

TRANSPOSITION OF THE ANTITRUST DAMAGES DIRECTIVE INTO SPANISH LAW

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SUMMARY: This paper analyses the legal measures adopted to implement Directive 2014/104/EU into Spanish law. After briefly looking at the context of private enforcement of competition law in Spain, it examines the process followed for the transposition and the issues discussed before the adoption of the Transposition Decree in May 2017. Overall, it can be affirmed that the new rules comply with the mandates of the Directive, only in a few matters there seems that there will be doubts concerning the interpretation of the new provisions. Some of the doubts may be rooted in the Directive itself (relative responsibility of co-infringers, umbrella claimants, harm to suppliers), and others in the lack of express rules in the Transposition Decree on some matters (causation, fault requirement, interests calculation), moreover it is uncertain how the new procedural tools will play out in practice as they imply a revolutionary change in our procedural rules.

Keywords: private enforcement, competition law, damages, Directive 104/2014, implementation, transposition, competition, EU law.

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1. Introduction.

Administrative authorities have been the main enforcers of competition law (EU and domestic) in Spain for more than fifty years. In the last two decades, private claims before national courts have emerged in parallel to the development of public enforcement actions and slowly grown as an alternative way of making EU and domestic competition law effective.

The substance of Spanish domestic competition rules was recently modernized by the Defence Competition Act of 2007 (hereinafter DCA)¹. The DCA prohibitions closely mirror TFEU articles 101 and 102. Institutions in charge of competition law enforcement were majorly revamped in 2013 with the merger of the National Competition Commission (NCC) with six authorities with regulatory powers in several industries (telecom, energy, railway transportation, air transportation, postal and audio-visual) to create the National Markets and Competition Commission (hereinafter NMCC)². At the regional level, eight regional competition authorities exist (Andalucía, Aragón, Basque Country, Castile & León, Catalonia, Extremadura, Galicia and Valencia) in charge of the enforcement of competition law in their respective regions.

Lacking any specific provision regarding damages claims in the DCA³, courts have accommodated private actions within the existing legal framework for tort claims⁴. So far, most private actions for infringement of competition law have been “stand-alone” commercial disputes concerning vertical restraints or abuse of dominance⁵. Only recently has there been an increase in “follow-on” claims, most of which are still in progress (pending actions in court:

¹ See Act 15/2007, of 3 July 2007 ([Official State Gazette 159, 4 July 2007](#), only available in Spanish).

² See Act 3/2013 of 4 June 2013 creating the National Markets and Competition Commission (Official State Gazette 154 of 5 June 2013, [available in English](#)).

³ The situation was different under DCA1989 (Defence Competition Act 16/1989, of 17 July, [Official State Gazette 170 of 18 July 1989](#), only available in Spanish) and DCA1963 ([Official Gazette 173 of 23 July 1963](#), only available in Spanish), under which only follow-on actions were possible and only once there was a final decision by the Defence Competition Tribunal (articles 13.2 of DCA1989 and 6 of DCA1963). That requirement was not needed for private claims based on TFEU articles 101 and 102. See A Creus “La privatización del Derecho de la Competencia” (1999) *Gaceta Jurídica de la Competencia* 200: 55-66 and C Fernández, I Tapia & E López “La eficiencia real del Derecho de la competencia: la indemnización de los daños causados” in Petitbó & Martínez (dirs) *La modernización del Derecho de la competencia en España y en la UE*, 2005, 171-185.

⁴ See H Brokelman “La indemnización de daños y perjuicios” in A Petitbó & S Martínez (dir) *El Derecho de la Competencia y los jueces*, FR Pino-M Pons 2007, 60-73; I Sancho “Aplicación privada de las normas antitrust” in JA García (dir) *Tratado de Derecho de la Competencia y de la publicidad*, Tirant Lo Blanch 2013, 923 (“*aunque no exista una previsión expresa en la Ley de Defensa de la Competencia, aplicando las reglas generales de la culpa extracontractual, en la medida en que una conducta ilícita, en este caso restrictiva de la competencia por vulneración de los arts. 1 ó 2 LDC, que ordinariamente encierra un comportamiento doloso por sus agentes, haya ocasionado a terceros algún daño o perjuicio, éstos tendrán derecho a reclamar su reparación o indemnización, que puede llegar a incluir, además del daño emergente, el lucro cesante*”).

⁵ See F Marcos “Competition Law Private Litigation in the Spanish Courts (1999-2012)” (2013) *Global Competition Litigation Review* 182: 167-208.

envelopes cartel⁶, milk processors' cartel⁷, property insurance cartel⁸). However, two leading cases on follow-on claims were decided by the Supreme Court in 2012 and 2013 after a decision by the Defence Competition Tribunal (DCT) in 1999 on the sugar cartel case⁹. Today, the majority of private claims continued to be filed in connection with infringements in the petrol retail industry¹⁰.

In this context, Directive 2014/104/EU was approved on 26 of November 2014 by the Parliament of the EU and the European Commission to make it easier for businesses and individuals to bring actions for compensation before national courts when they have been victims of a breach of EU competition law¹¹.

2. Transposition process.

The process for implementation of Directive 2014/104/EU in Spain started on schedule in February 2015, with the appointment by the Ministry of Justice of a special group within the General Codification Commission (GCC) for the preparation of a proposal (2016 Proposal)¹². The GCC is an advisory institution utilized by the Ministry of Justice for the preparatory works of legislative texts in technical matters in which the Ministry takes the lead¹³.

⁶ NCC Resolution of 25 March 2013 ([S/0316/10 Sobres de Papel](#)).

⁷ NCC Resolution of 26 February 2015 ([S/0425/12 Industrias Lácteas](#)).

⁸ NCC Resolution of 12 November 2009 ([S/0037/08 Compañías de Seguro Decenal](#)). See F Marcos "The Spanish Property Insurance Cartel" ([2012](#)) *Connecticut Insurance Law Journal* 18/2: 509-532.

⁹ See Supreme Court Judgments of 8 June 2012, *Galletas Guyón v. ACOR*, STS 5462/2012 (ECLI: [ES:TS:2012:5462](#)) and of 7 November 2013, *Nestlé v. Ebro Puleva*, STS 5819/2013 (ECLI: [ES:TS:2013:5819](#)). The case is analyzed in F Marcos "Damages' claims in the Spanish Sugar cartel case" (2015) *Journal of Antitrust Enforcement* 3/1: 1-21 and A Robles "Las reclamaciones de daños y perjuicios causados por infracciones de derecho de la competencia. Comentario a STS de 23 de noviembre de 2013, Sala Civil, asunto del cártel del azúcar" *ADI* 34: 519-534.

¹⁰ Reignited by Supreme Court judgments of 12 of January 2015, *Ribeira Baixa & Ribeira Alta v. REPSOL*, STS 277/2015 (ECLI: [ES:TS:2015:277](#)); 31 of March 2015, *Estacio Servei Pineda del Mar & Olma v. REPSOL*, STS 1553/2015 (ECLI: [ES:TS:2015:1553](#)) and 13 of May of 2015, *Promotores Internacional & Pablo Rada Combustibles v. REPSOL*, STS 2216/2015 (ECLI: [ES:TS:2015:2216](#)), which changed the doctrine held in the case-law regarding the overcoming effects of voidness of vertical restraints by extending it to the whole contract if the anti-competitive clauses were essential for the economic balance of contract (see §§20-22). See P Vela "Experiencia de la Sala primera del Tribunal Supremo en aplicación privada de la competencia" in Ruiz (dir) *La compensación de los daños por infracción de las normas de competencia tras la Directiva 2014/104/UE*, 72-73. The "petrol station" cases are better featured as hybrid follow-on and stand-alone cases "because they do not technically qualify as follow-on cases because the facts at issue are essentially different, but where the parties heavily rely upon previous decisions of the Spanish Competition Authority (NCA) –or less frequently, the European Commission (EC) which seemingly have played a decisive role in triggering the action", see E Ameye "Spain" in *The Private Enforcement Competition Review*, 9th ed. 2016, 350-351.

¹¹ [Official Journal L 349 of 5 of December 2014, 1–19](#).

¹² [Order of 16 of February of 2015, creating within the General Codification Commission an special section for the transposition of Directive 2014/104/UE](#). The group was composed of five law professors, an official from the Ministry of Economy and Competitiveness and a High representative of the Ministry of Justice (Deputy Director of legislative Policy, General Secretary of the Commission).

¹³ This Commission is a technical body generally used for the planning and coordination of legislative reforms, aimed at ensuring the technical quality of the proposals, see A Menéndez "La Comisión General de Codificación y la elaboración de las leyes" in *Seguridad jurídica y codificación*, Centro de Estudios Registrales 1999, 17-29. A

The GCC's proposal was made public in January 2016¹⁴. The 2016 Proposal introduced a new chapter in the DCA for handling damages claims and new sections in the Civil Procedure Act (hereinafter CPA)¹⁵ on the access, disclosure and use of sources of evidence¹⁶.

The deadline for Member States to implement the Directive expired in December 2016; however, Spain's political deadlock during 2016 delayed the implementation process until May 2017¹⁷. A few days before the deadline for implementation (27 of December 2016), the Ministry of Justice opened a surprising public consultation on the transposition of Directive 2014/104/EU to collect opinions on the objectives, problems and need for potential legislative action as well as available alternatives to implementation (without making any reference to the 2016 Proposal)¹⁸. The results of the public consultation are unknown¹⁹.

Implementation was finally achieved directly by the Government by Royal Decree Law 9/2017, of 26th May (hereinafter "Transposition Decree")²⁰. In addition to transposing the Directive into Spanish Law, the Transposition Decree transposed several other EU Directives concerning financial, commercial and health matters, and the free movement of workers.

description of its organization and the use of special groups for the preparation of legislative proposals in C Jerez & M J Pérez "La Comisión General de Codificación y su labor en la modernización del Derecho de Obligaciones" (2009) *RJUAM* 19-I: 164-165.

¹⁴ [Proposal of an Act to Implement Directive 2014/104/EU](#) (*Propuesta de Ley para la transposición de la Directiva 2014/104/UE sobre las acciones de daños por infracciones del Derecho de la Competencia*, only available in Spanish, hereinafter "2016 Proposal").

¹⁵ Act 1/2000, of 7 of January 2000 ([Official State Gazette 7 of 8 of January 2000](#), consolidated version only in Spanish).

¹⁷ The lack of a Parliamentary majority in the general election of 20 of December 2015 prompted a new election on 26 of June 2016, only then a new government was formed (29 of October 2016).

¹⁸ Public Consultation on the transposition of Directive 2014/104/EU (open until 11 of January 2017).

¹⁹ Only the main lobby of competition lawyers, have made their comments public, see Asociación Española para la Defensa de la Competencia (AEDC) [Observaciones sobre la transposición de la Directiva 2014/104/UE](#) 10 of January 2016 (however the comments refer solely to the 2016 Proposal).

²⁰ [Official State Gazette 126 of 27 of May 2017](#). In the past, the Spanish Government has used Decrees Laws to transpose EU Directives in other occasions (see, for example, [Royal Decree-Law 9/2013, of 4 of July, establishing the quality and safety standards for the donation, procurement, evaluation, processing, preservation, storage and distribution of human cells and tissues, and approving the coordination and operation standards for their use in humans](#); Royal Decree-Law 8/2012, of 16 of March, for the transposition of [Directive 2008/122/EC of 14 of January 2009, on timesharing](#); or Royal Decree 11/1995 of 28 of December, for the transposition of [Directive 91/271/EEC of 21 of May 1991 concerning urban waste-water treatment](#)). Indeed, even after the Royal Decree Law 9/2017 was adopted, see Royal Decree Law 21/2007, of 29 of December, on urgent measures to adapt Spanish Law to EU rules on securities markets ([Official State Gazette 317 of 30 of December 2017](#)).

This transposition option has been assessed as legitimate and lawful by the Spanish Constitutional Court (Judgments 1/2012, of 13 of January and 329/2005, of 15 of December, [Official State Gazette Special Supplement 36 of 11 of February 2012](#) and [10 of 12 of January 2006](#)). See GM Díaz *La Reserva de Ley en la Transposición de las Directivas Europeas*, Iustel 2016, 121-122 and R Alonso García "Sobre la posibilidad de desarrollo del Derecho comunitario a través de la técnica del Decreto-Ley (A propósito de la Sentencia del Tribunal de Justicia de las Comunidades Europeas, *Comisión v. España*, de 23 de mayo de 1990 -31/89-)" (1990) *RAP* 123: 297-302.

Decree Law is a temporary legislative instrument reserved for matters of extraordinary and urgent need and is subject to validation by Parliament (article 86 of the Spanish Constitution)²¹. The Government justified the use of Decree Law to transpose ‘in block’ several directives on Spain’s Parliamentary deadlock in 2016 and, as a result, the extraordinarily urgent need to immediately implement the aforementioned EU Directives in time to avoid economic sanctions that could have been imposed in accordance with article 260.3 of the TFEU²². Moreover, the use of Decree Law exempts the Government from gathering reports, conducting impact assessments, and debating the new rules in Parliament, all of which are mandatory for regular bills.

The Transposition Decree entered into force on the date of its publication (the 27 of May) and was validated by Parliament the following month (the 22 of June)²³. The Transposition Decree is now being discussed by Parliament through the fast-track legislative procedure before finally being approved as a regular bill²⁴.

Given the long period that lapsed between the approval date of the Directive (24 of November 2014), the date of the 2016 Proposal (January 2016), the deadline for implementing the Directive (27 of December 2016), and adoption of the Transposition Decree (26 of May 2017), it may be questioned whether the Government satisfied the requirement of extraordinary urgency and necessity, but rather the delay in transposing the Directive was the result of unjustified inactivity of the Government during that period.

In summary, the Transposition Decree was enacted following a five-month delay from the transposition deadline set in the Directive²⁵. The final rules in the Transposition Decree include new articles in the DCA and in the CPA, but it only follows in part the 2016 Proposal²⁶. The major change has to do with a substantial downsizing of the proposed amendments to the CPA concerning the access to sources of evidence. Moreover, some of the new rules to be introduced

²¹ A transposition ‘in block’ was also used before by Royal Decree Law 13/2012, of 30 of March 2012, which transposes Directives on the internal electricity and gas markets and on electronic communications and by which measures are taken to correct deviations due to mismatches between the costs and revenues of the electricity and gas sectors ([Official State Gazette 78 of 31 of March 2012](#)).

²² [Official Journal C 326 of 26 of October 2012, 47–390](#). See Statement of Reasons of Royal Decree Law 9/2017, of 26th May 2017 (which referred also to the importance of preserving the “credibility” of Spain as a Member State). In the validation hearing in the Congress, the Ministry of Foreign Affairs informed that the Decree would entail the closure of infringement proceedings against Spain and avoidance of sanctions. In the past this has been deemed a reason strong enough to justify the use of Decree Laws, see M Sánchez “Los Decretos-Ley como instrumento de transposición de Directivas Comunitarias” (2012) [Revista General de Derecho Administrativo 31](#).

²³ [Congress Official Gazette 64, 22 June 2017](#).

²⁴ See Bill 121/000007 transposing into Spanish Law several Directives in financial, commercial and health matters, as well as on the movement of workers ([Congress Official Gazette 7-1, 30 of June 2017](#)). In accordance with article 86.3 of the Spanish Constitution, [Official State Gazette 311 of 29 of December 1978](#) if presented as a regular bill, amendments could be introduced in the legislative process.

