured party mitigates its loss as far as possible.

Only loss of profits effectively suffered as a result of the damaging action or omission are recoverable; income obtained by the plaintiff shall be deducted from the total amount of damage suffered.

As regards actions for restitution as a result of an agreement being declared null and void, the extent of the restitution obligation will vary according to whether one or both of the parties to the agreement contributed to the nullity (Articles 1306 of the Civil Code):

(A) where both parties are responsible for the nullity, neither shall be entitled to demand the repayment of any sums or goods transferred under the agreement, nor the payment or fulfilment of any sums or obligations owed by the other party;

(B) where only one party is responsible for the nullity of the agreement, then it shall not be entitled to demand the repayment or return of any sums or goods transferred under the agreement, nor the payment or fulfilment of any sums or obligations owed by the other party. In contrast, the party which was not responsible shall be entitled to demand the repayment or return of the sums or goods transferred under the agreement, but shall not be obliged to fulfil its obligations thereunder.

The above rules fit to a great extent with the conclusions of the European Court of Justice in the Courage Ltd. v. Crehan (case C-453/99, 20/09/01), where the ECJ found that a party to a contract that was liable to restrict or distort competition (and, therefore, that was null and void) could obtain compensation from the other party for loss caused by the restriction or distortion of competition if the other party bore significant responsibility for the restriction or distortion. However, in the light of general principle that a litigant should not benefit from his own unlawful conduct, the ECJ concluded that EC law did not prevent national law from refusing relief to a party who was found to have borne significant responsibility for the distortion of competition[13].

G. Damages

Introduction

According to Article 13.3. of the CDL, "the Competition Court may issue a non-binding report on the expediency 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"[14].

The resolution of the Court of Appeal of Burgos dated 26 June 2002 is from a case in which the first instance judge asked the Competition Court for a report on *quantum.* The damage in question had been caused by certain restrictive agreements adopted by a regional association of lift companies, which had already been declared prohibited by the Competition Court (we have not had access to its report). This is the only instance we have found of a civil judge asking the

13 Criteria that were taken into account for that purpose included whether one party to the contract was in a "markedly stronger position" than the other, and so, inter alia, was in a position to impose terms on the other.

14 The CDL sets out certain criteria to be taken into account by the Competition Court when imposing a fine as a result of the administrative proceedings relating to an infringement of the CDL: (i) the type and scope of the restriction upon competition, (ii) the size of the market affected, (iii) the market share of the relevant undertaking, (iv) the effect of the restriction upon competition upon actual or potential competitors, or other parties in the economic process, and upon consumers and end-users, (v) the duration of the restriction upon competition, (vi) the degree to which the prohibited conduct is repeated and (vii) whether the offending party acted with wilful misconduct or gross negligence. It seems reasonably likely that the Competition Court, when preparing reports requested in accordance with Article 13.3 of the CDL, would also take these criteria into account for the purposes of determining the amount to be paid by the entity responsible for the anti-competitive agreement or conduct.

Competition Court for a report on quantum in connection with Article 13.3 of the CDL.

The prohibited agreements consisted in the sharing of the lift maintenance and repair market within the province of Burgos between the members of the association. First, the members imposed a long duration (generally five years) on the maintenance agreements entered into with their customers (residents' associations) in order to make it difficult for those customers to change service provider. Then, when the fixed term expired, it was agreed that no member of the lift association would provide maintenance services to a customer if that customer had in the past received services from another member of the association. The effect of this agreement was to force the customer to renew its maintenance contract with its existing service provider. This was to the detriment of the claimant, a lift maintenance company which did not belong to the association.

Despite the earlier administrative resolution declaring the existence of the prohibited agreements, the first instance judge and the Court of Appeal dismissed the action for damages due to the lack of evidence of any damage caused (a point that the Competition Court also raised in its report, in particular, the absence of data relating to the average market share and profits of the claimant). However, the Court of Appeal gave some guidelines as to the evidence which the claimant should have submitted in order to substantiate the loss of profits suffered during the relevant period as a result of the restrictive agreements implemented by the association: this included the number of lifts for which the claimant had contracted to provide maintenance services in each of the years affected, the number of lifts for which the claimant was authorised to provide such services, the number of qualified employees of the claimant, etc. The claimant had not submitted an expert's report setting out the loss it claimed to have suffered.

(a) Calculation of damages

(i) Are damages assessed on the basis of profit made by the defendant or on the basis of injury suffered by the plaintiff?

There are no specific guidelines for the calculation of damages in cases of infringement of EC or national competition law. Therefore, the general rule of "restitutio in integrum" contained in Article 1106 of the Civil Code, which seeks to restore the parties to the positions they would have been in but for the breach or infringement and which is also applicable to liability in tort, should be taken into account. Article 1106 reads as follows: "Damages for loss comprise not only the value of the loss suffered, but also that of the gain that the creditor has been prevented from obtaining …".

This Article distinguishes between two types of damages:

(A) Damages in respect of what may be called "actual loss" ("daño emergente"), that is, loss which has actually been suffered and which is identifiable.

(B) Damages in respect of loss of profits ("lucro cesante"), which relate to the profits which the relevant party might have made if the circumstances in question had not arisen. The courts have adopted a narrow approach when considering claims for damages of this kind, requiring that:

  (i) The potential profits cannot be just mere hopes or expectations. There must be a certain degree of likelihood that they would have been realised.

  (ii) There must be a causal link between the act or omission and the loss of profits: The claimant must prove that it was prevented from obtaining the profits in question as a result of the defendant's conduct.

Civil Code does not distinguish, however, between direct and indirect damage[15].

Profits made by the defendant as a result of the infringing activity may be higher or lower than the damage suffered by the claimant. The general principle is that only

15 A reference to the concept of "direct damage" can be found in the recent Royal Decree 300/2004, of 20 February, which approves the extraordinary risk insurance regulation. Article 3 of this Royal Decree sets out the requirements for the Insurance Compensation Consortium to pay a compensation for the loss of profits suffered by the insured as a result of the occurrence of any of the events listed in that Royal Decree. Amongst them, the Royal Decree requires that direct damage has occurred to the assets insured in the relevant insurance policy, and that those assets are owned by, or are at the disposal of the insured. Loss of profits incurred as a result of the damage to any other assets or suffered by any natural or legal persons other than the insured, do not give rise to any claim for compensation (it seems that Royal Decree 300/2004 considers these types of damage as an "indirect damage").

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; however, this profit may be used as a reference point to calculate the loss of profits suffered by the claimant. Indeed, some regulations expressly provide that the profit made by the defendant may be taken into account when calculating the damages payable (for example, the Trade Mark Law and the Patent Law).

Law 17/2001, of 7 December, on Trade Marks sets out clear criteria for the evaluation of damages and states that damages claimed as a result of trade mark infringements shall be in respect of both actual damage and loss of profits. Loss of profits may be calculated in one of the following three ways, at the claimant's choice: (i) profits that the claimant would have obtained had the violation of its trade mark not occurred; (ii) profits that the infringing party has obtained as a result of the infringement; or (iii) the price that the offender would have had to pay had the holder of the trade mark granted him a licence to use it[16]. The holder of the trade mark in question is also entitled to automatic compensation (i.e. without having to evidence the damage) of 1 per cent. of the turnover obtained by the defendant as a result of the infringing products or services. Law 11/1986, of 20 March, on Patents establishes similar criteria for the calculation of damages. However, it is doubtful whether these criteria (which are appropriate in cases where the defendant has unlawfully appropriated an intellectual property right belonging to a third party and has obtained a profit as a result of exploiting it) would be applicable to cases of infringement of competition law. The general rule should be applied in such cases, and only the loss suffered by the claimant should be considered for the calculation of damages, irrespective of any profit made by the defendant.

(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) What economic or other models are used by courts to calculate damage?

There are no set legal models for the calculation of damage arising as a result of breaches of competition law (see paragraph G.(a)(i) above, nor have we found any ruling awarding damages for an infringement of competition law and therefore, it is not possible to indicate with any certainty the financial model(s) which might be used by the Courts to estimate "but for" income and costs.

The CPL does not establish any specific economic system to be followed by experts when calculating loss for the purpose of civil proceedings. In theory, expert reports may use a variety of accounting and evaluation techniques aimed at identifying and supporting the revenues and costs which would otherwise have been received and incurred if the anti-competitive conduct had not taken place. Normally, experts will elect the economic model which is most suited to the case in hand.

As regards the approach adopted by the courts, case law offers a wide variety of criteria and models which have been taken into account in this area. Generally speaking, civil judges will assess the quantity and quality of the evidence provided by the claimant in order to calculate its loss. The more intelligible, credible and persuasive the evidence submitted by the claimant (it should be objective in nature and supported, where possible, by reports of economics experts and by logical calculations), the greater the chance that the judge will be persuaded as to the existence of damage and its exact quantum. This is particularly true for loss of profits, in view of the element of uncertainty associated with this type of damage. Each case must therefore be considered on its own merits, although by analysing the most representative decisions, it would be possible to identify a pattern of some principles normally applied by the courts.

For example, in a recent decision of the Supreme Court dated 12 June 2003 (in the Canal Satélite Digital ("CSD") case, a Direct-To-Home TV platform), the State

16 In order to fix the damages payable, the law on Trade Marks states that the following elements shall be taken into account: how widely recognised the trade mark is, its renown and prestige, the number and type of licenses granted by the holder at the time when the infringement started, etc. If the holder claims for compensation for harm caused to the reputation of the trade mark, other elements to be considered are the circumstances in which the infringement was carried out, the seriousness of the harm and the prominence of the trade mark in the market.

Administration was ordered to pay CSD 26,445,280.37 Euro for loss of profits as a result of certain provisions contained in a Royal Decree which were plainly contrary to EU law. The court fixed the damages by taking into account a number of different factors based on the level of potential subscriptions to CSD during the period in which the controversial Royal Decree was in force. CSD also tried to claim damages for expenses incurred in having to move its transmission centre to Luxembourg, although this claim was dismissed as the court held that, on the facts, this move had occurred before the inception of the Royal Decree. On similar grounds, the court also dismissed claims for to cover related legal fees and travelling costs.