²⁵ Theoretically, given the nature of the Directive provisions, this could be the ground for victims claiming liability of the Spanish State as the delay (lack) of transposition might have limited their right to compensation (e.g. given the shorter statute of limitations before the Transposition Decree was enacted), see P Callol “Procedimiento de reclamación de daños causados por ilícitos antitrust: Aspectos clave de recepción en España de la Directiva comunitaria y responsabilidad potencial del Estado por su transposición tardía” in M A Recuerda (coord.) [Problemas prácticos y actualidad del Derecho de la Competencia. Anuario 2017, 218-224](#).

²⁶ See Annex I for a short and concise table of Reference: From Directive to Transposition Decree.

in the DCA have been redrafted and reduced from the text of the 2016 Proposal to reproduce verbatim the rules of the Directive rather than exceed the mandates set forth therein, as the GCC originally intended²⁷.

3. Scope of new rules (material, territorial and temporal).

The Transposition Decree extends the coverage of claims for compensation of competition infringements of both articles 101 and 102 of the TFEU and their domestic equivalents in the DCA. It governs both follow-on and stand-alone claims, although certain rules only apply to the former²⁸. Likewise, it governs all compensation claims derived from competition infringements (including abuse of dominance), but also includes specific rules for compensation of harm arising from multilateral anticompetitive practices, particularly cartels. In a significant departure from the 2016 Proposal, the Transposition Decree excludes from its scope qualified unfair competition acts; however, in accordance with Article 3 of the DCA such claims may also be deemed competition infringements²⁹. Possible explanations for this change are that (i) compensation claims for unfair competition acts are contemplated in the Unfair Competition Act³⁰, and (ii) some mandates of the Directive may not be well-adapted for the particular features of these claims.

Additionally, the Transposition Decree introduces supplementary rules in the CPA concerning the access to sources of evidence of competition infringements. This approach contrasts with the 2016 Proposal, which envisaged an entirely new regulation in the CPA whereby evidence of competition infringements would be applicable and extended to all civil proceedings³¹.

Pursuant to Additional Provision 1 of the Transposition Decree, these rules only apply to “follow-on” claims initiated before Spanish courts, regardless of whether the infringement decision was adopted by the European Commission, the EU General Court, the EU Court of Justice, a Spanish competition authority, a Spanish court, or the competition authority or court of other Member States. Naturally, the wording of this provision is inaccurate and incomplete as it refers only to follow-on claims, while many of the Transposition Decree’s rules also apply

²⁷ Criticism has been raised against this form of regulatory automatism in transposition of EU directives, instead of conceiving it as an opportunity to modernize law and promote (or at least do not impede) activities that may be profitable, see C Sebastián *España Estancada. Por qué somos tan ineficientes*, Galaxia Gutenberg 2016, 55 (“*El Estado español ha mostrado, en general, una notable desidia en la transposición de la directivas comunitarias, y en algunos casos sólo lo ha hecho –y de forma muy poco rigurosa ahondando en la práctica y cultura de legislar de cualquier manera- cuando había amenaza de sanción*”).

²⁸ See A Casado “La Directiva 2014/103/UE sobre las acciones de daños en materia de competencia: una apuesta por las follow-on actions” in Ruiz Peris (dir) *La compensación de los daños por infracción de las normas de competencia tras la Directiva 2014/104/UE*, 427-450.

²⁹ Section II of the Statement Reasons of the 2016 Proposal said: “*It has also been considered appropriate to extend the possible damages claims resulting from an infringement of Article 3 of the DCA, concerning the distortion of free competition by unfair competition acts, a provision without equivalent in EU legislation, although damages derived from such acts of unfair competition also have an action for damages of their own in Act 3/1991, dated 10th January, on Unfair Competition*”.

³⁰ Act 1/1991, of 19 January 1991, on Unfair Competition ([Official State Gazette 10 of 11 January 1991](#)).

³¹ See, assessing this option very negatively, C Herrero “La transposición de la Directiva de daños antitrust. Reflexiones a raíz de la publicación de la Propuesta de Ley de Transposición de la Directiva” (2016) *Cuadernos de Derecho Transnacional* 8: 157 and 160-165.

to “stand-alone” actions (i.e., even if there has not been a prior administrative or judicial decision declaring and punishing the infringement)³².

Finally, regarding time-effectiveness of the new rules, the Transposition Decree affirms the new substantive rules introduced in the DCA concerning damages claims arising from infringements of competition law are not retroactive³³. Only private claims initiated after the entering into force of the Transposition Decree will be governed by the new rules³⁴. Claims for infringements in which the previous one year statute of limitations has extinguished will not be prosecutable; however, new claims for ongoing infringements or infringements that ceased within the one year limitations period will be allowed. The non-retroactivity of the rules is further confirmed by the provision establishing that amendments of the CPA on access to sources of evidence only apply to those proceedings initiated after the Transposition Decree has entered into force³⁵.

4. Relevant Issues.

This section examines the main issues concerning antitrust damages claims affected by the Transposition Decree or that may be relevant in future actions for damages.

4.1. Jurisdiction: competent courts.

Parties injured by an infringement of competition law may file suit for damages against the infringer before the Spanish courts if the defendant is domiciled in Spain³⁶ or where the actions in question were carried out or had caused harm in Spain³⁷. Of course, the choice of the Spanish

³² This may be indicative of the Directive’s provisions thinking more about “follow-on” than “stand-alone” claims, noticed also by A Creus “La aplicación privada del Derecho de la competencia en España” in M Pedraz & D Ordoñez (oord) *El Derecho Europeo de la Competencia y su aplicación en España, Liber amicorum en homenaje a Santiago Martínez*, Wolters Kluwer 2014, 346-347.

³³ See Transitory Provision 1.1 of Transposition Decree.

³⁴ This improves the text of the 2016 Proposal which was more conservative by making its substantive rules (DCA amendments) inapplicable to those administrative cases started before the entering into force of the new rules (despite the amendments do not introduce any changes at all on those matters) and that would surely had been against the terms of the Directive. The same thing would occur if the new provisions are deemed applicable to only harm produced after the enactment of the Transposition Decree, but see P Callol & J Manzarbeitia “Antitrust damages litigation-Key aspects of cartel damages cases in Spain” (2017) *ECLR* 38: 374-375 (who consider that any harm produced or infringements that took place before the enactment of Decree would be governed by the prior regime).

³⁵ See Transitory provision 1.2 of Transposition Decree. Obviously, this provision refers strictly to compensation proceedings. It would not have any logic to extend it to administrative proceedings before the competition authorities delaying the effectiveness of the new rules in follow-on claims to those that were pending judicial review when the Transposition Decree was adopted.

³⁶ See Articles 22bis and 22ter of Basic Act of Judicial Power as amended by ([Official State Gazette 157 of 2nd July 1985](#)) as amended by Basic Act 7/2015, of 21st July (hereinafter BAJP). Indeed, an express or implicit submission to the Spanish court by the parties regarding the hypothetical claim of damages raised by an infringement would not be a valid cause for rejection of jurisdiction, see ¶70 EUCJ Judgment of 21 May 2015, C-352/13, *CDC Hydrogen Peroxide* ([ECLI:EU:C:2015:335](#)).

³⁷ The jurisdiction of the Spanish courts depends on the legal grounds for the claim being exercised: if it is brought as a contractual claim, Spanish Courts have jurisdiction when the contractual obligations were created or performed in Spain [article 22quinquies.a) of BAJP]; if it is brought as a tort claim, Spanish Courts have jurisdiction if the harm was produced in Spain [article 22quinquies.b) of BAJP].

forum will be driven by other considerations, such as costs and procedural rules³⁸. The general rule for civil proceedings in Spain is that legal fees and litigation costs are paid by the losing party unless the court finds that a case presents serious legal or factual complexities³⁹.

Commercial Courts will be competent to decide damages claims based on infringements of EU competition rules (TFEU articles 101 and 102) or domestic competition rules (articles 1 or 2 of the DCA)⁴⁰. Doubts regarding the competency of Spanish courts may arise in legal disputes where the infringement of competition law is only an incidental matter to an action before the general Civil Courts⁴¹. On the other hand, it seems reasonable to assume these cases will be transferred to commercial courts⁴².

See also articles 4, 63 and 7.2 of Regulation (EU) 1215/2012 of the European Parliament and of the Council of 12 of December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (*Official Journal L 351 of 20 of December 2012, 1–32*). See ¶56 of EUCJ Judgment of 21 of May 2015, C-352/13, *CDC Hydrogen Peroxide* ([ECLI:EU:C:2015:335](#)); J Suderow “Acciones derivadas de ilícitos antitrust: el foro especial de la obligación extracontractual después de la Sentencia CDC Hydrogen Peroxide” ([2016](#)) *CDT 8/2: 319-325*; C Oró “Reglamento de Bruselas I y acciones indemnizatorias derivadas de un cártel: cuestiones de competencia judicial internacional” (2015) *La Ley UE 30* (La Ley 6285/2015) and M Penadés “Reclamaciones de daños transfronterizas y competencia internacional” in Ruíz (dir) *La compensación de los daños por infracción de las normas de competencia tras la Directiva 2014/104/UE*, 2016, 459-460.

³⁸ See C Herrero “La aplicación privada del Derecho de la Competencia Europeo: El Libro Blanco en materia de Acciones de Daños y Perjuicios por incumplimiento de las normas comunitarias de Defensa de la Competencia” (2008) *RDCD 3*: 115-116 and I Sancho “Ejercicio privado de las acciones basadas en el Derecho comunitario y nacional de la competencia” ([2009](#)) *Indret 1/2009, 18*

³⁹ See Article 394 of CPA (with a cap of one-third of the total value of the action). If there is a partial rejection/award of the claim, each party will bear its own costs and the common costs will be divided equally.

⁴⁰ See article 86 ter.2.f) of BAJP and Additional provision 1 of DCA2007.

⁴¹ These would be ‘indirect’ antitrust claims, in which the defendant invokes a competition infringement in opposition to a standard commercial or contractual suit, and ordinary civil courts may not reject their jurisdiction on that ground (therefore, considering the competition law issue in their ruling). See P Callol “Spain” in AA Foer & JW Cuneo (eds.) *International Handbook on Private Enforcement of Competition Law*, Edward Elgar 2010, 386. If it is used as an exception of the nullity of contract in which the claim is based (in accordance to articles 405 and 408 of CPA) the ordinary civil court will continue hearing the case (article 411 of CPA) However, if the defendant instead issues a counterclaim based on competition law, the ordinary civil court should not accept it as it lacks jurisdiction to hear it (article 406.2 of CPA). See Sancho ([2009](#)) *Indret 1/2009, 20-21*.

⁴² See Brokelman in *El Derecho de la Competencia y los jueces*, 2007, 58-58; C Fernández “Diez años de la aplicación privada del Derecho comunitario de la competencia en España” (2012) *Gaceta Jurídica de la Competencia 29*: 13 and F Gascón “Aspectos procesales de las acciones de daños derivados de infracciones de las normas sobre defensa de la competencia: apuntes a la luz de la Directiva 2014/104 y de la propuesta de ley de transposición” ([2017](#)) *CDT 9*: 129-130. On these issues, see AEDC [Observaciones sobre la transposición de la Directiva 2014/104/UE](#), ¶¶80-82; Caballol I Angelats “Aspectos procesales de la reclamación judicial del resarcimiento de daños y perjuicios causados por infracción de las normas comunitarias de competencia” in A Font & B Vilá (Coord) *La indemnización por infracción de normas comunitarias de la competencia*, M. Pons 2012, 17-18; I Colomer “La tutela judicial de la defensa de la competencia” in L Parejo & A Palomar (dir) *Derecho de la competencia. Estudios sobre la Ley 15/2007, de 3 de Julio de Defensa de la Competencia*, La Ley-Wolters Kluwer 2008, 504-513; A Martínez & J Rodríguez “La aplicación del Derecho de la Competencia por el juez civil español: de unos inicios dubitativos a ¿un prometedor futuro?” in Pedraz & Ordoñez (oord) *El Derecho Europeo de la Competencia y su aplicación en España, Liber amicorum en homenaje a Santiago Martínez*, 261-262; M^aV Torre “Sobre las reclamaciones de daños por infracción de las normas de Derecho de la Competencia tras la Directiva 104/2014. Vicisitudes procesales en torno a la acumulación de acciones por el actor y por el demandado” (2015) *RDCD 17* and *Daños y perjuicios por infracción de las normas de Derecho de la competencia. La tutela procesal del Derecho de la competencia en el plano nacional español*, Aranzadi, 2016, 64-66 and 161-181 and P Vidal & A Capilla

To prevent the court system from being flooded with compensation claims for infringements of competition law, the Transposition Decree facilitates the use of alternative dispute resolution mechanisms and out-of-court settlements by limiting the liability of infringing parties that enter into settlement agreements with victims. Settlements will limit infringers responsibility to compensation paid in accordance to the settlement and subsidiary liability to the victims if fellow co-infringers are insolvent (see *infra* §4.6).

4.2. Right to full compensation.

Article 71.1 of the DCA affirms the general liability of infringers of EU or domestic competition law for harm caused by their actions. The Transposition Decree, following article 3 of the Directive, grants the right to full compensation to anyone harmed as a result of an infringement of competition law. This is understood as the right to be put in the same position that the claimant would have been in had the infringement not occurred, and implies the repairing of all economic or financial harm. To receive compensation, the claimant must demonstrate the existence of harm. In practice, this includes the right to compensation for actual losses and lost profits, plus the payment of interest (article 72 of the DCA)⁴³.

Although article 72 of the DCA literally copies the rule from Article 3 of the Directive concerning the extent of compensation, the DCA rule does not constitute a novelty in the Spanish legal landscape. Spanish courts have already declared the right to full compensation in several cases based on the general rules concerning tort liability and the extent of liability⁴⁴. However, due to the vague language of the Transposition Decree, doubts concerning certain features of the legal grounds for liability will subsist until the courts have had a chance to apply these rules.

Firstly, although the new articles of the DCA clearly state compensation in these cases will be based on non-contractual liability (tort)⁴⁵ (and that would probably occur in most of the cases) it still should not be ruled out that infringement claims arising from commercial relationships could be based on contractual liability (e.g., bad faith in performance ex articles 1258 and 1101 of the Civil Code) or possibly unjust enrichment of the infringer⁴⁶.

“Comentario art. 72” in J Massaguer et al (dir) *Comentario a la Ley de Defensa de la Competencia*, 5th Ed. Thomson-Reuters 2017,1476-1477.

⁴³ Concerning the loss of profits resulting from the infringement, the Courts have recognized some flexibility in considering the counterfactual scenario, see §6 of Judgment of Commercial Court number 4 of Madrid of 25 of February of 2014, *Estació de Servei Cornellá v. CEPSA*, SJM M 11/2014 (ECLI:[ES:JMM:2014:119](#)) (“*although these estimations are not perfect, the defendant does not raise valid objections or, at least, they are not quantified*”)

⁴⁴ See articles 1902 and 1106 of Civil Code ([Official National Gazette 206 of 25 July 1889](#)). On this see A Robles “La función normativa de la responsabilidad por daños derivados de infracciones del Derecho de la competencia. Incidencia de la Directiva 2014/104/UE en nuestro Derecho interno” in [Estudios sobre el futuro Código Mercantil: libro homenaje al profesor Rafael Illescas Ortiz, Univ. Carlos III de Madrid 2015, 1113](#).

⁴⁵ See §12 of Supreme Court Judgment of 8 June 2012, *Galletas Guyón v. ACOR*, STS 5462/2012 (ECLI:[ES:TS:2012:5462](#)).

⁴⁶ See H Brokelman “Spain” in [The Private Enforcement Competition Review, 7th ed. 2014, 334](#); id. “La responsabilidad civil por infracción de las normas de defensa de la competencia” in Font & Gómez (Coord) *Competencia y acciones de indemnización*, 106-108; M^oP Bello “Una exploración sobre la posibilidad de alegar responsabilidad contractual en acciones de daños derivados de infracciones de la LDC: a propósito del caso ACOR”

Secondly, neither the Directive nor the Transposition Decree spell out a requirement of fault of the defendant in the realization of its harmful anticompetitive conducts⁴⁷. This will not present a problem in follow-on actions in which the infringement decision imposing sanctions issued by a competition authority always requires culpability for punishment of the infringing parties⁴⁸, but the claimant will need to prove fault in all other cases⁴⁹.

in JA Gómez & A García (eds) *El Derecho Mercantil en el umbral del siglo XXI. Libro Homenaje al prof. Dr. Carlos Fernández-Nova con motivo de su octogésimo cumpleaños*, M. Pons 2010, 263-270; A Tobío “La responsabilidad en la indemnización por daños derivados de un ilícito *antitrust*: transposición de la Directiva 2014/104/UE“(2017) *ADI* 37:91-92 and A Zurimendi “Las reclamaciones de los daños y perjuicios derivados de ilícitos anticoncurrenciales” in A Robles (coord) *La lucha contra las restricciones de la competencia. Sanciones y remedios en el Ordenamiento español*, Comares 2017, 269-279. Indeed, both could well be deemed to co-exist in certain cases, see S González *La nulidad de los negocios restrictivos de la competencia*, MPons 2016, 320-322 and “El nuevo marco que configura la Directiva de daños en el ámbito de la responsabilidad civil derivada de la infracción de las reglas de Derecho antitrust” (2015) *RDCD* 16: 3-5.

Contra IS Ortiz *La aplicación privada del Derecho de la Competencia. Los efectos civiles derivados de la infracción de las normas de libre competencia*, La Ley-Wolters 2011, 165-169; “La ‘aplicación privada’ del derecho antitrust y la indemnización de los daños derivados de ilícitos contra la libre competencia” (2008) *Revista e-Mercatoria* 7/1:4-6 and Fernández (2012) *Gaceta Jurídica de la Competencia* 29: 18-19.

⁴⁷ But see European Commission, *Staff Working Paper Annex to Green Paper Damages actions for breach of EC antitrust rules*, [COM \(2005\) 672 final](#), 19 of December 2005, ¶¶101-111 and *Staff Working paper accompanying the White Paper on Damages actions for breach of EC antitrust rules*, [SEC\(2008\) 404](#), 2 of April 2008, ¶¶163-179, COM (2008) 165 final, 2 of April 2008, 50-54; R Illescas “A propósito del reciente Libro Blanco de la Comisión de las CE sobre acciones de daños y perjuicios por incumplimiento de las normas comunitarias de Defensa de la Competencia” (2008) *ADI* 28: 59; FG Willman “The end of absence: the growing body of EU legislation on private enforcement and the main remedies it provides for” (2016) *Common Market Law Review* 53: 903-904 and González *La nulidad de los negocios restrictivos de la competencia*, 326-329 and (2015) *RDCD* 16: 6-10.

In Spain, see article 341-1.e) of Proposal of Commercial Code ([Anteproyecto de Ley de Código Mercantil](#)) 30 of May 2014, providing for a damages action if there was intent or negligence in the action (“*Acción de resarcimiento de los daños y perjuicios ocasionados por el acto o práctica, si ha intervenido dolo o culpa del agente*”)

⁴⁸ See Herrero (2016) [Cuadernos de Derecho Transnacional 8: 157 and 165](#); J Quijano “Competition Law and Damages Liability: What is common and what is special” in Velasco et al. (eds) *Private Enforcement of Competition Law*, 476; A L Calvo Caravaca & J Suderow “El efecto vinculante de las resoluciones de las autoridades nacionales de competencia en la aplicación privada del Derecho antitrust” (2015) [CDT 7/2: 136](#); Herrero (2008) *RDCD* 3: 111 and P Hitchings “The Conduit Case” in *Derecho de la Competencia Europeo y Español. Curso de iniciación*, vol. VII, Dykinson 2007, 169-170. See also Sancho (2009) [Indret 1/2009, 7](#) (“*No obstante, sin necesidad de modificación legislativa y por vía de interpretación jurisprudencial, resultaría muy prudente dar la posibilidad al agente de eximirse de responsabilidad probando que su conducta responde a un error excusable, esto es que “una persona que prestara un alto grado de atención no pudiera haberse dado cuenta de que la conducta en cuestión restringía la competencia*”) following the *White Paper on Damages actions for breach of EC antitrust rules*, [COM\(2008\) 165 final](#) §2.4 and the *Staff Working paper accompanying the White Paper on Damages actions for breach of EC antitrust rules*, [SEC\(2008\) 404](#), ¶¶168-172.

⁴⁹ As it cannot be considered strict liability, see Alonso Soto “La aplicación privada del Derecho de la Competencia” in Font & Gómez (Coord) *Competencia y acciones de indemnización*, 128; A Font & M^aA Gual “Teoría y Práctica de a conducta culpable en el ejercicio de la acción de indemnización de daños y perjuicios por infracción de normas del ordenamiento de la competencia” in Font & Vilá (Coord) *La indemnización por infracción de normas comunitarias de la competencia*, 147-149; Brokelmann “La responsabilidad civil por infracción de las normas de defensa de la competencia” in Font & Gómez (Coord) *Competencia y acciones de indemnización*, 114-115 and Tobío (2017) *ADI* 37: 94-97. Including those follow-on cases in which harm may still exist but the procedure was closed without a declaration of infringement or a fine being imposed (consent decree). In Spanish corporate law, the culpability of directors’ who acted against the law or against the company’s bylaws is presumed unless proven otherwise (see article 236.1 of Corporations Act 1/2010, of 2 July, [Official State Gazette 161 of 3 of July 2017](#)).

Thirdly, the Directive and the Transposition Decree are silent regarding the causality link between the infringement and the harm caused to the victim⁵⁰. The claimant must demonstrate that the harm is a direct consequence of the infringing action⁵¹. The defendant may allege other causes for the harm but will also have the burden of proving fault and causation.

Proving causality may not present a problem for claimants in most cases (i.e., where there would be a sufficient and adequate causal nexus between the infringement and the harm). However, the burden of showing causality may pose some trouble in cartel cases where the claimant purchased a product from a competitor of the cartel at a price reflecting an overcharge caused by the cartel's exploitative practices ("umbrella claims"). Despite the recognition EUCJ's recognition of umbrella claimants' right to compensation⁵², constructing legal claims against cartelists will be difficult. For example, "umbrella claimants" will likely face significant evidentiary hurdles satisfying the fault requirement and demonstrating the causal link between the cartel's anti-competitive conduct and the harm they have suffered⁵³.

Fourthly, while the compensation regime established by the Directive and the Transposition Decree refers principally to cases in which victims are located in the downstream market, they also contemplate harm to victims in upstream markets (article 12.4 of Directive and, implicitly, articles 73.4 and 5 of DCA), in which case the harm will consist of lower prices or a loss of

But see Vidal & Capilla "Comentario art. 72" in Massaguer *Comentario a la Ley de Defensa de la Competencia*, 1475-1476 and P Vidal & T Arranz "Aspectos Sustantivos de la Transposición al Ordenamiento español de la Directiva de daños por infracciones del Derecho de la Competencia" (2017) *La Ley Mercantil* 38: 5-6 who consider that it may be a case of strict or quasi-strict liability (objective).

⁵⁰ But see European Commission, *Staff Working Paper Annex to Green Paper Damages actions for breach of EC antitrust rules*, [COM \(2005\) 672 final](#), ¶¶273-276 and Staff Working paper accompanying the White Paper on Damages actions for breach of EC antitrust rules, [COM \(2008\) 165 final](#), ¶98.

⁵¹ See ¶66 of judgment of EU Court of Justice of 6 of November 2012 (Grand Chamber) *Europese Gemeenschap v. Otis et al.*, C-199/2011 (ECLI:[EU:C:2012:684](#)) ("... it still falls to the national court to determine individually the loss caused to each of the persons to have brought an action for damages"). See also Willman (2016) *Common Market Law Review* 53: 902; Brokelmann "La responsabilidad civil por infracción de las normas de defensa de la competencia" in Font & Gómez (Coord) *Competencia y acciones de indemnización*, 115; Fernández (2012) *Gaceta Jurídica de la Competencia* 29:20; González *La nulidad de los negocios restrictivos de la competencia*, 337-343 and (2015) *RDCD* 16: 14-18; Quijano in *Private Enforcement of Competition Law*, 478; Robles in [Estudios sobre el futuro Código Mercantil: libro homenaje al prof. R. Illescas Ortiz, Univ. Carlos III de Madrid 2015, 1118-1119](#) and Zurimendi in *Sanciones y Remedios en el Ordenamiento español*, 280.

⁵² See ¶34 of Judgment of EU Court of Justice of 4 of June 2014, C-557/12, *Kone AG v. ÖBB-Infrastruktur AG*, ECLI:[EU:C:2014:1317](#) ("the victim of umbrella pricing may obtain compensation for the loss caused by the members of a cartel, even if it did not have contractual links with them, where it is established that the cartel at issue was, in the circumstances of the case and, in particular, the specific aspects of the relevant market, liable to have the effect of umbrella pricing being applied by third parties acting independently, and that those circumstances and specific aspects could not be ignored by the members of that cartel. It is for the referring court to determine whether those conditions are satisfied"). See also recital 38 *in fine* of Directive.

⁵³ See Tobío (2017) *ADI* 37: 112 (although I doubt they can benefit from the presumption of harm produced by cartels set by article 76.3 of DCA, see *infra* §4.7.2); E Olmedo "Daños derivados de la subida de precios bajo el paraguas de un cártel ("umbrella pricing"): una lectura jurídica del nuevo paso en la aplicación privada del derecho de la competencia" (2014) *La Ley Mercantil* 7: 7-10.

sales⁵⁴. In those cases the victims will be the sellers or the suppliers to the infringer (e.g., in buyer cartels or abuse of dominance of a monopsonist)⁵⁵.

Finally, the Transposition Decree lacks clarification regarding the period for calculating interest, which may raise doubts about whether Spanish law is in line with the Directive. The general rule is that interest is calculated from the moment a judicial claim for damages is started (article 1100 of the Civil Code), whereas the Directive establishes that interest is to be calculated from the moment the harm occurred to the date of effective compensation⁵⁶.

4.3. Responsibility of infringers: joint and several/parental liability.

In the case of cartels and other infringements of competition law carried out by several entities, liability for damages is held jointly and severally by all co-infringers. Solidary liability operates as a guarantee for aggrieved parties when harm was caused by a plurality of parties (*favor creditoris*). Article 73 of the DCA transcribes verbatim article 11 of the Directive into Spanish law, acknowledging the right of any injured party to claim full compensation from any of the infringers until it has been fully compensated (see also 1144 of Civil Code).

Until now, the general rule under Spanish law provided for collective and individual liability of each tortfeasor for its share of the harm (art. 1137 of the Civil Code). A court could declare joint and several liability, but only among those defendants addressed by the judgment⁵⁷. In accordance with the Directive's mandate, the Transposition Decree also introduces a liability reduction scheme for small and medium enterprises (SMEs) and leniency beneficiaries.

⁵⁴ See E Bueren & F Smuda "Suppliers to a sellers' cartel and the boundaries of the right to damages in U.S. versus EU competition law" (2017) [European Journal of Law & Economics 1-41](#) and R Vallina, J A Santana & A Sellés "Cuantificación del daño y sobrecostes en la Directiva de daños por infracciones de la competencia" in MA Recuerda (coord.) *Problemas prácticos y actualidad del Derecho de la competencia. Anuario 2015*, 287-288 (difficulties may exist in proving both the harm and the causality in these cases).

⁵⁵ See recital 43 of Directive and AEDC [Observaciones sobre la transposición de la Directiva 2014/104/UE](#), ¶¶28-31.

⁵⁶ See Recital 11 of Directive 2014/104/EU ("The payment of interest is an essential component of compensation to make good the damage sustained by taking into account the effluxion of time and should be due from the time when the harm occurred until the time when compensation is paid, without prejudice to the qualification of such interest as compensatory or default interest under national law and to whether effluxion of time is taken into account as a separate category (interest) or as a constituent part of actual loss or loss of profit. It is incumbent on the Member States to lay down the rules to be applied for that purpose"). Unclear in this regard, §17 of Supreme Court judgment of 4 March 2015 *Hidrocantábrico/Iberdrola* STS 669/2015 (ECLI:ES:TS:2015:669) ("the obligation to compensate in cases of non-contractual liability constitutes a debt of value, since its purpose is to restore the existing situation when the harm was produced, so it is necessary to adjust its amount to the moment in which the injured receives the corresponding compensation"). See also F Cachafeiro "Damages Claims for Breach of Competition Law in Spain" in [H. Rosenau & T. Van Ngjia \(eds.\) Competition Regime: Raising Issues and Lessons from Germany, Nomos 2014](#), 187; C Gómez "Comentarios al art. 1 de la propuesta de ley de transposición de la directiva 201/104/UE relativa a las acciones por daños por infracciones del Derecho de la Competencia" (2015) *La Ley Mercantil* 28(5):4; Herrero (2016) [Cuadernos de Derecho Transnacional 8: 172](#) and V Sopena & GA Martín "La transposición de la Directiva europea para la reclamación de daños por infracciones de la competencia en España: mucho ruido, pocas nueces y una oportunidad perdida" (2015) [RDCD 17:7](#).

⁵⁷ See C Arija "El principio de no presunción de solidaridad en las obligaciones con pluralidad de deudores" (2017) *Revista de Derecho Patrimonial* 43: 39, 43-45 and 57 (this was relevant concerning the running of the limitation period for those co-infringers who were not addressed by the victims' claims).

In the case of SMEs⁵⁸, the criteria for reducing the liability of SMEs is difficult to ascertain from the text of the Transposition Decree (article 73.2 of the DCA), which may lead to further complexities implementing the reduction in practice⁵⁹.

On the other hand, limiting the liability of leniency beneficiaries will preserve the attractiveness of leniency programs run by the European Commission and other competition authorities. Leniency programs incentivize to cooperate with public enforcers by awarding cartel infringers immunity from fines. At the same time, undertakings risk exposing and publicising their infringements if self-incriminating statements provided during settlement negotiations are disclosed, making them easy ‘prey’ for aggrieved parties in search of compensation⁶⁰. For that reason, leniency beneficiaries’ will only be liable for their direct and indirect purchasers or suppliers. Moreover, their liability to other injured parties will be only subsidiary, in case they were not able to obtain full compensation from the rest of the infringers⁶¹.

Undertakings subject to joint and several liability that have fully compensated injured parties have the right to obtain contribution from the rest of co-infringers for their respective share of responsibility for the harm caused (article 73.5 of the DCA)⁶². Nevertheless, it is unclear how Spanish courts will determine the “relative responsibility” of each co-infringer in practice⁶³.

⁵⁸ See Recommendation 2003/361/EC of 6 of May 2004, concerning the definition of micro, small and medium-sized enterprises ([Official Journal L 124 of 20 of May 2003, 36-41](#)).