In respect of the number of subscribers the court analysed the temporary and permanent loss of subscribers suffered by CSD as a result of the situation in which CSD was placed by the unlawful Royal Decree. Although the damages claimed were 100,016,198.21 Euro (this amount was calculated in the report of one expert instructed by CSD and was corroborated, to a certain extent, by the reports of two experts appointed by the judge), the court considered that there had been other causes of CSD's fall in profits which were not attributable to the Administration's actions.

The first contributing factor considered by the court was publicity and marketing expenditure which varied substantially between 1997 and 1999. The court found that during the period covered by the claim, CSD's marketing and publicity expenditure dropped to as little as a fifth compared to other periods. The inconsistency in application of funds, the court held, must have had an impact on the new subscription and retention rates which the claimant's experts had failed to address. Further, the experts failed to take into account changes in the programme schedules which would have affected subscription rates. For example, during the 1997-1998 season, CSD acquired certain exclusive football transmission rights. In addition, CSD's competitor, Vía Digital, entered the market and this increased competition led to an overall improvement of programming quality. Equally, the increasingly competitive market for pay-for-view television with the impact of foreign products, notably from France and the United States, pushed down subscription fees. This was referred to by the experts but not factored into their final damages calculations based on estimated subscription levels. A further issue which the experts glossed over was the refusal of many of Spain's most important retailers, including El Corte Inglés, Al Campo, Continente and Pryca, to sell CSD's product because it was claimed of the regulations imposed by the Royal Decree. This though remained unsubstantiated and evidence of prior contracts was not adduced.

For these reasons, the Court, whilst accepting the illegality of the Royal Decree, awarded damages to CSD in an amount less than that claimed. The court's approach in calculating the loss of profits was as follows. First, the court calculated the number of subscribers who delayed in subscribing to CSD by assimilating the estimations made by the experts with the figures for new subscribers obtained by the other DTH platform operator, Vía Digital, during the same period. This number was then multiplied by the average monthly subscription fee (calculated by averaging out across the range of subscriber packages available) and the number of months of delay. Into this calculation, the court factored in a number of correcting issues. These included variations in subscription rates in different months, decrease in subscription fees, better programming, market penetration of the product based on length of time available to consumers and distribution networks. To this figure legal interest, which in 1997 stood at 7.5 per cent., was applied.

The second analysis involved calculating the lost income by taking the number of subscribers lost by CSD (reduced by 20 per cent. to take into account changes in programming and subscription rates), then multiplying this by the average monthly income per subscriber and then multiplying again by the average life of a subscriber (taken to be six years and two months). A correcting reduction is made to this figure to take into account cancelled subscriptions and then the figure is reduced by 65 per cent. to give gross margin. An additional calculation along the same lines was undertaken to determine the loss incurred by virtue of lost initial sign-up fees.

These calculations led to an total award for damages of 26,445,280.37 Euro to be paid by the State Administration to the claimant.

In a case of an unfair competition ruling of 25 May 1999, the Court of Appeal of Barcelona had to calculate the loss of profits suffered by a pharmacist in a small village as a result of unfair conduct carried out by a doctor during 1994. The claimant argued that the conduct gave rise to a loss of profits due to the fact that the patients bought medicines directly from the doctor instead of buying them in her pharmacy. Although the figures are not high, this ruling gives an example of how civil courts calculate loss of profits.

The Court of Appeal accepted the action for damages and calculated the loss of profits on the basis of the expert report submitted by the claimant, according to the following approach: (i) calculation of the average increase of the claimant's turnover in 1993, 1995 and 1996, giving a figure of 8.4 per cent.; (ii) increasing the actual turnover obtained in 1993 by 8.4 per cent., giving a loss of 32,736.74 Euro with respect to the turnover which should have been obtained in 1994; (iii) applying a percentage of 14.97 per cent. by way of profit margin, resulting in a net loss of 4,900.69 Euro.

Furthermore, it is important to note that, the court used a judicial presumption (regulated by Article 1253 of the Civil Code) in order to arrive at the conclusion that the conduct carried out by the defendant had led to a decrease of the claimant's sales.

In the absence of damages awarded as a result of an anti-competitive agreement or conduct, it seems reasonable and logical that the judge considers the following elements to identify the "but for" scenario and calculate damages suffered by the claimant, depending on the nature of the injury and the type of anti-competitive conduct carried out by the defendant (please note that this is only a theoretical exercise not supported by case law; we have not checked whether the Spanish economists have ever analysed this particular issue):

(a) In a price fixing case, the "but for" scenario would involve an estimation of the price that would have been paid had the anti-competitive agreement not existed.

(b) In a margin squeeze case, the "but for" scenario for a defendant's customer would involve an estimation of what a fair and non-discriminatory wholesale price would be for the essential product or service in question.

(c) In a case of discriminatory volume discount pricing, the "but for" scenario for a defendant's competitor would involve an estimation of the sales which it would have obtained had the volume discount pricing not been applied. Loss of profits as a result of the claimant having been forced to also apply discounts to keep customers and thus survive would also be taken into account. The same criteria would be applicable in cases of predatory pricing.

(d) In case of tying agreements, the "but for" scenario for a defendant's customer would be based on the price paid by it as a result of being obliged to buy a second or more products (the "tied" goods) as a condition of sale or lease of the "tying" goods, on the theory that the purchase was unwanted and would not have occurred if it were not for the "tie". If the injured party is a defendant's competitor in the market of the tied goods, damages could be calculated on the basis that it would have enjoyed higher sales had the tie not existed.

(e) In a case of a network of long-term contracts entered into by the defendant with its customers creating a barrier to entry, the "but for" scenario for a defendant's competitor would be based on the sales which he could have obtained had it not been for the network of long-term agreements.

(f) In the case of a refusal to grant access to an essential facility, or to a specific raw material or technology, the "but for" scenario would involve examining the sales which would have been available to the defendant's customer had access been granted. Damages could then be calculated by estimating the loss of profits on these sales as compared to the sales which were actually achieved, including expenses incurred as a result of having had to turn to another source of supply, for example, a supplier outside the national territory.

(g) In cases where the defendant implements a course of exclusionary conduct in respect of a new entrant, the "but for" scenario would be based on a projection of what would have happened to the excluded entrant's sales "but for" the anti-competitive acts. Proof of damage in such cases is not

easy. For example, in the case 456/99, Retevisión v Telefónica (resolution of 8 March 2000), where the Competition Court declared that Telefónica had abused its dominant position by carrying out an advertising campaign which was aimed at preventing or minimising Retevisión's entry into the fixed telephone market, damages could have been calculated by taking into account the number of customers who delayed in subscribing for Retevisión's services, or even the number of customers actually lost by Retevisión, as a result of the impact of the illegal advertising campaign, as well as the marketing and promotional expenses incurred by Retevisión to counter Telefónica's campaign which would otherwise not have been incurred (minimising costs)[17].

(h) In cases where the plaintiff's business is partially or totally destroyed as a result of the anti-competitive conduct, calculation of damage should involve the estimation of the loss of the value of the going concern.

(iv) 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 (please see *CSD case* in section G (a) (iii) above; please feel free to take this case as an illustrative example).

(v) Are there maximum limits to damages?

No. There are no established limits in connection with claims for damages based on infringements of EC or national competition law nor under general liability in tort.

(vi) Are punitive or exemplary damages available?

Spanish law does not recognise the concept of punitive or exemplary damages, although there are some categories of damages which seem to approach that concept, for example, under the Trade Mark Law and the Patent Law.

(vii) Are fines imposed by competition authorities taken into account when settling damages?

No.

Obviously, a prior administrative resolution imposing a fine (fines can only be imposed if the relevant undertaking acted with negligence or wilful misconduct (Article 10 of the CDL)) will be taken into account by the judge, together with the other evidence submitted by the claimant for the purpose of considering the question of liability. However, the existence or amount of any fine has no bearing on the Court's assessment of quantum.

(b) Interest

(i) Is interest awarded from the date

- **the infringement occurred; or**
- **of the judgment; or**
- **the date of a decision by a competition authority?**

17 Please note, however, that evidence of lost sales as a result of an advertising campaign is not easy to obtain. In the event that illicit advertising carried out by a well known manufacturer of spirits, one of its direct competitors asked for damages in the amount of the lost profits suffered as a result of the illicit advertising. The defendant carried out an advertising campaign on TV and in newspapers of a 5% proof beverage with cola and rum; however, the claimant considered that the advertisement constituted a way to indirectly advertise the rum itself, which is an alcoholic beverage of more than 20% proof with the advertising on TV of this type of beverage prohibited under the General Publicity Law and the Unfair Competition Law. The first instance judge declared that the advertising was unlawful and ordered the cessation of the advertising campaign. However, he dismissed the action for damages because the expert appointed by the first instance judge upon the claimant's request was not able to show that the claimant's income had diminished nor that there had been a smaller increase in the demand of the claimant's rum during the period in which the illicit advertising was broadcast. According to the ruling, the econometric report showed that neither the claimant's nor the defendant's sales had been affected, as they were consistent with past trends. Therefore, as no damage had been proved, the action for damages was dismissed (Ruling of the First Instance Judge no 5 of Majadahonda of 9 December 1999).

In cases where, as a result of an agreement being declared null and void, the parties have to return on the one hand the goods which were the subject matter of the agreement (or the value of those goods if sold), together with any income or gain derived therefrom, and on the other, the price paid for the goods together with interest, this interest is calculated from the date when the price was paid to the supplying party. This has the effect of restoring the parties, as far as possible, to the positions they would have been in had the agreement never been entered into.
In cases where the claimant is awarded damages, the judge will fix a lump sum for those damages on the basis of various criteria used by the courts (see paragraph G(a)(iii) above). One of the elements taken into account to calculate the damages could be the interest accrued from the date when 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.
If the defendant does not pay the damages immediately after the first instance decision has been issued, then the relevant amount will accrue the so-called "procedural interest" ("mora procesal") from the date of the judgment.

(ii) What are the criteria to determine the levels of interest?