⁵⁹ See JI Ruiz “Tiempos de cambio: del monopolio de la aplicación pública del derecho de la competencia a la responsabilidad compartida” in Ruiz (dir) *La compensación de los daños por infracción de las normas de competencia tras la Directiva 2014/104/UE*, 40; Vidal & Arranz (2017) *La Ley Mercantil* 38: 7; H Brokelman “La Directiva de Daños y su transposición en España” (2015) *Revista General de Derecho Europeo* 37:14. Additionally, article 73.2 of DCA only refers to “purchasers” (like the Directive), whilst it seems clear that the same rule should govern claims by suppliers (see article 12.4 of Directive), in case they are the aggrieved party, see Tobío (2017) *ADI* 37: 103.

⁶⁰ They are less likely to appeal the decision adopted by the competition authority and thus the declaration of infringement is final for them earlier than for the rest of the co-infringers that will surely appeal it in court (with the binding force and evidentiary value of the decision by the competition authority has in front of the damages court, see *infra* §4.7.1).

⁶¹ Article 73.5 *in fine* DCA introduces an additional rule concerning the liability of the leniency beneficiary regarding potential umbrella claimants, which would not be subsidiary and would be calculated in accordance with its share of responsibility for the harm [see E Olmedo “La incidencia de las acciones por daños sobre la efectividad de los programas de clemencia y la estabilidad de los cárteles en el Derecho Europeo de la Competencia” in Ruiz (dir) *La compensación de los daños por infracción de las normas de competencia tras la Directiva 2014/104/UE*, 419 and (2014) *La Ley Mercantil* 7: 13]. The interpretation of this rule is far from clear, see Tobío (2017) *ADI* 37: 105-106.

⁶² Articles 1145 and 1210.3 of Civil Code already provided a similar rule for joint and several liabilities (that would need to be exercised in five years from payment date). Moreover, if one of the co-infringers becomes insolvent, his share of liability is proportionally distributed (in accordance with their sharing of liability), article 1145 *in fine* of Civil Code.

⁶³ The CPA enables defendants to call to the proceedings other infringing parties that may be liable (article 14 of CPA), but their calling and intervention in the case will only be relevant for the apportionment of respective shares of responsibility. The Transposition decree is silent concerning the criteria to be followed in allocating the respective shares of liability of co-infringers, but the market settings may provide information (see Recital 37 of the Directive) or the decision of the competition authority. Legally, each defendant is individually responsible for its share of liability, and the internal contributory actions among defendants would have to be filed within five years of the payment to the aggrieved party (article 1964.2 of Civil Code). It would be more problematic if this claim for recovery had to be filed in one year as considered by J Martí “Acciones de daños por infracciones del

Finally, Article 71 of the DCA obligates parent companies to compensate injured parties for harm arising from the conduct of its subsidiaries, except in cases where the parent company did not have the ability to exercise control over the infringing behaviour of the subsidiary⁶⁴. This extension of liability for damages to parent companies mirrors the rebuttable presumption of liability of the parent company for fines imposed to its subsidiaries in domestic and EU public enforcement actions.⁶⁵

4.4. Passing-on of the harm and indirect purchasers/suppliers claims.

In addition to excluding the possibility of overcompensation, multiple or punitive damages (article 72.3 of the DCA), the Transposition Decree introduces a rule for compensating aggrieved parties located in a supply or distribution chain harmed by the downstream or upstream transfer of harm (article 78 of the DCA)⁶⁶. An aggrieved party may only claim compensation for the part of the overcharge or underpayment it effectively endured, which includes actual losses as well as lost profits.

Article 78.3 of the DCA explicitly allows for the defendant to raise the passing-on defence if the plaintiff transferred all or part of the harm. The Spanish Supreme Court has already considered the passing-on defence in a claim for competition damages⁶⁷. Indeed, including this defence is a natural extension of the logic behind damages compensation, according to which actions by aggrieved parties reacting to mitigate the harm are taken into account when calculating the harm suffered by the mitigating party⁶⁸. Furthermore, it would be contrary to the

Derecho de la Competencia: Responsabilidad Conjunta y Prescripción” (2017) *ADI* 37: 46 (who refers, incorrectly, to article 1968.2º of Civil Code). See Vidal & Capilla “Comentario art. 73” in Massaguer *Comentario a la Ley de Defensa de la Competencia*, 1486.

⁶⁴ See Article 71.2.b) DCA and I Contreras “La responsabilidad por daños de la matriz por conductas anticompetitivas de su filial” (2016) *RDCD* 19. Naturally, lawyers have raised complaints against this extension, see AEDC [Observaciones sobre la transposición de la Directiva 2014/104/UE](#) ¶¶17-24; Vidal & Capilla “Comentario art. 72” in Massaguer *Comentario a la Ley de Defensa de la Competencia*, 1464-1467; Vidal & Arranz (2017) *La Ley Mercantil* 38: 3-4 or have interpreted it in restrictive manner [holding that it would only operate “when the controlling stake is 100%, or very close to that figure”, P Callol & J Manzarbeitia “Antitrust damages litigation-Key aspects of cartel damages cases in Spain” (2017) *ECLR* 38: 379]

⁶⁵ See article 61.2 of DCA2007 and B Wardhaugh “Punishing parents for the sins of their child: extending EU competition liability in groups and to subcontractors” (2017) *Journal of Antitrust Enforcement* 5: 22-48.

⁶⁶ Although both the Directive and the Transposition Decree’s provisions are constructed in the understanding that in most cases the harm flows downstream, there may be cases (e.g. buyer cartels or abuse of monopsony power) in which the harm may flow upstream, and in those cases the rules should be interpreted and construed as giving standing to indirect suppliers to which direct suppliers to the infringer may have transferred wholly or partially the harm (see recital 43 and article 12.4 of Directive). See Bueren & Smuda (2017) *European Journal of Law & Economics* 1-41 and Vallina, Santana & Sellés in *Problemas prácticos y actualidad del Derecho de la competencia. Anuario 2015*, 288 (anticipating the difficulties in proving and quantifying the harm passed on in these cases).

⁶⁷ See §5 of Supreme Court Judgment of 7 November 2013, *Nestlé v Ebro*, STS 5819/2013 (ECLI:ES:TS:2013:5819), revoking judgment of 3 October 2011 Provincial Court of Madrid (Sect. 8) *Nestlé v. Ebro*, SAP M12900/2011 (ECLI:ES:APM:2011:12900) which had admitted passing-on because it was proven that Nestlé had increased its prices (at §3). See Martínez & Rodríguez in *El Derecho Europeo de la Competencia y su aplicación en España*, 271-272 and C Tudor “La admisión de la defensa passing-on en el cártel del azúcar: ensayo crítico sobre la SAP de Madrid, Secc. 8, Asunto 737/07” (2012) *RDCDC* 11: 277-291.

⁶⁸ A duty to mitigate the harm by victims is generally acknowledged in case law, but the Supreme Court has declared (in a damages claim by Hidrocantabrico following a decision of the NCC declaring an abuse of dominance

general legal principle against unjust enrichment if the claimant were allowed to recover damages above the actual harm suffered⁶⁹.

The new rules contemplate the flow or transfer of harm to both upstream and downstream markets, depending on the type and features of the infringing conduct, which will ameliorate the position of the direct victims (*compensation lucro cum danno*)⁷⁰. In these cases, the defendants asserting a passing-on defence have the burden to prove the claimant wholly or partially passed-on the harm. Theoretically, the wording of the defence does not exclude its availability against umbrella claimants if there was passing-on⁷¹.

On the other hand, following article 14 of the Directive, new article 79 of the DCA enables damages claims by indirect purchasers, who have the burden of proving the overcharge was passed-on to them⁷². To ease the evidentiary burden of bringing these claims, article 79.2 of the DCA establishes a rebuttable presumption that the indirect purchasers assumed the overcharge where it has been shown infringing conduct caused an overcharge to the direct purchasers and the indirect purchasers subsequently purchased the affected goods or services (or other goods or services therefrom derived) from the direct purchasers. This presumption only refers to first-degree acquirers (i.e., indirect purchasers who acquired goods or services from the direct victims of the violation) and does not extend further downstream. Due to the near-sightedness of the Directive (reflected in the Transposition Decree) with respect to harms that propagate upstream, it is unclear if this presumption applies to suppliers or sellers to the infringers, where the harm is transferred upstream.

In the same vein, and to avoid the risk of unjust enrichment of the aggrieved parties and multiple liability of infringers given the liability towards both direct and indirect purchasers, article 80 of the DCA follows article 15 of the Directive inviting any court hearing damages claims to take into account related damages proceedings that have concluded or are in progress, as well as relevant public information concerning any prior decision by the competition authorities on

of Iberdrola) that it lies in the defendant the burden of proof to demonstrate that the claimant's behaviour enhanced or worsened the damages (given Iberdrola abusive failure to provide access to its network, which forced Hidrocantabrico to serve its clients through separate generators and hence caused a significant overcharge), see §11.5 in fine of Judgment of 4th March 2015 *Hidrocantábrico/Iberdrola* STS 669/2015 (ECLI:ES:TS:2015:669).

⁶⁹ See F Cantos, E Cabrera & P Gonzalo "La aplicación privada del Derecho de la Competencia en España y en el Derecho Comparado: la propuesta de Directiva de daños y algunas cuestiones jurídicas que suscita" (2013) *Gaceta Jurídica de la Competencia* 36: 52; PM Garrido "El sistema passing-on: el ejercicio de la acción y defensa procesal" in Font & Vilá (Coord) *La indemnización por infracción de normas comunitarias de la competencia*, 2012, 51-52 and 58-60 and Herrero (2016) *CDT* 8:178-179.

⁷⁰ Because the aggrieved party had gained through the actions causing the harm. Nonetheless, the requirements for this claim to be accepted by court requires to prove and quantify that profit and to demonstrate its causal relationship with the infringement of competition law. See LA Velasco & C Herrero "The passing-on defence, A false dilemma?" in LA Velasco et al. (eds) *Private Enforcement of Competition Law*, Lex Nova, 2011, 577-587 and Herrero (2008) *RDCD* 3: 114.

⁷¹ See also Tobío (2017) *ADI* 37: 108 and Gonzalez (2015) *RDCD* 16: 1-30.8- 9.

⁷² General tort law already would have recognized this possibility as long as the indirect purchaser could prove the harm and the causality link to the defendant's behavior, see Callol in *International Handbook on Private Enforcement of Competition Law*, 2010, 386 and Sopena & Martín (2015) *Revista de Derecho de la Competencia y Distribución* 17: 6.

the case⁷³. In order for this rule to be effective, a system of information and publicity about these cases should be organized⁷⁴.

Finally, Guidelines being developed by the European Commission should assist the courts in estimating the share of the overcharge passed on to indirect-purchasers (article 16 of the Directive)⁷⁵.

4.5. Limitation period.

Article 74 of the DCA copies the Directive rule on the limitation period for bringing damages claims for competition infringements (article 10 of the Directive). The limitation period is extended to five years from the previous one-year period provided for standard non-contractual claims in the Civil Code (article 1968 of the Civil Code)⁷⁶.

The limitation period begins to run when two conditions are met. The first condition is objective and is satisfied on the day in which the infringing conduct has ceased. The second condition is subjective and concerns the claimant's knowledge of the existence of a potential claim. This condition is met when the claimant knows, or can reasonably be expected to know three distinct facts:

- (i) that some behaviour of an undertaking constitutes an infringement of competition law;
- (ii) the harm suffered by claimant as a result of the infringement, and
- (iii) the identity of the infringer.

The requirement of the harm to be known is different from the knowledge of the mere existence of harm set forth in article 10 of the Directive, further extending the duration of the time bar. However, in the past the Supreme Court had already followed a similar rule in setting the *dies a quo* for the purposes of starting the running of the limitation period⁷⁷. Finally, given that the

⁷³See Gascón [\(2017\) CDT 9: 150-151](#). It would probably had made sense to introduce further flexibility in the existing rules on claim and case joinders *ex officio* or by petition of parties, but the rules on joinders have not been touched by the Transposition Decree (see articles 68 to 98 of CPA).

⁷⁴ Arguably, defendants can inform the court of any other damages claims they are involved in or they may be aware of. Otherwise, the only rules on information on this regard (article 16.3 of DCA, article 15.2 of Regulation 1/2003 and articles 212.3, 404.3 and 461.5 of CPA) seem to be insufficient and have a different focus, see P Hitchings, M A Malo & L Loras "Considerations concerning the implementation of the EU competition law damages directive in Spain" (2015) *Concurrences* 2: 27 ("It may also be worth considering increasing the existing publicity mechanisms around these cases") and also AEDC [Observaciones sobre la transposición de la Directiva 2014/104/UE](#) ¶¶62-63.

⁷⁵ The Commission made public in 2016 the text of the final report [Study on the Passing-on of Overcharges](#), which will inform the Guidelines to be adopted.

⁷⁶ Duration may be longer in accordance to existing law in some regions (e.g. three years in Catalonia), see Article 121-21.d) of Act 29/2002, of 30th December, First Act of the Catalan Civil Code ([Official State Gazette 32 of 6 of February 2003](#)). However, the apparent short duration of the period (1 year) until now was easily handled by complainants in practice, given the alternative ways of interrupting it foreseen by the law (article 1973 of Civil Code): submission of a court claim; filing of an extrajudicial claim or any act of recognition of harm produced by the infringers. See Creus in *El Derecho Europeo de la Competencia y su aplicación en España*, 350.

⁷⁷ See § 6 of Supreme Court Judgment of 4 of September 2013, *Centrica v. Iberdrola*, STS 4739/2013 (ECLI: [ES:TS:2013:4739](#)) ("Only from that moment, the person harmed by the abuse of dominant position was able to

liability for damages is joint and several (see *supra* §4.3), a claim started against one of the co-infringers interrupts the limitation period with respect to the rest of the co-infringers (article 1974 of the Civil Code), to whom the claimant can also direct its claims until he gets full compensation.

The limitation period shall be interrupted if a competition authority initiates a formal investigation or proceeding of the infringing behaviour until one year after the decision by the competition authority is final or the proceeding is otherwise terminated⁷⁸. According to Spanish law, the interruption triggers an additional period of five years. An infringement decision issued by a Spanish competition authority becomes final when it is no longer subject to judicial review.

4.6. Alternative Dispute Resolution (ADR).

To accommodate and promote the use of consensual dispute resolution of damages claims for competition infringements, the Transposition Decree has transcribed verbatim article 19 of the Directive⁷⁹, which introduces a qualified mitigating circumstance to be considered by the NMCC or the regional competition authorities in calculating the amount of any future fine. This mitigating factor is only available where the infringer has effectively compensated the victims for the harm caused before a decision by the competition authority is issued (article 64.3.c of the DCA)⁸⁰, creating an incentive to resort to ADR early in the public enforcement procedure.

The new rules provide for the interruption of the limitation period for bringing an action for damages during the dispute resolution process; however, the interruption will only affect parties

ascertain the extent of the damage caused and determine it, in order to be able to claim damages from the defendant”), in § 7 the Court expressly referred to article 10.2 of the Directive Proposal. See Callol & Manzarbeitia (2017) *ECLR* 38:376.

However, this claim was finally quashed by the Supreme Court judgment of 6th July 2017, *Centrica v. Iberdrola*, STS 2792/2017 (ECLI: [ES:TS:2017:2792](#)) because “*the plaintiff has not been able to prove undoubtedly, as the case may be, the existence and quantification of a loss of profit that has been caused exclusively by the illegal action attributable to Iberdrola*” (§1.5).

⁷⁸ Until now, the notification of the administrative decision by the competition authority declaring the infringement has been considered to be the *dies a quo*, see §2 of judgment of Provincial Court of Madrid (sect. 28) of 3rd July 2017, *Musaat v. ASEFA, SCOR & CASER*, SAP M 9034/2017 (ECLI: [ES:APM:2017:9034](#)).

⁷⁹ The existing general rules on this matter enable agreements between private parties to avoid or terminate litigation (article 1809 of Civil Code). The CPA also considers this possibility (article 19.1), requiring courts to verify if parties could reach an agreement at the beginning of the trial (article 415) and also once the subject matter of the proceedings have been determined (article 428). Parties have to notify the court if they reach a settlement that cancels the object of pending litigation, to allow the court to close the case (articles 19.3 and 22.1) If the settlement is approved by the court it will have the same effect as a judgment.

⁸⁰ This provision is clearer and more specific than the already existing mitigating circumstance consisting in “*carrying out actions to repair the harm caused*” [article 64.3.c) of DCA]. See also §18 of European Competition Authorities (ECA) Working Group on Sanctions, *Pecuniary sanctions imposed on undertakings for infringements of antitrust law. Principles for convergence*, May 2008 (“*The applicable fine may be reduced if the offender takes active steps to mitigate the adverse consequences of the infringement, in particular by providing voluntarily, timely and adequate compensation to those who have suffered damage as a result of it*”). Although the incentive for the parties is far from clear, see

M^oC Pablo-Romero “Soluciones extrajudiciales a las reclamaciones de daños por infracciones de competencia” (2015) *RDCDC*16: 6-7.

who are or have been involved in the process (Article 74.3 of the DCA)⁸¹. Article 81 of the DCA also allows the court to order a suspension of the proceedings in which the damages claims are being heard for a maximum of two years to allow for the conclusion of the consensual dispute resolution process⁸².

Additional incentive for infringers to resort to ADR mechanisms is created through the introduction of several rules that improve their position vis-à-vis the aggrieved parties. Firstly, the claimant's right to full compensation will be reduced in proportion to the liability held by the settling infringer (article 77.1 of DCA). The court will have to decide the amount of that reduction based on the settling infringer's contribution to the resulting harm (*supra* §4.3). Secondly, the settling infringers will only be liable for the proportion of the harm they caused, and non-settling infringers will not be able to ask them to contribute for the remaining compensation, unless otherwise agreed in the settlement (article 77.2 of DCA)⁸³. Nevertheless, a settling infringer may be asked to contribute if that is the only possibility for the claimant to get full compensation (article 77.3 of DCA)⁸⁴. Finally, in deciding the amount of compensation to be paid by the non-settling infringers, courts should take into account the amount paid in the settlement (article 77.4 of DCA).

4.7. Measures to facilitate claims.

Although the codification and clarification of the substantive rules and principles of damages claims for competition infringements will likely ease their use in practice, the greatest incentive introduced by the Transposition Decree affects follow-on claims through the increased evidentiary value of final decisions issued by competition authorities (*infra* §4.7.1). Moreover, given the difficulties that claimants may face in quantifying the harm produced by the competition infringement, the Transposition Decree grants the courts some discretion in making that calculation, as well as creating a presumption that harm exists in the case of cartels (*infra* §4.7.2). Finally, new rules provide for the generous disclosure of evidence to help correct the

⁸¹ If mediation is used as the alternative dispute resolution procedure, article 4 of the Act 5/2012, of 6th July, on mediation in civil and commercial matters ([Official National Gazette 162 of 7 of July 2012](#)) provides that the reception of the application for mediation will suspend the limitation period. There is a discordance between this rule and the one introduced by the Transposition Decree which instead ordains the "interruption" of the period, see AEDC [Observaciones sobre la transposición de la Directiva 2014/104/UE](#) ¶41 and Vidal & Arranz (2017) [La Ley Mercantil](#) 38: 10.

⁸² Taking into account the general interest and the interest of third parties that may be affected, the court may shorten the suspension period to push the parties to a swift resolution of the matter. In general, in cases of consensual dispute resolution, parties may request a suspension of the proceedings, but the suspension would be for a maximum of 60 days (article 19.4 of CPA). See C Gómez "Los acuerdos extrajudiciales en la Directiva 2014/104/UE" in Ruiz (dir) *La compensación de los daños por infracción de las normas de competencia tras la Directiva 2014/104/UE*, 360-362.

⁸³ It seems unlikely that such agreement be included in the settlement, see A Soriano "De la tradicional inarbitrabilidad del Derecho de la competencia a su paulatina aceptación general" (2015) *La Ley UE* 31 (6890/2015) 16 and 26.

⁸⁴ See recital 51 of the Directive. Of course, being the claimant the one that will have to prove such impossibility, see Pablo-Romero (2015) *RDCDC*16: 9.

information asymmetry claimants may face when initiating their claims due to limited access to evidence of antitrust infringements (*infra* §4.7.3).

4.7.1. Evidentiary value of final decisions handed down by national competition authorities.

To facilitate follow-on claims after Spanish public enforcers have declared an infringement (either the NCMC or its regional counterparts), article 75.1 of the DCA makes that decision binding on the court hearing the claim for damages derived from the infringement. It asserts that if a final decision of a Spanish competition authority finds an infringement, the infringement is deemed to be irrefutably established for the purposes of a damages action brought before the court⁸⁵. This rule promotes the efficient resolution of follow-on damages claim and enhances legal certainty and coherence.

Theoretically, the binding effect of the competition authority's prior decision extends to all the features of the declared findings and resolutions related to the infringement included therein: facts, infringing parties, proof of their behaviour and assessment of the prohibition infringed⁸⁶. When the decision declared the existence of harmful effects of the market this is also part of the binding content for the damages court, though the claimant still would need to prove she is among the victims and quantify her harm⁸⁷. Additionally, it makes sense to consider that the findings by the competition authority regarding the perimeter of the infringing conducts do not necessarily bind negatively or restrictively to the damages court. Only the affirmative statements concerning the infringement and all those facts intrinsically linked to the existence of an infringement are binding. Still, regarding other facts that may be relevant for the damages claim but which were not declared and considered for whatever reason in the decision of the

⁸⁵ Indeed, this is coherent with articles 434.3 and 465.6 of the CPA, which empower the courts to discretionally suspend the proceedings until a decision is adopted if the court considers that necessary in order to adopt a decision (see also article 42.3 of CPA). But it does not rule out the risk of simultaneous proceedings reaching contradictory decisions, see Colomer in *Derecho de la competencia*, 2008, 460-463, 491-494; A Creus "La aplicación judicial" in A Petitbó & S Martínez (dirs) *La modernización del Derecho de la competencia en España y en la UE*, F Rafael del Pino- M Pons, 2005, 75; I Díez-Picazo "Sobre algunas dificultades para la llamada aplicación privada de las normas de competencia en España" in [1989-2007: una reflexión sobre la política de defensa de la competencia](#), *Círculo de Empresarios*, 2008, 61-66; Gascón ([2017](#)) *CDT* 9: 147-148 and A Huergo "Derecho de la competencia. Cooperación y concurrencial entre autoridades administrativas y tribunales" in JM^a Baño (coord.) *Memorial para la Reforma del Estado. Estudios Homenaje al prof. Santiago Muñoz Machado*, CEPC 2016. 2296-2301 and 2303-2310.

⁸⁶ See Calvo & Suderow ([2015](#)) *CDT* 7/2:132 (restricting it to the *ratio decidendi* part of the decision). Referring to recital 34 of the Directive, Hitchings, Malo & Loras (2015) *Concurrences* 2: 227 extend it to "the nature of the infringement as well as its material, personal, temporal and territorial scope". Contra E Ameye "Spain" in *The Private Enforcement Competition Revue*, 9th ed. 2016, 359 & 361 (who excludes the "legal assessment" from the binding effect).

⁸⁷ Although the competition authority may need to estimate the effect of the infringement as a relevant factor in setting the amount of a fine [see article 64.1.f) off DCA], the reckoning made by the competition authority will not bind the damages court, although it may serve as an orientation to both the court and the plaintiffs (always depending on the soundness of the criteria followed in the calculation) see F Marcos "Why there might not be many damages claims arising from the Spanish property insurance cartel?" in Velasco et al. (eds) *Private Enforcement of Competition Law*, 324-326 (concerning the property insurance cartel) and also S. Gómez "Efectos de las decisiones de las ANC y la protección documental aportada en un programa de clemencia en las acciones por daños: Reflexiones ante la Propuesta de Ley de transposición de la Directiva 2014/104 al ordenamiento Español" (2016) *RDCDC* 19: 7.

competition authority, the court may consider additional evidence (and even make a different assessment)⁸⁸.

This rule resembles article 15 of Regulation 1/2003 regarding decisions adopted by the European Commission, although here, tracking the Directive, a decision by the Spanish competition authority (or reviewing court) has to be final⁸⁹. Notably, the Supreme Court had already considered this solution in a few cases before the Transposition Decree was adopted⁹⁰.

Limiting the binding effect to final decisions by competition authorities may incentivize potential claimants to delay filing their damages actions. On the other hand, claimants may choose to proceed with their claims before a final decision if elements of the public enforcement action indicate a decision is unlikely to be overturned by reviewing courts⁹¹ (e.g., the existence

⁸⁸ For example, regarding those who were not declared infringers by the authority due to procedural issues in the public enforcement proceedings. The same goes, for example, concerning whether “passing-on” occurred, see see Ameye in *The Private Enforcement Competition Review*, 9th ed. 2016, 359. But see Zurimendi in *La lucha contra las restricciones de la competencia*, 299.

⁸⁹ It is the same whether the decision becomes final after judicial review has been carried out or if finality was reached due to lack of appeal by the parties; there does not seem justified to allow the damages court to treat the later cases with more skepticism, but see P Callol & M Yuste “La Directiva comunitaria sobre reclamación de daños y perjuicios derivados de infracciones del Derecho de la competencia. Principales novedades y potencial incidencia en el ordenamiento jurídico español” in MA Recuerda (coord) *Problemas prácticos y actualidad del Derecho de la Competencia. Anuario 2015*, 308.

⁹⁰ See §3 of Supreme Court Judgment of 7 of November 2013, *Nestlé v Ebro Puleva*, STS5819/2013 (ECLI: [ES:TS:2013:5819](#)) and §15 of Supreme Court Judgment of 9 of January 2015, *AVS & Sogecable v. Mediapro*, STS 191/2015 (ECLI: [ES:TS:2015:191](#)). See also §3 of judgment of Provincial Court of Madrid (sect. 28) of 3 of July 2017, *Musaat v. ASEFA, SCOR & CASER*, SAPM9034/2017 (ECLI: [ES:APM:2017:9034](#)), in which the defendants were surprised with the Supreme Court finally quashing of their appeals against the fine imposed by the NCC (revoking prior judgments of the National Court, which annulled the fines) and therefore were ‘trapped’ by their own argument of binding effect of those decisions. On this same case, see §§6-10 of Judgment of Commercial Court number 12 of Madrid of 9 of May 2014, *MUSAAT v. ASEFA, SCOR & CASER*, SJM M 118/2014 (ECLI: [ES:JMM:2014:118](#)). On this case see F Marcos “Indemnización de daños y perjuicios por boicot a raíz del cartel del seguro de daños decenal (SDD): Notas a propósito de la Sentencia del Juzgado Mercantil nº 12 de Madrid de 9 de Mayo de 2014 (MUSAAT v. ASEFA, CASER y SCOR)” (2015) *RDCD* 16.

⁹¹ Interestingly, in some of the very first appeal proceedings against NMCC decisions after the Transposition Decree was adopted, judges have expressly referred to their additional responsibility due to the binding effect of their judgments in potential follow-on damages claims concerning particularly the perimeter of the infringement (regarding NMCC resolutions of 22 of September 2013, [S/0428/12 Palés](#) and of 2 of January 2014, [S/0404/12 Servicios Comerciales AENA](#)), see §§D, G) and H) of the dissenting opinions of SP Soldevilla to the National Court judgments of 26 of July 2017 *Indepal v. NMCC SAN3380/2017* (ECLI: [ES:AN:2017:3380](#)); of 21 of July 2017 *Palets Joan Martorell v. NMCC SAN3378/2017* (ECLI: [ES:AN:2017:3378](#)); 21 of July 2017 *Aserraderos de Cuéllar v. NMCC SAN3377/2017* (ECLI: [ES:AN:2017:3377](#)); of 21 of July 2017 *Embalajes Novalgos v. NMCC SAN3384/2017* (ECLI: [ES:AN:2017:3384](#)); of 21 of July 2017 *Maderas de Miguel Carretero v. CNC SAN3376/2017* (ECLI: [ES:AN:2017:3376](#)); of 21 of July 2017 *Aglolak v. NMCC SAN3389/2017* (ECLI: [ES:AN:2017:3389](#)); of 19 of July 2017 *Bamipal v. CNMC SAN3363/2017* (ECLI: [ES:AN:2017:3363](#)); of 19 of July 2017 *Serrerías Carrera Ramírez v. NMCC SAN3372/2017* (ECLI: [ES:AN:2017:3372](#)) of 19 of July 2017 *Serradora Boix v. NMCC SAN3375/2017* (ECLI: [ES:AN:2017:3375](#)), of 19 of July 2017 *Top Car Auto Reisen v. NMCC SAN3373/2017* (ECLI: [ES:AN:2017:3373](#)); of 19 of July 2017 *Sanz Ull Hnos v. NMCC SAN3364/2017* (ECLI: [ES:AN:2017:3364](#)); of 19 of July 2017 *Ecolignor v. NMCC SAN3366/2017* (ECLI: [ES:AN:2017:3366](#)); of 19 of July 2017 *Hemasa v. NMCC SAN3368/2017* (ECLI: [ES:AN:2017:3368](#)); of 19 of July 2017 *AENA v. NMCC SAN 3362/2017* (ECLI: [ES:AN:2017:3362](#)); of 19 of July 2017 *Inversiones Grupo Saiz v. NMCC SAN3374/2017* (ECLI: [ES:AN:2017:3374](#)); of 19 of July 2017 *Maderas Vicente Castillo e Hijos & Uncasher SAN 3369/2017* (ECLI: [ES:AN:2017:3369](#)); of 19 of July 2017 *Embalajes Blanco v. NMCC SAN3381/2017*

of several leniency applications indicating the competition authority's findings are solid and robust). However, even if claimants do not wait for a final decision, the competition authority's decisions can be considered as a qualified statement to be taken into account by the court in its decision on the damages claims⁹².

On the other hand, final decisions issued by the administrative or judicial authorities of other EU Member States hold less evidentiary value, with the Transposition Decree introducing only a presumption of the existence of a competition infringement (article 55.2 of the DCA)⁹³. Moreover, the presumption only arises if the final decision refers to an infringement of TFEU articles 101 or 102, eliminating all evidentiary value to a final decision based solely on the infringement of another Member State's domestic competition law.