Normally, the interest rate applicable will be that agreed by the parties. In the absence of an agreed rate, the interest applicable will be based on the "legal interest rate", which is published annually in the Official State Bulletin (B.O.E.).

For procedural interest, 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 proceedings?

Agreements which are anti-competitive under Article 81 of the Treaty and Article 1 of the CDL (and also under Article 82 of the Treaty and Article 6 of the CDL by virtue of constituting an abuse of a dominant position), are capable of being declared null and void. The consequence of this nullity is the restitution of the goods and amounts which were the subject matter of the agreement (Article 1303 of the CC). There is no time limit to apply for an agreement to be declared null and void, nor for a declaration that conduct infringes competition law under Article 82 of the Treaty and Article 6 of the CDL. However, the time limit 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 as a result of infringements of competition law, the general rule is that the injured party has to bring an action before the court within one year from the day when that party discovers the damage or, in the opinion of most of academics, from the date the Competition Court (or the Court responsible for reviewing Competition Court decisions) gives a definitive decision on the infringement in the event that previous administrative procedure has been initiated (Article 1968 and Article 13.2 of the CDL in connection with Article 1902 of the CC).

(ii) On average, how long do proceedings take?

In Spain there are a large number of First Instance Courts ("Tribunales de Primera Instancia") in each city (for example, in Madrid there are more than 60). Once the First Instance Court has given its decision, a dissatisfied party may bring a first appeal before the Court of Appeal, of which there are more than fifty throughout Spain. The parties' final recourse is to appeal against the decision of the Court of Appeal before the Supreme Court.

The duration of proceedings varies from one Court to another and it is difficult to give a reliable estimate. The Madrid Bar Association published a report in 2001 on the average duration of proceedings in Madrid during the year 2000. In short, the average duration of the first instance stage was one year and four months, although differences of more than three years were found between the 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.
In addition, it must be borne in mind that these proceedings were decided under the old CPL. In 2000 a new CPL was passed by Parliament, and now the time taken to resolve proceedings has been reduced somewhat, especially for first instance hearings (now lasting between seven months and two years). In any case, the variations to be found between Courts remain very significant.

(iii) It is possible to accelerate the proceedings?

Under the new CPL there are two kind of proceedings: ordinary proceedings and oral proceedings.
The main difference between the two is that oral proceedings (i.e. *abbreviated* or *fast track* proceedings) have one fewer stage than ordinary proceedings. In short, ordinary proceedings consist of two hearings while for oral proceedings there is only one. This means that, in principle, the duration of ordinary proceedings is longer than for oral ones.
In the case of an action for damages based on an infringement of competition law, the action will take the form of ordinary or oral proceedings depending 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 claimant may ask for an early assessment of evidence (see paragraph E.(a)(iv) above).

(iv) How many judges sit in actions for damages cases?

In the Court of First Instance there is only one Judge. In the Court of Appeal there are three judges and in the Supreme Court there are six.

(v) How transparent is the procedure?

According to section 265 of the CPL the claimant and defendant have to attach to their claim and defence (respectively) all the documents and experts' reports (if any) on which they rely in their claim or defence. This means that neither is able to adduce other documents at subsequent stages of the procedure apart from, in exceptional situations: these include (i) when the documents are dated after the claim or the defence, as appropriate, is lodged; (ii) when the documents are dated before such date but the claimant or defendant is able to show that it was not aware of the existence of the relevant documents before that date; or (iii) when the claimant or defendant could not obtain the documents because of external circumstances beyond their control, provided that the claimant or defendant indicates the file or place when the documents are located (Article 270 of the CPL).
This is a particular example of the application of a general principle established by Article 136 of the CPL: Once a stage of the proceedings has passed (in this case the serving of the claim and defence with their accompanying documents and reports) the parties have lost the chance take any of the steps associated with that stage.
In short, Spanish civil procedure is 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 or documents.
Finally, according to the Sole Additional Disposition of the CDL (included by the recent Law 62/2003), Civil Courts shall deliver to the Competition Service copies of all decisions in which EC competition law has been applied. However, this

Additional Disposition does not state that these decisions shall be made available to the public.
The parties' briefs or experts reports are not publicly available. There is no public registry where rulings are registered. First instances rulings are not compiled in case law collections. These collections include a selection of rulings reaching the appeal stage and all rulings of the Supreme Court (which is the highest level). Case law collections are normally used by lawyers and other legal professionals, but not by the public. Some regulations provide that the defendant may ask for the publication of the ruling in official gazettes, or for the ruling to be notified to the interested parties. For example, the UCL grants this to the injured party as means of compensation for the damage suffered.

I. Costs

(i) Are Court fees paid up front?

Only certain Court fees ("*tasas*") must be paid up front. Companies with a turnover of more than 6 million Euro in the last financial year are obliged to pay Court fees. Individuals and companies with a turnover below 6 million are exempt from paying Court fees.
Court fees should be paid at the time of serving the claim, any counter claim and any appeal. The amount payable ranges between 90 and 6,000 Euro, depending on the type of proceedings and the amount of damages claimed from the other party.

(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 ("*condena en costas*"). Please see paragraph (iv) below.

(iii) Are contingency fees permissible? Are they generally available for private enforcement of EC competition rules?

The concept of contingency fees in its strict sense (*quota litis*) is prohibited in Spain. Therefore a lawyer cannot agree with his client that he will only receive a percentage of any amount awarded at trial, and that if judgment is given against his client, he will not get any fees at all.
However, 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 trial (e.g. depending on the amount of damages awarded to the client).
The use of this kind of bonus or uplift arrangement depends on the agreement between client and lawyer, not on the type of action.

(iv) Can the plaintiff/defendant recover costs? Are there any excluded items?

The court will always order a party which loses the case to pay both parties' costs ("*criterio del vencimiento*"), unless (i) the case raises serious doubts as regards the facts or the application of the relevant law, or (ii) the arguments of the losing party are not totally dismissed. In those cases, the court will not make an order for costs, and each party will pay its own costs[18].
Costs include only the following concepts:

1) Fees corresponding to the solicitor and barrister when their involvement is compulsory in the trial (this will be whenever the amount claimed from the defendant is more than 900 Euro). The fees should not be excessive; those for the solicitor should be similar to the recommended fees published by the professional body for solicitors (such fees are calculated as a percentage of the amount claimed from the defendant; the relevant percentage is taken from a sliding scale). Barrister's fees are fixed by law. Unless the Court declares that the losing party has acted unreasonably at trial, that party will only be obliged to pay the solicitor's fees of the other up to a third of the amount of the claim.

18 If the arguments of the losing party are only partially dismissed but the court considers that it has litigated rashly (*con temeridad*), the losing party will also be ordered to pay both parties' costs.

2) Costs relating to the compulsory publication of announcements or public notices.
3) Compulsory deposits made with the court when lodging an appeal.
4) Expenditure relating to witnesses and experts, and experts' professional fees. Please note that a party will only be able to recover the costs of three witnesses for each issue in dispute.
5) Expenditure derived from obtaining copies, certificates, excerpts or any other document which is necessary during the trial.
6) Expenditure relating to the execution of public deeds, and the obtaining of copies and notarial certificates, and documents and details registered with the Land and Commercial Registries.

Any other cost incurred by the parties and not included in the above list will not be recoverable even if the party obtains a favourable judgment.

(v) What are the different types of litigation costs?

Please refer to paragraph I) (iv) above.

(vi) Are there national rules for taxation of costs?

Costs will be assessed by the court at the end of the trial, once the judgment ordering the party which loses the case to pay both parties' costs is definitive.
Costs will be taxed by a judicial agent according to the recommended fees guides published by the professional body for solicitors, professional fees charged by experts and their expenditure, expenditure incurred and evidenced by witnesses and fixed rates established by law for other items.
Taxation of costs prepared by the judicial agent may be challenged by the parties. The parties may argue that certain concepts or items of expenditure should or should not have been included, as appropriate, or that experts' or lawyers' professional fees are excessive. The judicial agent will review the taxation of costs in view of the challenges lodged, and finally the Court will make a decision on the issue without the possibility of further appeal.

(vii) 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. This means that the insured party pays an annual premium and receives legal representation in any legal proceedings relating to the activities specified under the policy (which may include that party's commercial activities) without incurring any further cost.
The defendant may also have subscribed for an insurance policy for civil liability. In this case, the insurance company will pay any damages granted to a claimant in civil proceedings.
As a general rule, a company may take out an insurance policy covering the consequences of a claim for breach of EC or national competition law. However, please note that, 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 ("asistencia jurídica gratuita") is available for members of the public who cannot afford the costs of a trial. According to Law 1/1996, of 10 January, on Legal Aid, as a general rule, only natural persons who satisfy the eligibility tests can apply for legal aid, although public interest associations and foundations can also benefit from legal aid. People granted legal aid do not have to pay (i) pre-trial legal advice, (ii) solicitors' and barristers' fees, (iii) costs of publishing announcements in official journals, (iv) deposits required for lodging certain appeals, (v) experts' fees. There are other additional benefits. To qualify as having insufficient means, the total monthly income of the applicant and his family unit must not be more than twice the National Minimum Wage ("salario mínimo interprofesional") set annually by the Government. Legal aid is available for all cases, including matters which have to be resolved before the civil courts. Therefore, although Law 1/1996, of 10 January on Legal Aid does not explicitly mention competition claims, we

understand that legal aid covers these types of claims should the claimant qualify as having insufficient means.

(viii) What are the likely average costs in an action brought by a third party in respect of a hard-core violation of competition law?