4.7.2. Quantification of harm.

As in any other damages actions, the claimant holds the burden of proving the extent of the harm suffered as a result of the infringement of competition law (article 76.1 of DCA). According to the principle of full compensation set forth in article 72.2 of the DCA this entails “restoring the aggrieved party in the same situation it would have been in had the infringement not been committed”. Given the specific features of competition law infringements, the quantification of the harm can be a difficult task⁹⁴. Although, the plaintiff is obliged to quantify in its suit the amount claimed (article 219 of DCA), given the difficulties involved in this calculation, and even though the Transposition Decree does not introduce a rule to this effect,

(ECLI:ES:AN:2017:3381) of 19 of July 2017 *Palés Penedés v. NMCC* SAN3222/2017 (ECLI:ES:AN:2017:3222); of 17 of July 2017 *ATM v. NMCC* SAN3217/2017 (ECLI:ES:AN:2017:3217) of 17 of July 2017 *Ebaki XXI v. NMCC* SAN3216/2017 (ECLI:ES:AN:2017:3216) of 17 of July 2017 *Pallet Tama v. NMCC* SAN3234/2017 (ECLI:ES:AN:2017:3234) and of 10 of July 2017 *Autos Cabrera Medina v. NMCC* SAN3379/2017 (ECLI:ES:AN:2017:3379).

⁹² See Vidal & Arranz (2017) *La Ley Mercantil* 38: 11; and even in the past, before the Transposition Decree was adopted, see Sancho (2009) *Indret* 1/2009, 26; Martínez & Rodríguez in *El Derecho Europeo de la Competencia y su aplicación en España, Liber amicorum en homenaje a Santiago Martínez*, 259 and Gómez (2016) *RDCDC* 19: 8.

⁹³ This rule strictly follows the Directive, whilst the 2016 Proposal extended the binding force of decisions by Spanish Competition Authorities to any final decision by a competition authority of a Member State [see Gascón (2017) *CDT* 9:149, although its wording was far from clear, see Gómez (2016) *RDCDC* 19:6]. The 2016 Proposal solution seemed more plausible and reasonable, also for S Oromí “El ejercicio de acciones de responsabilidad civil por los perjudicados en materia de derecho de la competencia. Aspectos procesales” (2016) *Revista Vasca de Derecho Procesal y Arbitraje*, 28-1:110 & 114; Sopeña & Martín (2015) *Revista de Derecho de la Competencia y Distribución* 17: 17 and Gómez (2016) *RDCDC* 19: 8.

⁹⁴ A summary of the few cases in Spain in which damages were requested and the difficulties encountered in their quantification (from the perspective of the NCC) in OECD, *Quantification of Harm to Competition by National Courts and Competition Agencies*, DAF/COMP(2011)25, 27 Nov. 2012, 141-145. See also J Delgado & E Pérez “Economic Evidence and the Quantification of Damages in Competition cases in Spain” in LA Velasco et al. (eds) *Private Enforcement of Competition Law*, 208-213; Roy “La cuantificación de los daños por infracción de las normas de defensa de la competencia: experiencia judicial en España” in Font & Vilá (dir) *La indemnización por infracción de normas comunitarias de la competencia*, 248-257 and G Siotis & E Cañizares “El estándar de prueba en las acciones de reclamación de daños” in *1989-2007: una reflexión sobre la política de defensa de la competencia*, *Círculo de Empresarios*, 2008, 377-494.

the courts should be flexible in taking into account circumstances that may make it difficult or impossible to plead an accurate figure⁹⁵.

In addition, several rules in the Transposition Decree, copied verbatim from the Directive, are aimed at helping potential claimants overcome some of the obstacles they may face in determining and quantifying the harm suffered due to the infringement.

Firstly, article 76.2 of the DCA empowers the damages court “to estimate the amount of the harm” in those cases in which it is demonstrated that the claimant suffered harm but it is practically impossible or excessively difficult to precisely quantify the harm based on the available evidence. Under these circumstances, the court may rely on the evidence on file and expert reports presented by the parties to discretionarily set the amount claimed, as long as the court’s reasoning and motivation is sufficiently justified⁹⁶.

Secondly, if the court so requests, the NMCC or the regional competition authorities can advise the court on the criteria that should be followed in quantifying the amount of damages (article 76.4 of the DCA)⁹⁷. The Commission has already prepared a practical guide providing an overview of alternative economic techniques and methods to assist the courts and parties⁹⁸.

⁹⁵ See Vallina, Santana & Sellés in *Problemas prácticos y actualidad del Derecho de la competencia. Anuario 2015*, 294 and Gascón (2017) *CDT 9: 137*. See also JM^a Fernández Seijo “El agotamiento de un modelo: Notas sobre la compleja convivencia de la Ley de Defensa de la Competencia con la Ley de Enjuiciamiento Civil en materia de determinación de daños y perjuicios” (2013) *Anuario de la Competencia 2011-2012*, 167-191.

⁹⁶ Not like Judgment of First Instance Court number 50 of Madrid of 1 of March 2010, *Nestlé v. Ebro* SJPI 56/2010 (ECLI:ES:JPI:2010:56) which reduced 50% the amount of harm calculated by the plaintiff’s expert based simply in that the defendant’s expert had said so, without further explanation or reasoning. This was later criticized by the Supreme Court judgment 7 November 2013 (§7 “*That the calculation of compensations has to be made based on hypotheses of factual situations that have not occurred can really justify a greater flexibility in the estimation of the damages by the judge. But this greater flexibility can not be confused with ‘Solomonic’ solutions lacking the necessary justification*”).

⁹⁷ A similar provision, concerning the assistance to courts by competition authorities, existed already in broader terms, in article 15.3 and 4 of Regulation (EC) 1/2003 of 16 of December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty ([Official Journal L1 of 4 of January 2003, 1-25](#)). In Spanish law, see article 5.2.a) of Act 3/2013 of 4 June 2013 creating the NMCC ([Official State Gazette 154, 5 of June 2013](#)), article 15bis of CPA and regarding the assistance by Regional Competition Authorities, see articles 3.2.f) and 26.2 of Act 1/2012, of 2 of February 2012, of the Basque Competition Authority ([Official State Gazette 40 of 16 of February 2012](#)); article 6.1.l) f Act 1/2009, of 12 of February 2009, the Catalanian Competition Authority ([Official State Gazette 74 of 27 of March 2009](#)); articles 4.1 and 7.2 of Act 1/2011, of 28 of February, regulating the Galician Council on Competition ([Official State Gazette 75 of 29 of March 2011](#)) and article 5.e) of Decree 15/2009 of 5 of February, that regulates the exercise of the powers of the Region of Castile and León on competition ([Official Regional Gazette Castile & León 28 of 11 of February 2009](#)); article 3.k) of Decree 29/2006 of 24 of January of the Government of Aragón, that creates and regulates the competition authorities in Aragón ([Official Gazette of Aragón 17 of 10 of February 2006](#)). The Andalucía Competition Agency, which does not include any express powers in its regulation, has nevertheless published a [Basic Guide on Damages Claims in the field of Competition Law](#) (2013).

⁹⁸ See Communication from the Commission on quantifying harm in actions for damages based on breaches of Article 101 or 102 of the TFEU ([Official Journal 167 of 13 of June 2013, 19–21](#)), accompanied by [Practical Guide Quantifying Harm in Actions for Damages based on breaches of article 101 or 102 of the TFEU](#) (which includes a detailed taxonomy and description of methods and techniques available and an assessment of the types of harm depending on the infringement and its effects).

Thirdly, like other damages claims, parties may resort to expert reports for quantification of harm, submitted together with their suit or reply. In general, the CPA recognizes the use of expert reports in court (articles 299.1.4° and 335), and the courts have accepted them as long as they made their calculations “*starting off correct basis (the existence of the cartel and the concerted fixing of prices above those that would have resulted from free competition) and uses a reasonable method, among the several advocated by economic science and accepted by the courts of other countries, for the calculation of the damages caused to the plaintiffs, as is estimating what would have occurred if the restrictive practice of competition had not taken place by examining the immediately preceding period, taking into consideration the prices (...) in that period immediately prior to the start of the activity of the cartel, modulating them according to the variations in costs of production throughout the period of the cartel's performance (...), not taking into account other costs for not considering them relevant (...), and comparing them with the prices charged by the defendant to each claimant during the action of the cartel*” (concerning the damages’ calculation in the sugar cartel)⁹⁹. Moreover, courts have shown in many instances to be well capable of assessing these reports and adopting a sound and reasonable decision¹⁰⁰.

⁹⁹ See §7.2 and 3 of Supreme Court Judgment of 7 of November 2013, *Nestlé v Ebro Puleva*, STS 5819/2013 (ECLI: [ES:TS:2013:5819](#)), comparing a plausible report with an implausible one. The defendants report was strongly criticized by the court in Judgment of Provincial Court of Valladolid (Sect. 3) of 9 of October 2009, *Nestlé v. ACOR SA VA1185/2009* (ECLI: [ES:APVA:2009:1185](#)), because it asserted that no harm had been produced by the cartel (§2).

¹⁰⁰ See, for example, §4 of Judgment of the Provincial Court of Madrid of 18 December 2006, *Antena 3 v. LNFP*, SAPM 18320/2006 (ECLI: [ES:APM:2006:18320](#)) (“*The harm needs effective proof of the actual decrease suffered because of the impediment; these lost profits, require great rigor in their calculation, to avoid what the Supreme Court called profit dreams, they have to be accredited according to the circumstances of each case, with the specific details thereto required, and in order to verify the connection between the lost profits to perceive, and the fact said to have produced that situation. And in the case submitted to our consideration, we agree that the conclusions of the opinion of Ernst & Young, on which the applicant bases the economic harm suffered, are based on a theoretical and subjective scenario that does not conform to reality. This Court considers that to verify the profitability of football, the analysis should not have been based on purely theoretical propositions, but on real scenarios, like it could have been to compare the returns of football matches obtained by other TV channels that were adjudicators –paying objective prices and not “reasonable prices” for acquisition- and that issued soccer matches, with the profitability of Antena 3 with the alternative programming during that period. And not starting from data or premises that do not result from a market in free competition, such as the “reasonable price of football”, or sharing audio-visual rights with three other competitors, when they could have been more. And finally, we must emphasize again that commercial TVs can obtain excellent audience results without retransmitting football matches, as is the case of Antena 3, whose Director of management control recognized that neither Antena 3 nor Telecinco broadcast football and, ultimately, they are audience leaders. Which leads us to conclude that Antena 3 has not fully accredited, for the foregoing, the damage claimed in this litigation, basing the same in an expert opinion that, as we have shown, is based on purely theoretical and subjective assumptions and not in reality, so the reason for the appeal filed by the LNFP should be estimated*”. See also §§9 and 15 of Judgment of Provincial Court of Madrid of 25 of May 2006 *Conduit v. Telefónica* SAP M6773/2006 (ECLI:[ES:APM:2006:6773](#)) (confirming §8 of Judgment of Commercial Court 5 of Madrid of 11 of November 2005, SJM M70/2005 ECLI:[ES:JMM:2005:70](#)). On this particular case, see Hitchings in *Derecho de la Competencia Europeo y Español. Curso de iniciación*, vol. VII, 171-176 and specially M Martínez-Granado & G Siotis “Sabotaging Entry: An Estimation of Damages in the Directory Enquiry Service Market” (2010) *Review of Law & Economics* 1: 1-57. In the retail petrol cases, the quantification of the harm caused by the vertical restraints considers the overcharge paid by the harmed petrol station to its supplier as compared with the average supply in the station’s region,

Finally, to further alleviate the burden of proving damages in cartel cases, which represent the most severe and egregious infringement of competition law¹⁰¹, the harm is presumed to exist (*in re ipsa loquitur*) unless proven otherwise by the infringer (article 76.3 of DCA)¹⁰². With cartels, the harm would have been caused through an effect on prices, and, therefore, plaintiffs will need to prove they acquired the cartelized goods or services from the infringers (as direct or indirect purchasers) or that they sold or supplied the infringers inputs or goods that were underpaid due to the existence of a cartel¹⁰³.

4.7.3. Access to Sources of Evidence.

Given the difficulties that those aggrieved by an infringement of competition law may face in gathering the evidence required to claim damages, the Transposition Decree introduces a new Chapter in the CPA that may equip them with tools to collect evidence needed for constructing

considering also if the victim station had not recouped investments made in the station when the exclusive supply clause was declared void and any profits he may have gained, see §§17 and 19 of judgment of Commercial Court of Barcelona number 2 of 27 October 2009 *Bright Service v. REPSOL* SJMB47/2009 (ECLI:[ES:JMB:2009:47](#)) [confirmed by §6 of Judgment of Provincial Court of Barcelona (section 15) of 18 May 2015 SAPB6628/2015 (ECLI:[ES:APB:2015:6628](#))] and §11 of Judgment of Commercial Court number 2 of Palma de Mallorca of 3 of March 2009 *E.S. Fontanet v. REPSOL* SJMIB14/2009 (ECLI: [ES:JMIB:2009:14](#)) [confirmed by Judgment of Provincial Court of Palma de Mallorca (section 5) of 1 of September 2010 SAPIB1683/2010 (ECLI: [ES:APIB:2010:1683](#)) and Supreme Court Judgment (Chamber 1) of 8 of May 2013 STS2506/2013 (ECLI:[ES:TS:2013:2506](#))].

Finally see §§4 and 5 of judgment of Provincial Court of Madrid (section 28) of 3 of July 2017, *MUSAAT v. ASEFA, SCOR & CASER*, SAPM9034/2017 (ECLI: [ES:APM:2017:9034](#)) and before see §13 of Judgment of Commercial Court number 12 of Madrid of 9 of May 2014, *MUSAAT v. ASEFA, SCOR & CASER*, SJMM118/2014 (ECLI:[ES:JMM:2014:118](#)).

¹⁰¹ The Transposition Decree revises the definition of cartel existing before in the DCA Additional Provision Four. 2 (“*For purposes of the provisions of this Act, a cartel is understood as any secret agreement between two or more competitors whose purpose is the setting of prices, production or sales quotas, the distribution of markets, including fraudulent bids, or the restriction of imports or exports*”), further broadening and enriching it to include “concerted practices” and dropping the requirement of secrecy (“*an agreement or concerted practice between two or more competitors aimed at coordinating their competitive behaviour on the market or influencing the relevant parameters of competition through practices such as, but not limited to, the fixing or coordination of purchase or selling prices or other trading conditions, including in relation to intellectual property rights, the allocation of production or sales quotas, the sharing of markets and customers, including bid-rigging, restrictions of imports or exports or anti-competitive actions against other competitors*”). Aside from the relevance this may have in the context of damages claims, the change is not merely semantic, as it has implications concerning the availability of the leniency program envisaged in articles 65 and 66 of DCA, see A Rincón “¿Qué es un cartel para la CNMC? in J M^a Beneyto & J Maillo (dirs) *La Lucha contra los cárteles en España*, Aranzadi 2015, 69-108.

¹⁰² This presumption is grounded in the existing empirical evidence that more than 90% of the cartels cause harm (OXERA, [Quantifying antitrust damages-towards a non-binding guidance for courts](#), Dec. 2009), but some lawyers still have criticized this as it is a “generalization of reality” [Brokelman (2015) *Revista General de Derecho Europeo* 37:17]. See also FP Maier-Rigaud; C Milde & M Helm, Moritz “Textbook Cartels versus the Real Deal: should we be surprised if some cartels do not lead to damage?” [SSRN Working Paper 14 of March 2015](#).