It is difficult to give a reliable estimate, since the costs will vary greatly depending on the amount claimed from the defendant and on the extent to which appeal procedures are pursued.
According to the table below and the rules on costs, an approximate estimate of the costs involved for one party in pursuing damages for Euro 1 million where there is an easily provable hardcore restriction and the affected company had a turnover above Euro 6 million last financial year would be around Euro[19] 65,000 (only first instance).
The following table contains recommended fees published by the professional body for solicitors of Madrid:

Value of Claim	By Tranche	Running Total
Up to 3,000 ε: 25%	750ε	750ε
From 3,001 to 18,000ε:15%	2,250ε	3,000ε
From 18,001 to 60,000ε: 10%	4,200ε	7,200ε
From 60,001 to 120,000ε: 9%	5,400ε	12,600ε
From 120,001 to 180,000ε: 8%	4,800ε	17,400ε
From 180,001 to 240,000ε: 7%	4,200ε	21,600ε
From 240,001 to 300,000ε: 6%	3,600ε	25,200ε
From 300,001 to 450,000ε: 5.5%	8,250ε	33,450ε
From 450,001 to 600,000ε: 5%	7,500ε	40,950ε
From 600,001 to 750,000ε: 4.5%	6,750ε	47,700ε
From 750,001 to 900,000ε: 4%	6,000ε	53,700ε
From 900,001 to 1,050,000ε: 3.5%	5,250ε	58,950ε
From 1,050,001 to 1,200,000ε: 3%	4,500ε	63,450ε
From 1,200,001 to 1,500,000ε: 2.5	7,500ε	70,950ε
From 1,500,001 to 1,800,000ε: 2%	6,000ε	76,950ε
From 1,800,001 to 2,100,000ε: 1.5%	4,500ε	81,450ε
From 2,100,001 to 2,400,000ε: 1%	3,000ε	84,450ε
From 2,400,001 to 2,700,000ε: 0.75%	2,250ε	86,700ε
From 2,700,001 to 2,700,000ε: 0.5%		

J. General

(i) Are some of the answers to the previous questions specific to the private enforcement of competition rules? If so, in what way do they differ from the general private enforcement rules?

Article 13.2 of the CDL seems to require a prior final administrative resolution in order for the injured party to seek damages before the civil courts for infringement of national competition law. This means that the injured party is prevented from bringing an action for damages directly before the courts, in contrast to most other actions for damages.
Although there are grounds for arguing that Article 13.2 should not be interpreted in this way, the Supreme Court (in the Disa case), some Courts of Appeal and certain academic authorities have all taken the view that a prior administrative resolution is a procedural prerequisite in actions for damages of this kind.
For as long as this Article is not abrogated or clarified by the legislator, there remains a high risk that civil courts will dismiss actions for damages based on infringements of national competition law if a prior administrative resolution has not been issued.

19 Fees guides published by the professional body for solicitors not only take into account the amount claimed but also indicate that additional criteria like the complexity of the case, the outcome of the trial, etc. must be valued. To calculate the estimate we have not taken into account criteria other than the amount of the claim; we assume that the the case is not significantly complex, since the hardcore restriction is "easily provable".

As regards the application of EC competition law, our opinion is that a prior resolution of the competition authorities is not a prerequisite for an action for damages, in view of the direct effect of the EC competition rules, as repeatedly supported by ECJ case law and now by EC Regulation 1/2003, and also because Article 13.2 of the CDL does not refer to EC competition law.

(ii) EC competition rules are regarded as being of public policy. Does that influence any answers given?

No.

(iii) Are there any differences according to whether the defendant is a public authority or a natural or legal person?

Yes, claims for damages against public administrations are subject to a specific procedure regulated in Law 30/1992, of 26 November, of the legal regime of the Public Administrations, the ordinary administrative procedure and Royal Decree 429/1993, of 26 March.
The key question to consider here is what should be understood by the expression "public administrations".
According to Article 2 of Law 30/1992, of 26 November, of the legal regime of the Public Administrations and the ordinary administrative procedure, "public administrations" are the State administration, the Autonomous Communities administrations, the entities integrated the Local administration, and the public law entities with legal personality vinculated to, or dependant of any public administration when they exercise administrative faculties.
Therefore, should the defendant be a public administration, then the action to claim damages should firstly be filed before the administrative instance; the decision passed by the competent administrative authority may be then appealed before the contentious-administrative courts.

(iv) Is there any interaction between leniency programmes and actions for claims for damages under competition rules?

There are no leniency programmes under the CDL.

(v) Are there differences from region to region <u>within</u> the Member State as regards damages actions for breach of national or EC competition rules?

Procedural law falls within the exclusive jurisdiction of the State, and therefore it is the same for all Spanish civil courts.
Regional Autonomous Communities have competence to apply Articles 1 and 6 of the CDL (executive competence) within their territory, however, the exclusive legislative competence as regards competition defence and unfair competition remains with the State (i.e. only the State is able to modify the Competition Defence Law and the Unfair Competition Law). Therefore, Autonomous Communities are allowed to create regional competition authorities[20], and those entities (and not the Competition Court) are competent to apply Articles 1 and 6 of the CDL if the restrictive agreement or practice does not have any effect outside their territory[21]. The Autonomous Communities have to pass regional laws in order to regulate jurisdictional matters within their territories. Law 1/2002 provides that the references to the Competition Court in (amongst others) Article 13 of the CDL, shall be deemed to refer also to the Autonomous competition authorities. Therefore, (in some instances) these authorities may be the competent bodies to prepare the report on damages referred to in Article 13.3 of the CDL upon the request of the Civil Courts (see paragraphs E.(b)(iii) and G above).

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20 Several Autonomous Communities have already created regional competition defence authorities, such as Murcia (Decree 13/2004, of 13 February) and Catalonia (Decree 222/2002, of 27 August).

21 Law 1/2002, of 21 February, co-ordinates application of the competition rules by the State and the Autonomous Communities. This law was approved as a result of the resolution of the Constitutional Court of 11 November 1999, which declared that the Autonomous Communities have executive competence in connection with internal trade and, therefore, with competition matters to the extent allowed by their Statutes of Autonomy.

Regional regimes on private law (e.g. in Navarra and Catalonia) also contain brief references to private law, but these references do not modify substantially the regime stated in the Civil Code which is analysed in this report.

(vi) Please mention any other major issues relevant to the private enforcement of EC competition law in your jurisdiction

In Spain, the law applicable to non-contractual obligations is the law applicable in the place where the events which gave rise to the obligations occurred (*lex loci delicti*)[22].

Recent trends show that the Supreme Court and Courts of Appeal are more and more willing to apply EC competition rules directly, without referring the case to the competition authorities. However the following considerations should be taken into account:

(a) in none of the cases studied did the injured party claim for damages based on an infringement of EC or national competition law. We have found two cases where the claimant applied for damages, but he based his claim in the UCL rather than in the CDL. In one of these cases, the Court did not make an award of damages as it was not provided with the necessary data and information to calculate them; in the other case, the court did award damages, but these were awarded under the UCL;

(b) the Court has only applied once to the Competition Court for a report on the amount of compensation (the Competition Court issued the relevant report, but did not provided a conclusive amount, since the necessary data was not available);

(c) in none of the cases examined was an injunction or interim measure ordered by the Court;

(d) in five cases the Courts declared itself to be lacking competence to deal with matters which were mainly related to competition law;

(e) the majority of the cases take the form of actions for the annulment of agreements prohibited under Article 81 of the Treaty and Article 1 of the CDL. There are only eight rulings dealing with the abuse of a dominant position (under Articles 82 of the Treaty and 6 of the CDL) and the majority of the judgments deal with collusive agreements (42 rulings);

(f) most of the cases (21 rulings) deal with the question whether an agreement or clause falls within the scope of the European block exemption regulation (Regulation 123/1985 and Regulation 1984/1983);

(g) only a few decisions (15 rulings) deal with national competition law (Articles 1 and 6 of the CDL). The majority apply EC competition law (20 rulings) or some apply both national and EC law simultaneously (14 rulings);

(h) in one case the Court suspended the procedure in the interests of judicial consistency, waiting for a decision on the same case from the European Commission on a possible infringement of Articles 81 and 82 of the Treaty;

(i) only in three cases was there a previous decision from the Competition Court, two of those decisions declared that the conduct under consideration was an infringement of competition law, and the third one declared that there was no infringement;

(j) civil courts do not analyse the relevant market, the market shares of the parties, the structure of the markets affected, etc. when assessing a case in which competition rules are applied. There are no specific criteria, scales or formulae to be used for the calculation of damages in competition cases;

(k) in most of the cases, the civil courts do not analyse whether intra-community trade is affected and, therefore, why EC competition rules (instead of the national ones) might be applicable;

(l) we have not found any examples of an arbitration award in which competition rules have been applied; and

(m) there are no reported cases of class actions involving the application of competition law.

Courts and arbitrators have been reluctant to apply competition law directly as a result of the Supreme Court's ruling in the Campsa case. After the Disa ruling, it

22 Article 10.9 Spanish Civil Code.

seems that there has been an increase in the number of cases applying competition rules, although none of those rulings led to an award of damages as, except in one case, the claimant did not ask for them.

(vii) 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.

As far as we are aware, there are no cases based upon the violation of EC or national competition rules in which damages were granted (please see section J (vi) above). Only two cases, both from Courts of Appeal, mentioned the issue of damages. However, both cases were based on infringements of UCL rather than DCL (Court of Appeal of Burgos, judgement dated 26 July 2002 and Court of Appeal of Gerona, judgement dated 16 April 2002. Please see section V below).

III. Facilitating private enforcement of Articles 81 and 82 EC

(i) Which of the above elements of claims for damages (under Sections II) provide scope for facilitating the private enforcement of Articles 81 and 82 EC? How could that be achieved?

Historically, private damages actions have played a very limited role in the enforcement of EC and national competition law before Spanish courts. Although these actions have always been available, there are a number of factors which may have contributed to the injured parties not pursuing them[23].

Some measures could be adopted in order to facilitate damages actions including, for example, the following:

(a) The abrogation of Article 13.2 of the CDL so as to allow private actions for damages to be brought directly before civil courts without the need to await an administrative ruling. It would be also necessary to make clear that the Competition Court is not a pre-court authority to which the injured parties must turn to before filing a claim in the civil jurisdiction (courts or arbitration).

This abrogation would be necessary in order to remove the current interpretation of Article 13.2 of the CDL held by the competition authorities, the civil courts and the majority of legal commentators, according to which a prior administrative ruling of the Competition Court declaring the infringement of national competition law is necessary for the injured party to claim for damages before civil courts.

In practice, this prerequisite constitutes an obstacle for the injured party to claim damages, as it has to wait until the administrative decision of the Competition Court is no longer subject to a possible appeal before it can claim damages. Assuming that:

(i) a sanctioning procedure before the Spanish competition authorities may take at the very least two years, and that afterwards the Competition Court's ruling may be appealed before the Audiencia Nacional and further challenged before the Supreme Court; and that

(ii) civil proceedings in which damages are claimed may go through three different courts: first instance, appeal and finally the Supreme Court,

actions for damages can be seen as "a never-ending path or, simply, the negation of the principle of access to justice[24]", in contravention of Article 24 of the Spanish Constitution. Furthermore, the injured party is obliged to follow a more sophisticated and costly procedure before the competition authorities and as he cannot recover his costs.

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23 Under former Law 110/1963, of 29 July, on the repression of practices restricting competition, it was clear that actions for damages should be preceded by an administrative decision declaring the infringement of competition law, at least in respect of Spanish competition law; under the CDL, it is not clear whether a prior administrative decision continues to be necessary to claim damages for violation of Spanish competition law; most of the authors understands, however, that actions for damages based in EC competition law are not subject to this prerequisite.

24 Creus, A., *La Privatización del Derecho de la Competencia* (1999), Gaceta Jurídica de la Competencia y de la EU, no 200, May – April 1999, at 56 and 59.

If the requisite set out in Article 13.2 CDL is removed, injured parties who are not a party to the anti-competitive agreement could claim damages directly before the civil courts more easily and quicker, avoiding the administrative procedure before the competition authorities.

(b) Granting competence to the new Mercantile Courts to apply Articles 1, 6 and 7 of the CDL. This could be achieved by amending Article 86 of Organic Law 6/1985, of 1 July, on the Judiciary.

(c) Including in the CDL an express provision on the types of actions which a claimant may bring against the offending party. The CDL should expressly set out the mercantile courts' competence to grant injunctions and interim measures, as is expressly recognised in the UCL[25].

(d) Granting similar powers to the new Mercantile Courts as regards trials based on national competition law to those granted in Article 15 of the Regulation 1/2003 in respect to the European Commission, for example, the possibility to request for information and reports relating to the case, and inserting a similar new provision in Article 16 of Regulation 1/2003 in the CDL.

(e) Other measures to be adopted (although these are more questionable than the former ones):

  (i) Establishing specific guidelines or criteria for the calculation of damages suffered as a result of infringements of competition law and, in particular, loss of profits, as available under the Trade Mark Act, the Patent Act and the Intellectual Property Act.

  (ii) Inclusion of an explicit reference in the CDL to the possibility that users and consumers will be able to use "class actions" to obtain relief for loss caused by infringements of EC or national competition law, in order to encourage the use of "class actions" in these cases, for a number of reasons:

    (A) First of all, because the application of competition law by civil courts is relatively underdeveloped in Spain, and that no action for damages based on the infringement of this law has ever been filed before a civil court;

    (B) Secondly, because no consumer association has ever used the "class action" procedure under Article 11 of the CPL to seek damages for infringements of competition law. In principle, Article 11 of the CPL does not limit actions available to consumer associations to actions for physical damage and therefore it would be possible to claim for "pecuniary" loss suffered, for example, as a result of a cartel, or an abuse of a dominant position; and

    (C) Thirdly, because of the lack of national awareness among consumers that a "class action" for damages may be brought for anti-competitive practices and, generally speaking, of any form of "class action" culture.

(ii) Are alternative means of dispute resolution available and if so, to what extent are they successful?

Yes, arbitration qualifies, in principle, as an alternative means of dispute resolution in this field. However, please note that the cases we have found do not award damages for infringement of competition law.

Discussion on arbitration

According to Article 2 of the new Law 60/2003, of 23 December, on Arbitration, only disputes relating to matters which may be freely negotiated and agreed according to law may be subject to arbitration[26]. The law does not contain specific provisions on types of disputes that cannot be submitted to arbitration.

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25 In the Campsa case (where the claimant applied for an injunction in respect of an alleged abuse of a dominant position and claimed damages), the Supreme Court considered that civil courts were not competent to apply competition law in a "principal manner". Although after the Campsa decision, the Supreme Court applied EC competition law in a direct manner in the Disa case in declaring an agreement to be null and void, whether or not an injunction is available in the civil courts remains an open question, as the claimant in that case did not ask for an injunction.

26 Article 1 of former Law 36/1988, of 5 December, on Arbitration, which has been repealed by Law 60/2003, contained a similar rule. Please note that the new Arbitration Law will not come into force until 26 March 2004.

Under Spanish law, arbitration tribunals are competent to settle a legal dispute if there exists a valid arbitration clause in the agreement out of which that dispute has arisen (this clause will apply even if the entire contract which contains it is declared null and void). Therefore, 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.

In the course of arbitration proceedings, EC and national competition law issues most frequently arise in non-performance disputes in which the non-performing party claims, as a means of defence, for the annulment of an agreement because of a breach of Article 81.1 of the Treaty or Article 1 of the CDL. This is particularly common in disputes relating to distribution agreements, licensing and technology transfer agreements and in horizontal agreements such as specialisation agreements, research and development agreements or even in joint venture agreements. Competition law issues may also arise in merger and acquisition arbitrations in respect of non-compete or non-solicitation provisions, etc. In addition, under Spanish law, arbitrators are obliged to apply mandatory rules *ex officio*, even though none of the parties raises those rules in the course of the arbitration proceedings (see Eco Swiss case, ECJ case no C-126/97)[27].

In Spain some Courts of Appeal have also dealt with this issue. In the ruling dated 29 May 2002, the Court of Appeal of Gerona upheld the ruling of the first instance judge dismissing the claim of the claimant (which sought the annulment of an exclusive fuel oil distribution agreement for infringement of Article 85(3) (now Article 81(3)) on the basis that it did not benefit from the exemption contained in Commission Regulation (EEC) No 1984/83 on the application of Article 85(3) of the Treaty to categories of exclusive purchasing agreements), and accepting the defence put forward. The defendant argued that, according to the arbitration clause contained in the agreement, disputes relating to it were subject to arbitration, and therefore civil courts did not have competence to hear the case. The Court of Appeal held that the subject matter of the agreement in dispute had been freely negotiable by the parties, without prejudice to the fact that the agreement had to respect certain mandatory rules such as Regulation 1984/83, of 22 June 1983, and Regulation 2790/99, of 22 December. The Court of Appeal concluded that the mandatory nature of these rules did not prevent the parties from submitting any disputes relating to the fuel oil distribution agreement to arbitration, although the arbitration award could be set aside if it infringed those Regulations or was contrary to mandatory rules of public order ("*orden público*")[28]. This principle would have been applicable even in the event that the parties had agreed upon arbitration in equity instead of arbitration at law, as the mandatory rules must be always respected. On the basis of this reasoning, the Court of Appeal dismissed the appeal and considered that the parties should have submitted the dispute to arbitration.

The Court of Appeal of Barcelona of 7 June 2000 set aside an arbitration award as being contrary to mandatory rules of public order, in particular, Article 1.1 of the CDL and Article 85.1 (now Article 81.1) of the Treaty. The parties had entered into several share purchase agreements between 1988 and 1990, whereby one sold to the other party 100 per cent. of the shares in a Spanish company, as well as certain patents, trade marks and utility models. The agreements contained non-compete clauses unqualified by any geographical or time limitation and arbitration

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27 In this case, an arbitration tribunal awarded damages for breach of contract to one of the parties (Eco Swiss and Bulova) for a licensing agreement containing a market-sharing clause which violated Article 81.1 of the Treaty. This existence of this clause was not raised by any party to the arbitration proceedings and was not considered by the arbitration tribunal *ex officio*. The losing party (Benetton) applied for the annulment of the award on the grounds, inter alia, that it was contrary to public policy, as it sanctioned an agreement that violated article 81.1 of the Treaty. The case was referred to the ECJ through a preliminary question asked by the Supreme Court of the Netherlands. The ECJ confirmed the public policy nature of the EC competition rules and the duty of courts of EU member states to review and set aside arbitration awards that violate these fundamental provisions, even though the parties have not raised this question. One of the main questions submitted to the ECJ was whether or not arbitrators are under an obligation to apply EC competition law *ex officio* and if the failure to do so was against public policy. Although the ECJ did not provide a clear answer to this particular question, it held that EC competition law under Article 85 (now Article 81) of the Treaty is a fundamental rule and consequently, "a national court to which application is made for annulment of an arbitration award must grant that application if it considers that the award in question is in fact contrary to Article 85 of the Treaty, where its domestic rules of procedure require it to grant an application for annulment founded on failure to observe national rules of public policy".

28 Article 41 of Law 60/2003, of 23 December, on Arbitration, states that the arbitration award may be annulled, inter alia, if it is contrary to mandatory rules of public order ("*orden público*"). A similar provision was contained in former Law 36/1988, of 5 December, on Arbitration.

clauses submitting all disputes relating to the agreements to arbitration. In 1995, the purchaser filed a claim against the seller for breach of the non-compete clauses contained in the agreements, but the defendant argued that there was an arbitration clause, and the first instance judge dismissed the claim (the first instance ruling being later confirmed by the Court of Appeal). The claimant then initiated the arbitration proceedings, and the defendant was ordered to pay the claimant 901,518.16 Euro for breach of the non-compete obligations. The defendant then initiated administrative proceedings before the competition authorities, and asked the Competition Court to declare the non-compete clauses as prohibited under Article 81 of the Treaty and Article 1 of the CDL.
The defendant also challenged the arbitration award before the civil courts arguing that it dealt with a subject matter which was not capable of being dealt with by arbitration and that it was contrary to mandatory rules of public order. The civil court suspended the proceedings until the Competition Court issued its resolution. The Competition Court considered that the non-compete clauses did not restrict competition due, amongst other reasons, to the fact that the seller had repeatedly breached those obligations from the very beginning and had competed with its former subsidiary, both directly and indirectly.
Once the Competition Court delivered its decision, the Court of Appeal annulled the arbitration award and, amongst other things, stated that:

(i) the mandatory nature of Article 85 (now Article 81) of the Treaty and Article 1 of the CDL did not prevent the dispute from being submitted to arbitration; however, the arbitration award could be annulled if it was contrary to public policy (*orden público*);
(ii) the civil court's role was to review the validity of the arbitration award, i.e. to determine whether it was contrary to mandatory rules of public policy;
(iii) the non-compete clauses infringed Article 85.1 (now Article 81.1) of the Treaty and Article 1 of the CDL and were therefore null and void, even though no restriction of competition had in fact occurred; the lack of a time limit meant that they could not be considered as ancillary restrictions to the transaction; and
(iv) the arbitrator started from the assumption that those clauses were valid and granted the purchaser damages for non-performance by the seller of its non-compete obligations. The court annulled the arbitration award because it was contrary to public policy, since the contract clauses which were the object of the arbitration were themselves contrary to public policy (i.e. Article 85 of the Treaty and Article 1 of the CDL) .