¹⁰³ The presumption does not cover the concrete amount of harm, which needs to be proven by the claimant (see recital 47 of Directive), although the rest of the rules on quantification of harm may provide further assistance. A singular interpretation of this principle (naming it a “presumption of causality” which is not what it is), see Zurimendi in *La lucha contra las restricciones de la competencia. Sanciones y remedios en el Ordenamiento español*, 290-291.

and elaborating their claim that may be held by the defendant, a third party and also the competition authority file in case of follow-on claims¹⁰⁴.

As in any other legal claim, the damages claimant bears the burden of proving the facts on which its action is founded (article 217.2 of CPA)¹⁰⁵. The plaintiff has to prove the following facts: (i) the existence of an infringement of competition law (which may be easier in follow-on cases, as indicated *supra* §4.7.1); (ii) the existence and quantification of harm; (iii) the culpability of the infringer; and (iv) the causal link between the infringement and the harm suffered.

In most cases, and especially in stand-alone claims, aggrieved parties will face difficulties in proving some or all of these facts as the evidence may be in possession of the infringer itself or third parties (including the competition authorities)¹⁰⁶.

Indeed, the claimant may need to have access to that evidence well before a suit is filed in court, but until now there was little he could expect from the pre-trial measures that CPA envisages to prepare the subsequent trial, as it contained no provision that would provide sufficient grounds for requiring the disclosure of any of the relevant evidence in this type of claims. The powers of discovery until now were rather narrow and limited¹⁰⁷. Once the suit was filed and the trial had started, applying for disclosure of documentary evidence required a precise identification of the documents requested from the defendant or from third parties (articles 328 and 330 of CPA). In the past, this required the claimant to be aware of the existence of documents that he did not know, placing an un-surmountable burden on any potential claim.

A new Chapter of the CPA is devoted entirely to the access of sources of evidence in proceedings in which damage claims for competition infringements are brought [Articles 283a

¹⁰⁴ In the past, lack of specific procedural rules for antitrust claims was considered the main obstacle for antitrust private enforcement in Spain, see Díez-Picazo [1989-2007: una reflexión sobre la política de defensa de la competencia, Círculo de Empresarios, 2008](#) 58-59 (“*el legislador se ha quedado corto y ha sido inusualmente parco a la hora de regular las cuestiones procesales que puede plantear y que exige la eficacia de la “aplicación privada” del Derecho de la competencia*”); Martínez & Rodríguez in *El Derecho Europeo de la Competencia y su aplicación en España*, 263-264 and Oromí (2016) *Revista Vasca de Derecho Procesal y Arbitraje* 28:107.

¹⁰⁵ The courts have not hesitated to admonish plaintiffs that had not done so in due course, see §§4 and 5 of judgment of Commercial Court of Madrid number 2 of 19 June 2007, *Euskaltel v. Sogecable & AVS* SJMM75/2007 (ECLI:[ES:JMM:2007:75](#)), leading to rejection of some of its claims [confirmed by §4 of judgment of Provincial Court of Madrid (section 28) of 23 of October of 2008, SAP M 13912/2008 (ECLI:[ES:APM:2008:13912](#)) and judgment of Supreme Court of 14 February of 2012 STS 1303/2012 (ECLI:[ES:TS:2012:1303](#))].

¹⁰⁶ The Directive talked about the “information asymmetry” that claimants suffer in these cases (recital 15 of Directive 2014/104/EU).

¹⁰⁷ See articles 256 to 263 of CPA (most useful measures provided thereto concern intellectual property violations, only if interpreted in a very open manner would allow to antitrust plaintiff to get help from them, see Sopeña & Martín (2015) *Revista de Derecho de la Competencia y Distribución* 17: 9). Articles 293 to 298 of CPA establish certain rules for pre-trial evidence practice and preservation under urgent circumstances (to protect and preserve evidence no longer available at a later stage). Similar possibilities are recognized within the context of interim measures requests in article 732.2 of CPA. Finally, only if the damages claim was constructed as an unfair competition infringement, it would be possible to benefit from the pre-trial measures contemplated in article 36 of Act 1/1991 on Unfair Competition. See Torre *Daños y perjuicios por infracción de las normas de Derecho de la competencia, 203-213*.

to article 283lk) of CPA]. Differently from the 2016 Proposal, which instead envisaged a complete discipline of access to sources of evidence in general, at the end the Transposition Decree introduces rules exclusively relating to access to sources of evidence for claims for damages arising of competition infringements¹⁰⁸.

The transition from the 2016 Proposal to the Transposition Decree has not been smooth and the Government has dropped from the text of the 2016 Proposal all the general rules concerning the access to sources of evidence¹⁰⁹, leaving alone the specific provisions of the 2016 Proposal which deal with disclosure of evidence concerning damages claims for infringements of competition law. In doing that some of the final provisions may be difficult to interpret as they were originally thought to make sense with the general provisions in mind.

4.7.3.1. Access to sources of evidence regarding an infringement of competition law.

Following article 5 of the Directive, two new rules on access to sources of evidence [article 283bis a) and b) of CPA] concern applications for disclosure of evidence held by the defendant or a third party¹¹⁰. This procedural step is instrumental and accessory to the damages

¹⁰⁸ The 2016 Proposal implicitly criticized the patchwork approach which had been followed by the legislator in introducing in the CPA the disclosure rules required by article 6 of the Directive 2004/48 on the enforcement of intellectual property rights ([Official Journal L195, of 2 of June 2004](#)) which was transposed by Act19/2006, of 5th June ([Official National Gazette 134 of 6 of June 2006](#)), introducing several amendments on evidentiary matters in the CPA, proposing instead “a new regulation on access to sources of evidence, applicable in general, which determines, inter alia, the requirements to request from the court a measure of access to sources of evidence, an exemplary list of possible measures, and also their execution and the consequences of the obstruction to their practice, always modulated by the principle of proportionality. With all that, it gives legal nature to the notion of source of evidence, through which it refers to any element that may serve as a basis for further evidence at the appropriate procedural stage. Through the new regulation individuals could have knowledge of the elements that will serve to try to form judicial conviction in accordance with the ordinary rules in terms of proposition and practice of proof; however, and precisely because of this, access to sources of evidence obtained under the new procedural tool does not relieve the litigant of the burden of proposing in time and form the practice of the relevant evidence. This new general framework is accompanied by the appropriate specialties in the field of intellectual and industrial property and, in what is now more relevant, in the matter of damages actions for breach of the rules of competition law, in order to give full and complete transposition to the Directive, which is particularly concerned in this area by the disclosure of evidence contained in a file of a competition authority” (2016 Proposal, Statement of Reasons II, 7th Paragraph). See Gascón ([2017](#)) [CDT 9: 141-143](#). On the distinction between sources and means of evidence in comparative civil procedure see L Acosta “Diferencias entre medio, fuente y objeto de la prueba” (2007) [Cuestiones Jurídicas1: 51-72](#) and C Meneses “Fuentes de prueba y medios de prueba en el proceso civil” ([2008](#)) [Revista Ius et Praxis 14/2: 43-63](#) and

¹⁰⁹ From twenty-five new articles in the CPA in of the 2016 Proposal, concerning access to sources of evidence [articles 283bis.a) to n), 283ter.a) to f) and 284quater.a) to e)] to only eleven new articles in the Transposition Decree [articles 283bis.a) to k). See P Ferrándiz “Discovery en reclamaciones de daños por prácticas restrictivas de la competencia (el nuevo art. 283 bis LEC)” [Diario LA LEY 9052, 2. Oct. 2017, 4](#). An authorized explanation is given by F Gascón “El acceso a las fuentes de prueba en los procesos civiles por daños derivados de infracciones de las normas sobre defensa de la competencia” (2017) [La Ley mercantil 38: 5-6](#).

¹¹⁰ In the past, this possibility only existed regarding documents that have to be identified by the requesting party (article 328.2 of CPA). See S Pereira [La exhibición de documentos y soportes informáticos en el proceso civil](#), Thomson-Aranzadi 2013, 106-108. The 2016 Proposal introduced in the CPA a general regime of access to “sources of evidence”, which has disappeared in the Transposition Decree, which still keeps eighteen references

proceedings themselves, as it allows a claimant to request the court's assistance to compel the disclosure of relevant evidence necessary to plead and prove their claims¹¹¹. Claimants may request documents, recorded or digital communications (e.g. electronic mails or oral conversations), invoices, quantitative information, expert reports or even witnesses. The court request may be addressed to a private individual but also to public authorities (including competition authorities, see *infra* §4.7.3.2)¹¹².

Additionally, article 283bis.a).1 expressly provides for the defendant to petition the court to compel the claimant or a third party to disclose relevant evidence for its defence (presumably evidence concerning the transfer of the overcharge)¹¹³.

To facilitate the admission of claims, parties may now submit applications for disclosure before an action is brought in court (e.g. by injured parties preparing to submit a claim)¹¹⁴, jointly with the suit itself, and during the proceedings [article 283bis.e).1 of CPA].

The new rules transpose the Directive's requirement that applications for disclosure orders include a reasoned justification for disclosure supported by preliminary facts and evidence available to the applicant (article 283b.a).1 of CPA). Furthermore, all requests for disclosure of specified items or categories of evidence must be circumscribed as narrowly and precisely as is reasonably possible based on the facts and evidence available to the applicant. [article 283bis.a)2 of CPA].

The court will refuse any application for random, indiscriminate or non-specific information (article 283bis.a).3 and b) of CPA]. Indeed, the Transposition Decree transcribes verbatim the Directive's requirement of proportionality [article 283bis.a).3 of CPA]. Before ordering any disclosure, the court will consider "*the legitimate interests of all parties and third parties concerned*", guaranteeing the right to be heard for all parties (including third parties) with an interest in the disclosure [article 283bis.f).1 of CPA].

All confidential information disclosed under the new rules is protected by article 283bis.b) of CPA, which, in addition to adopting articles 5.4, 5.5 and 5.6 of the Directive, provides additional

to "sources of evidence", nevertheless the emasculation of the general provisions may not impair the effectiveness of the new provisions, see Gascón (2017) *La Ley mercantil* 38: 12.

¹¹¹ It will be structured as an ancillary proceeding initiated *ex parte* (mainly by claimant, but potentially also by defendants), directed by the court with jurisdiction to decide the damages claim, see Gascón (2017) *La Ley mercantil* 38: 9-10.

¹¹² See recitals 15 and 17 of Directive 2014/104/UE; article 15.1 of Regulation (EC) 1/2003 and Regulation 1206/2001 of 28 May 2001 on cooperation between the courts of Member State in the taking of evidence in civil or commercial matters ([Official Journal L174 of 27 June 2001](#)).

¹¹³ See recital 39 of Directive 2014/104/UE and Ferrándiz [Diario LA LEY 9052, 2. Oct. 2017, 16](#).

¹¹⁴ In this form of pre-trial discovery (which would be possible even before an application for interim measures, article 732.2.II of CPA), the applicant would need to file its claim within the next twenty days since access was granted (otherwise the court shall revoke the disclosure order, impose the legal costs of the procedure on the applicant, and hold him/her liable for any damages caused), see article 283bis.e).2 of CPA. In these cases where the application was made before the suit was brought to court, article 283bis.d).2 of CPA states that no pleas as to jurisdiction may be filed, albeit the court may of its own motion decline jurisdiction if it considers that it is not competent.

protection by limiting access to confidential or sensitive information disclosed in the course of the proceedings¹¹⁵.

As a matter of necessity, some of the new CPA rules depart from the text of the Directive (in setting the context within which disclosure could be ordered): the competent court for ordering access to sources of evidence [article 283bis.d) of CPA]; the procedure and execution of disclosure orders [articles 283bis.e), f) and g) of CPA]; and the requirement for applicants to post a bond or pledge to guarantee payment of expenses arising from the disclosure [article 283bis.c) of CPA]¹¹⁶.

A party requesting disclosure of evidence must first serve the disclosure application on all affected parties, including third parties. The court will then hold an oral hearing, open to all affected parties, to consider evidence before issuing a disclosure order [article 283bis.f).3 of CPA]¹¹⁷. Finally, the requesting party must post a bond, if ordered by the court, before executing the order. [283bis.g).1 of CPA]. The order will describe the measures, scope and conditions of the disclosure ordered, and set the place and timing for disclosures [283bis.g).2 of CPA]. The court may also authorize the entry of offices and private domiciles and the collection of relevant documents and objects [283bis.g) 3 of CPA].

Altogether, these rules introduce an effective disclosure regime that appears to conform with the requirements and spirit of the Directive. On the other hand, the effectiveness of these new rules will depend on how courts penalize and sanction obstructive practices and breaches of confidentiality obligations. The Directive's general guidelines on penalties (Article 8) have been transposed and developed in articles 283bis.h) and 283bis.k) of CPA¹¹⁸. With respect to obstructive practices, the court may impose penalties on any party subject to a disclosure order that destroys, conceals or otherwise makes it impossible to access relevant evidence [article 283bis.h) of CPA]. The obstructing party faces a variety of economic and criminal penalties, including daily fines ranging from €600 to €60.000 per day of delay in complying with the order, payment of legal costs for both the disclosure proceeding and the main proceeding, regardless of the outcome, and criminal prosecution for judicial disobedience. Furthermore, based on the logic of *fictae confessiones*, the court may rule facts related to undisclosed relevant evidence

¹¹⁵ See Article 283bis b) 5 of CPA mirrors recital 18 of the Directive in empowering the court to “1. *redacting sensitive passages in documents or other pieces of evidence*; 2. *conducting hearings in camera*; 3. *restricting the persons allowed to see the evidence*; 4. *instructing experts to produce summaries of the information in an aggregated or otherwise non-confidential form*; 5. *drafting a non-confidential version of the court decision*; 6. *restricting access to certain sources of evidence to the representatives and legal defenders of the parties and to experts subject to confidentiality obligations*”.

¹¹⁶ But the amount of the bond or pledge should not be excessive, so that the applicant could not afford see Ferrándiz [Diario LA LEY 9052, 2. Oct. 2017, 21](#).

¹¹⁷ New rules protect the rights of the parties to appeal in case their application for disclosure was dismissed, and even they are allowed to re-file the application for disclosure in the review court [article 283bis.f).4 of CPA].

¹¹⁸ On the other hand, Articles 11 of BAJPC and 247 of CPA asserts a general principle of good faith in civil proceedings and the Criminal Code (adopted by Basic Law 10/1995 of 23 November, [Official Gazette 281 of 24 of November 1995](#)) punishes the crime of disobedience to judicial authority (article 556), and the destruction, disablement and concealment of documents, and also the disclosure of confidential proceedings, that would eventually be applicable in addition the specific rules introduced by the Transposition Decree.

are deemed admissions or, in serious cases, provide tacit acceptance by the defendant of the all claims.

On the other hand, to prevent and deter the breach of the confidentiality obligations and breaches of other use conditions granted by the court to sources of evidence, article 283bis.k) provides that the non-compliant party may face criminal liability for judicial disobedience and the full or partial dismissal of its pleas. Furthermore, the court may order the non-compliant party to compensate all parties harmed by the breach and payment of the costs of the procedure for access to the sources of evidence and the costs of the main proceedings¹¹⁹.

4.7.3.2. Access to evidence included in the file of a Spanish Competition Authority.

Although the prior decision of the competition authority declaring an infringement of competition law is valuable evidence for injured parties pursuing follow-on claims (e.g. proving the existence of an infringement) (*supra* §4.7.1), these claimants will also benefit from access to evidence in the competition authority's file (e.g. for establishing the causal nexus and harm and for quantifying the later). Recognizing that access to relevant evidence in the file of a competition authority must be balanced with the need to safeguard the effectiveness of enforcement actions, the Directive envisaged a separate disclosure regime to govern access to evidence in the possession of competition authorities (article 6).