However, there have also been cases in which arbitrators have decided that they do not have jurisdiction to apply competition law. In 1999, an important provider in a monopolistic sector initiated arbitration proceedings against one of its main customers for breach of a "take or pay" supply agreement he had entered into some years ago, claiming for payment of the amounts due plus interest. The defendant argued, inter alia, that the claimant had abused its dominant position by imposing unfair prices and that there was therefore no obligation to pay such abusive prices. It asked the arbitrator to declare the existence of the anti-competitive conduct, or alternatively for the intervention of the Competition Service and the suspension of the arbitration proceedings until the Competition Court handed down a resolution. The arbitrator resolved the dispute and dismissed most of the arguments put forward by the defendant, who was ordered to pay a certain amount to the claimant. As regards the competition issue, the arbitrator held that it was not competent to declare the conduct in question to be abusive and prohibited, as such a declaration had to be made by the Competition Court being the administrative body with exclusive jurisdiction to decide upon these types of issues, and therefore he considered the matter no further.
Theoretically, an arbitration award could be challenged before civil courts as being contrary to mandatory rules of public order where EC or national competition law has not been properly applied by the arbitrators. However, some questions arise in this context: for instance, is every incorrect award a violation of public policy *per se* or should only cases where the arbitrators have not applied competition law be allowed to appeal? If so, the appeal against an arbitration award before the civil Courts of Appeal (which is an extraordinary recourse) would in practice become an ordinary second instance. In our opinion, an arbitration award should only be

annulled by the courts when competition law was not applied and the clauses or conduct which constituted the subject of the arbitration were a flagrant infringement or hardcore restriction of competition law. In any event, Law 6/2003 on Arbitration is very recent, and it remains to be seen how it will develop in the future.

Unfortunately, arbitration decisions are not made available to the public, unless they are challenged before the Courts of Appeal, and only when these ones publish their judgments, and therefore we have had very limited access to arbitration awards dealing with competition issues. Indeed, we have not found any arbitration award granting damages for an infringement of competition law.

IV. Methodology and Bibliography

We have carried out a thorough search of civil decisions applying EC and national competition law. Generally, we have had access to only a limited amount of civil case law, as only decisions of the Supreme Court and of Provincial Courts of Appeals are contained in databases which are available to the public. Therefore, as first instance decisions are not included in those databases, we have not had access to all cases brought by claimants before first instance judges but only to those which reached the appeal stage.

In conducting our search, we have turned to various sources:

(a) the Documentation Centre of the General Counsel of the Judiciary ("Centro de Documentación del Consejo General del Poder Judicial", the CENDOJ) has conducted a search on its database of decisions. We would like to acknowledge the invaluable assistance of the Director of the CENDOJ, Mr. Antonio Guerra, the magistrate in charge of the Filing Section of the CENDOJ, Mr. Juan Ayala and Mrs. Carmen Diz, who have provided us with advice on various aspects of the research methodology and which has obtained a number of resolutions not available from other sources; and

(b) various case law databases available in Spain have been also consulted.

A very special thank you is owed to Editorial Aranzadi, which has kindly given us helpful assistance by providing specific rulings at our request.

We also held a meeting with the President, the Vice President and Chef de Cabinet of the Competition Court to exchange points of view with regard to the subject matter of this report. We wish to thank the members of the Competition Court for the high degree of interest they showed in the report and for their useful thoughts and comments.

Finally, we would also like to recognise the significant contributions of Professor Juan Fernández-Armesto, former President of the Spanish Securities and Exchange Commission (CNMV), Professor of Commercial Law at Comillas University in Madrid, and a specialist in international commercial arbitration as Spanish representative in the ICC Arbitration Commission, whom we consulted in relation to various aspects of this report.

In the preparation of this report we have also consulted the Madrid Bar Association, some Arbitral Courts, the State Counsel and other consultative organisms and public authorities, as well as a number of articles and books written by experts on competition law, which have proved to be very useful:

1. ARTICLES

1.2 Alonso García, R., La aplicación de los artículos 85 y 86 del Tratado CEE por órganos administrativos españoles (1990) 17 Revista de Instituciones Europeas 437.

1.3 Creus, A., La privatización del Derecho de la Competencia (1999) 200 Gaceta Jurídica de la Competencia y la Unión Europea 55.

1.4 Fernández, C., Paret, J.M. and Ventura, M., ¿Pueden ir a prisión los directivos españoles por la comisión de conductas anticompetitivas llevadas a cabo por su empresa? (2002) 218 Gaceta Jurídica de la Competencia y la Unión Europea 35.

1.5 Fernández López, J. M., Aplicación jurisdiccional de los artículos 85.1 y 86 TCEE y de las normas internas de competencia (1997) Anuario de la Competencia 215.

1.6 Fernández López, J.M., Órganos encargados de la aplicación del derecho interno sobre competencia (comentario a la STS 908/1999) (2001) 211 Gaceta Jurídica de la Competencia y la Unión Europea 42.

1.7 Fernández López, M., La carga de la prueba y la nueva Ley de Enjuiciamiento Civil (2001) La Ley 1.

1.8 Font Serra, E., La prueba en la nueva Ley de Enjuiciamiento Civil (2001) VI Otrosí.

1.9 Gutiérrez, A., and Martínez Sánchez, A., Nuevas Perspectivas en la aplicación de las normas de defensa de la competencia por la jurisdicción civil (2002) 1 Actualidad Jurídica Uría & Menéndez 39.
1.10 Maldonado Ramos, J., Aspectos sustanciales de la regulación de la prueba en el nueva Ley de Enjuiciamiento Civil (2000) La Ley 1.
1.11 Martínez Lage, S., El efecto directo de los artículos 85 y 86 del TCE en Derecho Español (STS de 30.12.93) (1994) 136 Gaceta Jurídica de la CE 1.
1.12 Martínez Lage, S., La aplicación del Derecho de la Competencia por los tribunales ordinarios (1997) 140 Gaceta Jurídica de la CE 1.
1.13 Martínez Lage, S., La aplicación descentralizada del Derecho de la Competencia; Comunidad Europea, Estados miembros y Comunidades Autónomas (2000) 207 Gaceta Jurídica de la Competencia y la Unión Europea 3.
1.14 Martínez Lage, S., Competencia y arbitraje (2001) 214 Gaceta Jurídica de la Competencia y la Unión Europea 3.
1.15 Martínez Lage, S., Las indemnizaciones por infracción al Derecho de la competencia (2001) 216 Gaceta Jurídica de la Competencia y la Unión Europea 3.
1.16 Martínez Lage, S., La aplicación del Derecho de la competencia por las Comunidades Autónomas. Delimitación competencial (2002) 218 Gaceta Jurídica de la Competencia y la Unión Europea 3.
1.17 Medrano Irazola, S., El problema de la jurisdicción civil y la defensa de la competencia: reconsideración del debate y contribución a la búsqueda de soluciones (2000) 210 Gaceta Jurídica de la Competencia y la Unión Europea 11.
1.18 Morony, E., Bring on the big guns (2002) The European Lawyer 45.
1.19 Navarro Varona, E. and González Durántez, H., Medidas cautelares en el Derecho de la Competencia ante la Comisión y los Tribunales Europeos (2002) 220 Gaceta Jurídica de la Competencia y la Unión Europea 23.
1.20 Odriozola, M. and Irissarry, B., Private antitrust remedies: latest developments (2003) VIII PLC Global Counsel.
1.21 Otero García-Castrillón, C., El alcance extraterritorial del Derecho de la competencia y su utilización como medida comercial. Las perspectivas estadounidense, comunitaria y española (2001) 212 Gaceta Jurídica de la Competencia y la Unión Europea 34.
1.22 Petitbo Juan, A., and Berenguer Fuster, L., La aplicación del Derecho de la Competencia por órganos jurisdiccionales y administrativos (1998) Anuario de la Competencia 25.
1.23 Prat, C., El Tribunal Supremo y "el efecto directo" del derecho de la competencia (Comentario a la sentencia "Disa" del Tribunal Supremo de 2 de junio de 2000) (2000) Anuario de la Competencia 283.
1.24 Rodríguez Díaz, I., El ilícito antitrust como ilícito desleal. El resarcimiento de daños y perjuicios (2003) 228 Gaceta Jurídica de la Competencia y la Unión Europea.
1.25 Salvador Roldán, R., La reclamación de daños y perjuicios por infracción del Derecho de la competencia en Europa: ¿una aproximación al modelo americano? (2003) 226 Gaceta Jurídica de la Competencia y la Unión Europea 71.
1.26 Sanjuán y Muñoz, E., Competencias añadidas a los juzgados mercantiles en aplicación de los artículos 81 y 82 del Tratado de Roma constitutivo de la Comunidad Europea (2003) La Ley 1.
1.27 Uría Fernández, F., Las consecuencias jurídico-privadas de las conductas contrarias a la Ley de Defensa de la Competencia. Aportaciones de la Ley 52/1999, de 28 de diciembre, de reforma de la Ley de Defensa de la Competencia (1999) Anuario de la Competencia 171.

2. BOOKS

2.1 Cases Pallarés, L., Derecho Administrativo de la Defensa de la Competencia (Marcial Pons1995).
2.2 Díez Estella, F., La discriminación de precios en el derecho de la competencia (Civitas, 2003).
2.3 Guilarte Martín-Calero, C., La moderación de la culpa por los tribunales (Lex Nova, 1999).
2.4 Pasqual Liaño, M., Jurisprudencia civil comentada (Comares, 2000).
2.5 Reglero Campos, L., Tratado de Responsabilidad Civil (Aranzadi, 2002).
2.6 Roca y Trías, E., Derecho de Daños (Tirant lo Blanch, 1998).
2.7 Soriano García, J. E., Derecho público de la Competencia (Marcial Pons, 1998).
2.8 Yzquierdo Tolsada, M., Responsabilidad Civil Contractual y Extracontractual (Editorial Reus, 1998).

V. National case law summaries

1. SIGNIFICANT SUPREME COURT CASE LAW

Please note that two Supreme Court decisions establishing the same interpretation to a specific legal provision are deemed as "binding" case law. A single resolution of the Supreme Court may have a significant influence in practice, as well as the resolutions of the Courts of Appeal, but their influence is lower than that of the "binding" case law.

1.1 Supreme Court Judgment dated 18 May 1985 (Aiscondel)

(a) Facts and legal issues

Aiscondel, S.A. claimed for a declaration that a supply agreement signed with Montoro, Empresa para la Industria Química, S.A. was null and void, since it infringed the Competition Defence Act of 1963 (the judgment does not provide enough information to identify what the alleged infringement was).

(b) Held

The Supreme Court stated that, according to the Competition Defence Act of 1963, the Competition Court had exclusive competence to apply the Competition Act, and that civil courts could not annul a contract based on an infringement of competition law.

1.2 Supreme Court Judgment dated 30 December 1993 (CAMPSA)

(a) Facts and legal issues

The claimants, two hundred and ten shipowners, sought the cessation of what they alleged to be abusive conduct carried out by the former Spanish fuel monopolist, Campsa, consisting of discriminatory pricing in the supply of diesel oil. The claimants also claimed damages for loss, including loss of profits.

The first instance judge had dismissed the claim on the grounds that the civil courts lacked jurisdiction, and the Court of Appeal upheld the first instance decision.

(b) Held

The Supreme Court considered that the Competition Court was the only authority competent to declare, in a principal way, a breach of Article 6 of the CDL (it was noted that, with respect to infringements of Article 86 of the Treaty, now Article 82, the European Commission had such jurisdiction). The civil courts were therefore not entitled to apply these Articles in a "principal" manner, but only in an "incidental" manner[29]. In addition, as regards national competition rules, the Supreme Court held that, in the context of national competition rules, an action for an injunction is not within the jurisdiction of the Civil Courts, as the Competition Court has "exclusive" competence to declare the existence of a restrictive practice and to order an injunction, according to Article 10 of former Law 110/1963[30] and the Royal Decree of 4 March 1965 (approving the Regulations governing the Competition Court). As the injunction sought by the claimant involved an application of the competition rules in a principal way, the Supreme Court considered that the case could be heard exclusively by the administrative authorities and not by Civil Courts, and dismissed the claimants' application.

On the other hand, the Supreme Court stated that a claim for damages based on an infringement of EC or national competition law requires a prior final decision from the European Commission or the Competition Court confirming the existence of the prohibited conduct. The legal basis for this reasoning was Article 6 of the former Law 10/1963, of 20 July, on the repression of restrictive practices, referred to above, but the decision did not specify what the legal basis was as regards EC competition law. The Supreme Court held that a prior administrative resolution constitutes an essential procedural requirement for bringing an action for damages and therefore, in the absence of such a prior resolution, it dismissed the claim for damages as inadmissible.

The ruling in the Campsa case has acted in practice to disincentivise potential claimants from bringing actions for annulment and actions for damages before Spanish civil judges and arbitrators, whether based on national or on EC competition law.

However, before the Campsa ruling, Courts of Appeal had applied competition law in a direct and "principal" way on a number of occasions, mainly by deciding whether a specific agreement or action was valid in the light of Articles 81 and 82 of the Treaty, or Articles 1 and 6 of the CDL, and without considering whether or not the civil courts were competent to assess the issue: see for example the decisions of the Court of Appeal of Burgos of 25 April 1989 and of the Court of Appeal of Badajoz of 29 November 1991.

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29 The Supreme Court seems to use the same terms used by the Advocate General Mayras in BRT v. SABAM.

30 See our comment to paragraph A.(i) as regards the interpretation of Article 13.2 of the CDL.

1.3 Supreme Court Judgment dated 4 November 1999 (U.I.P.)

(a) Facts and legal issues

U.I.P. y Cía ("U.I.P") claimed damages from S.H., S.A. for non-fulfilment of its obligations under a film exhibition licence entered into between the parties.

The first instance judge annulled the agreement by applying Article 6 of the CDL (stating that it included anti-competitive trading conditions) and the Court of Appeal upheld that decision.

(b) Held

The Supreme Court reversed the rulings of the first instance judge and the Court of Appeal and rejected the annulment of the agreement, arguing that the civil courts were not competent to declare the existence of an abuse of a dominant position under Article 6 of the CDL, nor to annul the agreement containing unfair trading conditions imposed by the dominant undertaking. The Supreme Court argued that the Competition Court had exclusive competence to issue the declarations and injunctions set out in Law 110/1963 (and that this would also be the position under the current CDL, but without providing a consistent and conclusive argument).

1.4 Supreme Court Judgment dated 21 February 2000 (JADSA/IVECO-PEGASO)

(a) Facts and legal issues

Motor vehicle distributor José Andreu Dalmau, S.A. ("JADSA") applied for the early termination of a distribution contract with Iveco-Pegaso, S.A. to be set aside, arguing that the distribution contract's minimum duration was four years, as stated in Commission Regulation (EEC) No 123/1985 of 12 December 1984 on the application of Article 85 (3) of the Treaty to certain categories of motor vehicle distribution and servicing agreements.

JADSA also claimed for damages, which included:

(i) loss of profits,

(ii) expenses caused by the termination of employment relationships with its employees,

(iii) compensation for the use by Iveco-Pegaso of the customers secured by JADSA,

(iv) compensation for the damage resulting from the fact that JADSA was no longer Iveco-Pegaso's licensed distributor in the context of proceedings against its debtors started prior to termination of their relationship (essentially this affected the recovery of vehicles from non-paying debtors, since JADSA was unable to repair those vehicles or to offer the usual guarantees when reselling them), and

(v) compensation for the damage resulting from a notification to the customers by Iveco-Pegaso saying that the distribution contract had been terminated (as a consequence of which some customers stopped paying JADSA for vehicles which had been supplied to them).

(b) Held

The Supreme Court declared that the termination decided by Iveco-Pegaso was perfectly valid according to the distribution contract. According to the Court, the contract did not fall within the scope of Regulation 123/1985, given that it was not an exclusive distribution contract, and the regulation only applied to that type of agreement. The distribution contract did not infringe competition rules, since it had been duly notified by Iveco-Pegaso to the European Commission when Spain entered into the EC. In line with the ruling, no damages were granted to the claimant.

1.5 Supreme Court Judgment dated 2 June 2000 (DISA)

(a) Facts and legal issues

The judgment of the Supreme Court in the DISA case of 2 June 2000 reversed the position under the Campsa ruling and seems to have brought about an increase in the private enforcement of EC competition law in Spain (and also of national competition law). In this decision the Supreme Court applied EC competition rules directly for the first time, without specifying whether they were applied in a principal or incidental manner.

DISA, an oil distribution company, had entered into concession agreements regarding the same petrol station with two different concessionaires. The first concessionaire brought a claim against DISA seeking the enforcement of its contract and then DISA invoked the nullity of that agreement for breach of Article 81 of the Treaty.

(b) Held

Instead of arguing that it was not competent to apply the EC competition rules in a principal manner (as it had in the Campsa case), the Supreme Court declared that the

agreement had been concluded in breach of Article 81 of the Treaty and, consequently, it declared the agreement null and void in its entirety. The court stated that the nullity could be invoked even by the party which had introduced the null and void provision into the agreement and which benefited from that provision. In addition, the Supreme Court declared that the "non-infringing" party to the null and void agreement was entitled to bring an action for damages before civil courts based on the "culpa in contrahendo" of the "infringing" party (Disa) during the pre-contractual phase.

The Supreme Court based its decision on a number of rulings of the ECJ and the European Commission, and reproduced several paragraphs of the most relevant cases (Delimitis, Automec, Miller, CRAM, BRT v. SABAM, etc.).

In the Disa ruling the Supreme Court removed an important obstacle to direct applicability of EC competition law by civil courts, which had been erected by the Campsa case. It directly applied the EC competition rules, irrespective of the nature, principal or incidental, of the claim founded on the infringement of those rules (in this case, an action for annulment). It therefore seems that the Supreme Court has finally recognised the direct effect of the EC competition rules. Although the relevant agreement is examined in the light of EC competition rules, it also seems that the court would have reached the same conclusion had it applied Article 1.2 of the CDL (although this is just an assumption, as the wording of the judgment is not conclusive).

However, the Disa ruling did not touch upon certain questions, which remain unclear, for example, do the civil courts have competence to resolve an action for an injunction based on an infringement of EC or national competition law, or to order interim measures? Another question is whether the Supreme Court still considers that a previous administrative decision of the European Commission or the Competition Court is necessary to file a claim for damages based on an infringement of EC or national competition law.

Even before the Disa case, some Courts of Appeal had applied the competition rules in a direct and principal manner, for example, in the decisions of the Court of Appeal of Gerona 16 July 1998, of the Court of Appeal of Barcelona of 3 May 1999, of the Court of Appeal of Badajoz of 28 September 1999, of the Court of Appeal of Bilbao of 29 November 1999, of the Court of Appeal of Gerona of 27 March 2000 and of the Court of Appeal of Barcelona of 8 May 2000.

Since the Disa ruling, we have observed an increase in the number of decisions of the Civil Courts dealing with the direct application of EC competition law.

The Supreme Court has itself applied EC competition law in a number of cases including the ruling of 2 March 2001 (Mercedes Benz case), the ruling of 15 March 2001 (Petronor), the ruling of 20 June 2001 (Repsol case) and the rulings of 2 March 2001, 14 March 200, 20 June 2001, 11 December 2002.

The Courts of Appeal are also directly applying EC and national competition law, accepting their jurisdiction to assess whether a given agreement is prohibited under Article 81 of the Treaty or Article 1 of the CDL.

1.6 Supreme Court Judgment dated 2 March 2001 (Mercedes-Benz)

(a) Facts and legal issues

Motor vehicle distributor Motor Lugo S.L. claimed for the annulment of a provision obliging it to endeavour to sell, within the agreed territory and within a specified period, such minimum quantity of contract goods as may be determined by agreement between the parties or, in the absence of such agreement, by the supplier on the basis of estimates of the distributor's sales. The clause stated that a repeated failure to fulfil this duty entitled the supplier to terminate the contract early.

Effectively, the supplier deemed that the distributor's sales did not meet the minimum required and terminated the contract. No damages were claimed.

(b) Held

The Supreme Court declared that the contract fell within the scope of Commission Regulation (EEC) No 123/85 of 12 December 1984 on the application of Article 85 (3) of the Treaty to certain categories of motor vehicle distribution and servicing agreements, and that therefore it benefited from the block exemption provided therein.

1.7 Supreme Court Judgment dated 15 March 2001 (Gabai Oil/Petronor)

(a) Facts and legal issues

Petrol station Gabai Oil, S.A. applied for a declaration that an exclusivity provision contained in a distribution agreement signed with Petróleos del Norte S.A. and Repsol Comercial de Productos Petrolíferos was null and void. The claimant argued that the

provision was an infringement of Article 12 of EC Commision Regulation 1984/1983. No damages were claimed.

(b) Held

The Supreme Court declared that the contract fell within the scope of Commission Regulation 1984/1983, and that therefore it benefited from the block exemption provided therein.

1.8 Supreme Court Judgment dated 20 June 2001 (Josefa Diego/ Petronor-Repsol)

(a) Facts and legal issues

Petrol station owner Ms. Josefa Diego applied for a declaration that an exclusivity provision contained in a distribution agreement signed with Petróleos del Norte S.A. and Repsol Comercial de Productos Petrolíferos was null and void. The claimant argued that the provision did not benefit from Articles 10 and 11 of EC Commission Regulation 1984/1983 and was therefore an infringement of Article 81 of the EC Truly. No damages were claimed.

(b) Held

The Supreme Court declared that, as stated in the Commission resolution of 2 June 1994, the contract (which was the standard contract used by Repsol) fell within the scope of Regulation 1984/1983, and that therefore it benefited from the block exemption provided therein.

1.9 Supreme Court Judgment dated 11 December 2002 (Angulo Saiz/Repsol)

(a) Facts and legal issues

Petrol station Angulo Saiz S.L. applied for a declaration that an exclusivity provision contained in a distribution agreement signed with Repsol Petroleo S.A. and Repsol Comercial de Productos Petrolíferos was null and void. The claimant argued that the provision was an infringement of Article 11 c) of Commission Regulation (EEC) No 1984/83 of 22 June 1983 on the application of Article 85 (3) of the Treaty to categories of exclusive purchasing agreements. No damages were claimed.

(b) Held

The Supreme Court declared that, as stated in the Commission resolution of 2 June 1994, the contract (which was the standard contract used by Repsol) fell within the scope of Regulation 1984/1983, and that therefore it benefited from the block exemption provided therein.

2. TANGENTIAL SUPREME COURT CASE LAW

Other judgments from the Supreme Court which mention Articles 1 and 6 CDL and Articles 81 and 82 EC Treaty tangentially are:

2.1 Supreme Court Judgment dated 27 November 2003
2.2 Supreme Court Judgment dated 3 September 2003
2.3 Supreme Court Judgment dated 24 June 2002
2.4 Supreme Court Judgment dated 21 December 2001
2.5 Supreme Court Judgment dated 28 September 2001
2.6 Supreme Court Judgment dated 9 July 1999
2.7 Supreme Court Judgment dated 9 February 1994

3. SIGNIFICANT COURTS OF APPEAL CASE LAW

3.1 Court of Appeal of Gerona, judgment dated 16 April 2002

(a) Facts and legal issues

Eléctrica Curós, S.A. claimed damages from Hidroeléctrica de l'Empordá (**"HE"**) for the damage caused by the latter's conduct, which was an act of unfair competition and was contrary to the principle of free competition. The Competition Court had already declared that, for three months, HE, which had a dominant position in the region (a 66.5 per cent share of the market), carried out a promotional campaign aimed at eliminating its competitor from the market. HE had gifted to 18 customers of Eléctrica Curós valuable electrical household appliances (washing machines, microwaves, dryers, etc.), and all of them had become HE's customers as a result. The Competition Court imposed a fine of 90,121.82 Euro on HE (Case 431/98 Eléctrica Curós).

(b) Held

The Court declared that the conduct carried out by HE was an infringement of Article 6.2 d) of the CDL (abuse of a dominant position by placing competitors at a competitive disadvantage) and articles 5 and ff. UCL. The Court awarded Eléctrica Curós damages in an amount to be fixed when enforcing the judgment; this amount had to take into account

the damage suffered by Eléctrica Curós for the loss in three months of 6.3 per cent of its customers (18 customers) in view of a) its position in the market, b) its turnover and c) its size.

3.2 Court of Appeal of Burgos, judgment dated 26 July 2002

(a) Facts and legal issues

The resolution of the Court of Appeal of Burgos dated 26 July 2002 is from a case in which the first instance judge asked the Competition Court for a report on the quantum. The damage in question had been caused by certain restrictive agreements adopted by a regional association of lift companies, which had already been declared prohibited by the Competition Court (we have not had access to its report). This is the only instance we have found of a civil judge asking the Competition Court for a report on quantum in connection with Article 13.3 of the CDL.

The prohibited agreements consisted in the sharing of the lift maintenance and repair market within the province of Burgos between the members of the association. First, the members imposed a long duration (generally five years) on the maintenance agreements entered into with their customers (residents' associations) in order to make it difficult for those customers to change service provider. Then, when the fixed term expired, it was agreed that no member of the lift association would provide maintenance services to a customer if that customer had in the past received services from another member of the association. The effect of this agreement was to force the customer to renew its maintenance contract with its existing service provider. This was to the detriment of the claimant, a lift maintenance company which did not belong to the association.

(b) Held

Despite the earlier administrative resolution declaring the existence of the prohibited agreements, the first instance judge and the Court of Appeal dismissed the action for damages due to the lack of evidence of any damage caused (a point that the Competition Court also raised in its report, in particular, the absence of data relating to the average market share and profits of the claimant). However, the Court of Appeal gave some guidelines on the evidence which the claimant should have submitted in order to substantiate the loss of profits suffered during the relevant period as a result of the restrictive agreements implemented by the association: this included the number of lifts for which the claimant had contracted to provide maintenance services in each of the years affected, the number of lifts for which the claimant was authorised to provide such services, the number of qualified employees of the claimant, etc. The claimant had not submitted an expert's report setting out the loss it claimed to have suffered.

4. TANGENTIAL COURTS OF APPEAL CASE LAW

4.1 Court of Appeal of Burgos, judgment dated 25 April 1989
4.2 Court of Appeal of Badajoz, judgment dated 29 November 1991
4.3 Court of Appeal of Zaragoza, judgment dated 9 December 1993
4.4 Court of Appeal of Valencia, judgment dated 21 March 1994
4.5 Court of Appeal of Gerona, judgment dated 16 July 1999
4.6 Court of Appeal of Barcelona, judgment dated 3 May 1999
4.7 Court of Appeal of Badajoz, judgment dated 28 September 1999
4.8 Court of Appeal of Madrid, judgment dated 26 November 1999
4.9 Court of Appeal of Bilbao, judgment dated 29 November 1999
4.10 Court of Appeal of Barcelona, judgment dated 26 January 2000
4.11 Court of Appeal of Gerona, judgment dated 27 March 2000
4.12 Court of Appeal of Granada, judgment dated 1 April 2000
4.13 Court of Appeal of Barcelona, judgment dated 8 May 2000
4.14 Court of Appeal of Barcelona, judgment dated 7 June 2000
4.15 Court of Appeal of Jaén, judgment dated 31 July 2000
4.16 Court of Appeal of Zaragoza, judgment dated 8 September 2000
4.17 Court of Appeal of Barcelona, judgment dated 30 September 2000
4.18 Court of Appeal of Castellón, judgment dated 30 December 2000
4.19 Court of Appeal of Tarragona, judgment dated 3 November 2000
4.20 Court of Appeal of Lérida, judgment dated 15 February 2001
4.21 Court of Appeal of Granada, judgment dated 24 February 2001
4.22 Court of Appeal of Las Palmas, judgment dated 8 March 2001
4.23 Court of Appeal of Valencia, judgment dated 7 April 2001
4.24 Court of Appeal of Cuenca, judgment dated 17 May 2001
4.25 Court of Appeal of Madrid, judgment dated 6 June 2001
4.26 Court of Appeal of Badajoz, judgment dated 31 October 2001

4.27 Court of Appeal of Salamanca, judgment dated 28 January 2002
4.28 Court of Appeal of Gerona, judgment dated 16 April 2002 (see summary in paragraph 4 below)
4.29 Court of Appeal of La Coruña, judgment dated 15 May 2002
4.30 Court of Appeal of Gerona, judgment dated 29 May 2002
4.31 Court of Appeal of Madrid, judgment dated 22 June 2002
4.32 Court of Appeal of Burgos, judgment dated 26 July 2002 (see summary in paragraph 5 below)
4.33 Court of Appeal of Navarra, judgment dated 29 July 2002
4.34 Court of Appeal of Zaragoza, court order dated 10 September 2002
4.35 Court of Appeal of Barcelona, judgment dated 18 September 2002
4.36 Court of Appeal of Madrid, judgment dated 30 September 2002
4.37 Court of Appeal of Barcelona, judgment dated 18 October 2002
4.38 Court of Appeal of Gerona, judgment dated 14 February 2003