Following article 6 of the Directive, the Transposition Decree introduces two new rules in the CPA to regulate access to a competition authority's file [articles 283bis.i) and 283bis.j) of CPA]. The general duty of disclosure for public authorities in the CPA (article 332), and the generous disclosure rules adopted from Article 5 of the Directive (*supra* §4.7.3.1) will not apply to requests for access to evidence in the competition authority's file¹²⁰. On the other hand, a provision added to the CPA prior to adoption of the Transposition Decree, which limits a courts power to order competition authorities to disclose documents submitted in connection with a leniency application, was not explicitly abrogated by the Transposition Decree and is still in force¹²¹.

¹¹⁹ If the court deems that the breach was “*not serious*” it may instead impose a fine to the non-compliant party of between €6.000 and €1.000.000.

¹²⁰ The rules on transparency and access to information in force at both EU (Regulation 1049/2001 of the European Parliament and the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, [Official Journal L 145 of 31 of May 2001](#)) and Spanish Level (Act 19/2013, of 9 of December, on transparency, access to public information and good governance, [Official State Gazette 295 of 10 December 2012](#)) seem to provide additional channels through which potential claimants may try to have access to the competition authority's file, but see Judgment of EU Court of Justice of 27 of February 2014 (Third Chamber) C-365/12P, *Commission of the EC v. EnBW Energie Baden-Württemberg et al.* (ECLI:EU:C:2014:112) and Judgments of EU General Court of 13 of April 2005 (First Chamber, extended composition) T-2/03, *Verein für Konsumenteninformation v Commission of the EC* (ECLI:EU:T:2005:125) and of 28 of January 2015 (Third Chamber) T-341/12, *Evonik Degussa v. Commission* (ECLI: EU:T:2015:51).

¹²¹ Article 15bis.1 in fine “*The contribution of information will not reach the data or documents obtained in the scope of the circumstances of application of the exemption or reduction of the amount of the fines foreseen in articles 65 and 66 of the DCA*”. See also ¶77 of NCC Communication of 19 of June 2013 on the Leniency Programme ([Official State Gazette 196 of 16 of August 2013](#)). See Martinez & Rodriguez in *El Derecho Europeo*

Any disclosure from a competition authority's file is subject to the principle of subsidiarity¹²². A court may not order the disclosure of evidence from the file if one of the parties or a third party can reasonably produce the same evidence [article 283bis.i).10 of CPA]. However, given that parties involved in public enforcement proceedings are subject to a duty of secrecy "*about the facts of which they have had knowledge through them and of all information of a confidential nature they have had knowledge of*" (article 42 of DCA), it remains to be seen how a party could reasonably disclose evidence sought from the file of a competition authority without violating that duty¹²³.

The Transposition Decree follows verbatim the text of the Directive by limiting access pursuant to the principle of proportionality and introducing protective measures for certain categories of evidence in the competition authority's file¹²⁴.

Firstly, applications for disclosure must follow the principle of proportionality set forth in article 283bis.a) of the CPA, which governs access to any source of evidence in claims arising from infringements of competition law. Applicants must specify requested documents as narrowly as possible and indiscriminate requests for documents will be denied. Furthermore, the court will take into account "*the necessity to preserve the effectiveness of public enforcement of competition law*" [article 283 bis.i).4.c) of CPA]. In fulfilling this requirement, the new rules empower the competition authority to submit its views on the proportionality of the disclosure request [article 283bis.i).11 of CPA]¹²⁵.

Secondly, the new rules establish a "black list" of evidence that may not be disclosed in any circumstance: "*(a) statements made in the context of a leniency program; [and] (b) applications for settlement*" [article 283bis.i).6 of CPA]. The "black list" of evidence includes self-incriminating statements and acknowledgements of liability often made in applications for leniency and the reduction of fines (articles 65 and 66 of the DCA), and applications to expedite

de la Competencia y su aplicación en España, 264—266. But see A Gutiérrez "Spain" in [The Private Enforcement Competition Review](#), 5th ed. 2012, Chapter 24, 351 ("*the court could order one party to submit documents related to administrative proceedings, including leniency applications*" because "*the limits imposed in Article 15bis of the Civil Procedure Law to the submission of leniency documents only affect the competition authorities, and not the private parties that prepared and submitted those documents*") and 357, similarly, Callol in *International Handbook on Private Enforcement of Competition Law*, 388 ("*At a minimum a claimant could resort to including a witness who viewed and/or took notes of the evidence accompanying the leniency application*").

¹²² See Gascón (2017) *La Ley mercantil* 38:12 and Gascón (2017) *CDT* 9: 145. See recital 16 and article 6.10 of Directive.

¹²³ But see Callol in *International Handbook on Private Enforcement of Competition Law*, 388 (who considers that "*once a document is treated as non-confidential and is therefore open to other parties through the administrative file, then it may be produced before a court in a damages claim*").

¹²⁴ Although the Transposition Decree is silent in this regard, it makes sense for the authorities to organize their file taking these limitations in account and thinking on serving the potential requests for access by private claimants ("*confidentiality rings*"), see Hitchings, Malo & Loras (2015) *Concurrences* 2:26.

¹²⁵ This is the legislative recognition of the principle of balancing interests ("*weigh the respective interests in favour of disclosure of the information and in favour of the protection of that information provided voluntarily by the applicant for leniency*") asserted by the EUCJ in its judgments of 14 June 2011 (Grand Chamber), *Pfleiderer AG v. Bundeskartellamt*, C-360/09 (ECLI:EU:C:2011:389) (see ¶¶30 and 31) and of 6 June 2013 (First Chamber), *Bundeswettbewerbsbehörde v. Donau Chemie et al.*, C-536/11 (ECLI:EU:C:2013:366) (see ¶¶30-31 and 34-35).

the closure of proceedings in which undertakings may either acknowledge liability or forfeit their right to discuss their participation in the infringement¹²⁶.

Exempting these documents from the disclosure process is a way “*to ensure undertakings’ continued willingness to approach competition authorities voluntarily with leniency statements or settlement submissions*”¹²⁷. The shield bestowed on the categories of evidence is complete and absolute. Not only is the court prevented from ordering their disclosure but any “black list” document in the rightful possession of a party that is submitted during the proceedings will be deemed inadmissible [article 263 bis. j) 1 of CPA]¹²⁸.

Thirdly, temporal protection is extended to a “grey list” of evidence whereby the court may only order the competition authority to disclose certain pieces of evidence after the administrative proceedings have concluded, either by adopting a decision or otherwise¹²⁹. This “grey list” of evidence comprises: “(a) information that was prepared by a natural or legal person specifically for the proceedings of a competition authority; (b) information that the competition authority has drawn up and sent to the parties during the administrative proceedings; and (c) settlement submissions that have been withdrawn” [article 283bis.i).5 of CPA]. This protection covers all documents prepared and filed by the parties specifically for the administrative proceedings (e.g., replies to information requests by the authorities), as well as the statement of objections and any other documents (e.g., decision proposal) sent by the authority to the parties.

Finally, any relevant evidence in the competition authority’s file not covered by the “black list” or “grey list” constitutes the “white list”, and the court may order its disclosure at any time [article 283bis.i).9 of CPA].

4.8. Collective claims and consumer redress.

The Directive does not introduce specific rules concerning collective claims for consumer redress, nor does it require member states to implement mechanisms for bringing collective

¹²⁶ A settlement procedure enables an entity that cooperates with the competition authority to adopt a faster and streamlined decision, allocating resources to other cases, currently it only exist in the proceedings before the Commission of the European Communities in cartel cases [Commission Regulation EC/622/2008, of 30 of June 2008, as regards the conduct of settlement procedures in cartel cases ([Official Journal L171 of 1 of July 2008](#)) and Commission Notice on the conduct of settlement procedures in view of the adoption of Decisions pursuant to Article 7 and article 23 of Regulation (EC) 1/2003 in cartel cases ([Official Journal C167 of 2 of July 2008](#), amended in 2015, [Official Journal C256 of 5 of August 2015](#)). It has not parallel in domestic competition law in Spain yet (on this regard, see D Castro-Villacañas “La transposición de la Directiva de daños de 2014 y la interacción entre la aplicación pública y privada del Derecho de la Competencia” *Anuario de la Competencia* 2014: 430)

¹²⁷ See recital 26 of Directive.

¹²⁸ Following article 6.7 of Directive, article 283bis.i) 7 of CPA enables the claimant to file a reasoned request for the court to have access to this evidence for the sole purpose of ensuring their contents correspond to what is deemed to be a “*leniency statement*” or a “*settlement submission*”. Accordingly, if only parts of the evidence requested by the claimant are included in those definitions, the remaining parts thereof shall be disclosed following the rules set in article 283bis.b) [article 283bis.i).8 of CPA]. See also *supra* note 116.

¹²⁹ Until then, if that evidence is submitted before the court by a party who have had access to it through its access to the file in the administrative proceedings, it will be deemed inadmissible [article 283bis.j).ii of CPA].

actions. Nevertheless, the provisions of the Directive apply to all damages claims for infringements of competition law, including collective damages actions in those Member States, such as Spain, that have implemented a collective redress scheme¹³⁰. As a result, Spain's system for bringing collective claims established by the CPA will continue to apply to collective consumer actions for harm caused by antitrust infringements. These rules articulate a cumbersome and disorganized opt-in regime with several requirements scattered throughout the CPA¹³¹.

In general, the CPA contemplates two methods for submitting claims for collective redress. On the one hand, individual claims having the same object or petition can be consolidated into a joint litigation (articles 12 and 72 of CPA). Here, the court may consider that joinder is possible where the claims are based on the same facts¹³².

On the other hand, collective actions for damages may be brought on behalf of consumers and final users harmed by an infringement of competition law. The applicable rules governing the collective action depend on whether the affected group is already identified or easily identifiable (*collective interests*), or undetermined (*diffuse interests*).

In cases where the affected group is known, or is easily identifiable, legally constituted consumer associations have standing to bring collective actions for damages to defend the interests of their members or the interests of consumers and final users in general (articles 7.3 of BAJP and 11.1 of CPA). Any potential affected consumers may intervene and join the collective claim at any time before the judgment is issued (article 13 of CPA). A group of consumers or final users constituting the majority of those harmed by an infringement can submit a collective action on their own behalf (articles 6.7 of CPA).

¹³⁰ The EU initiative on this matter is represented by Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law ([Official Journal L201 of 26 July 2013](#)).

¹³¹ On the ineffectiveness of the system of the current system of collective claims for the redress of victims of antitrust violations, see Díez-Picazo [1989-2007: una reflexión sobre la política de defensa de la competencia, Círculo de Empresarios, 2008](#), 67-69; J Martín “Las acciones colectivas en España: especial referencia a la aplicación privada de la competencia” in Peris (dir.) *La compensación de los daños por infracción de las normas de competencia tras la Directiva 2014/104/UE*, 187-229. A different view (naming the legal regime “advanced, well balanced and incentivizing the filing of collective claims... one wonders why we don't have any) see Zurimendi in *La lucha contra las restricciones de la competencia. Sanciones y remedios en el Ordenamiento español*, 301-303.

¹³² See also Gascón [\(2017\) CDT 9: 124-125](#). Moreover, the bundling of competition damages claims may provide an efficient and effective way of reaching an amount to be claimed that makes the initiation of the claim worthwhile (see T Schreiber & M Smith “The case for bundling antitrust damage claims by assignment” [\(2014\) Concurrences 3-2014: 23-26](#) and T Schreiber & M Seegers “The EU Directive on Antitrust Damage Actions and the Role of Bundling Claims by Assignment” [\(2015\) CPI Antitrust Chronicle \(2\) Febr.](#)) this possibility is not regulated on the Transposition Decree, but it is indirectly referred in the “damages claim” definition (Additional Provision. 3.a) and concerning the use of evidence in the “white list” disclosed by competition authorities in execution of a court order pursuant the proceedings introduced by the Transposition Decree [article 283bis.j).3 of CPA]: “including the person that acquired the claim”. On the possibility of organizing these transfer and assignment agreements to specialized entities in Spain, see O Cojo “Third-Party Litigation Funding: Current State of Affairs and Prospects for Its Further Development in Spain” [\(2014\) European Review of Private Law 3-2014: 460-46](#).

In cases where the affected group is undetermined, or identification of affected consumers or final users is difficult, only the State Attorney (article 11.5 of CPA) and consumers' associations considered "widely representative" (articles 6.8 and 11.3 of CPA) have standing to initiate the action in court¹³³. This form of collective redress has only been attempted once in the context of a competition infringement. Following the European Commission's Decision of 4 July 2008 ([COMP/38.784 *Wanadoo España v. Telefónica*](#)) declaring Telefónica infringed article 102 TFEU through price squeezing in the retail broadband services market, AUSBANC brought a €458 million claim against Telefónica on behalf of affected consumers. This claim was quashed in late 2012, because AUSBANC lost its standing as a "widely representative" association¹³⁴.

When a consumer association or the State Attorney initiates a collective action for the protection of consumers or final users, the admission of the claim is publicized by the Court Clerk (article 15 of CPA). The publication of the admission of the claim provides notice to all potentially interested consumers or users to identify themselves and join the action¹³⁵.

5. Conclusions

Although antitrust damages claims have been possible in Spain for a long time, several doubts have persisted regarding the legal grounds and operation of these claims. The new rules introduced by the Transposition Decree of Directive 2014/104/UE resolve many of these doubts and should facilitate claims for damages in the future.

The rules introduced in the DCA and CPA fulfill the mandates of the Directive. They generally follow the language of the Directive making only necessary departures from the original text in order to adapt the new law to the Spanish legal system. Given the dire state of Spain's system for collective redress, the absence of provisions concerning collective actions and consumer claims in both the Directive and Transposition Decree, signal these types of claims will benefit little from the new rules.

Eleven new articles concerning private claims for damages brought by victims before Spanish courts are introduced in the DCA (articles 71 to 81) covering a wide range of issues. Not only are victims of competition infringements (including direct and indirect purchasers and suppliers and "umbrella" victims) now guaranteed the right to full compensation, but infringers are now subject to liability *in solidum*. Several presumptions are introduced to facilitate successful claims by victims of cartels, including the passing-on of the overcharge to indirect purchasers and parental liability. The binding effect of decisions by Spanish competition authorities finding

¹³³ For this purpose, the courts will acknowledge that a consumer association is "widely representative" if it is part of the Consumers and Users Council (article 24 of Royal Legislative Decree 1/2007 of 16 November, enacting the Consolidated Text of the Act of Protection of Consumers and Users and other complementary Acts, [Official State Gazette 287 of 30 of November 2007](#)).

¹³⁴ See Order of Provincial Court of Madrid (Sect. 28) of 30 September 2014, *Ausbanc v. Telefónica*, AAPM2461/2013 (ECLI:[ES:APM:2013:2461A](#)). Ausbanc was excluded from the Consumers and Users Council because it performed activities that the law banned to consumer associations (commercial advertising), see Judgment of National Court (Section 4) of 6 October 2010, *Ausbanc*, SAN 4765/2010 (ECLI:[ES:AN:2010:4765](#)).

¹³⁵ Nevertheless, the final decision in the case will be binding on all affected consumers, not only to those that have appeared in the proceedings (articles 221 and 519 of CPA). See Torre *Daños y perjuicios por infracción de las normas de Derecho de la competencia*. 233- 258.

an infringement further enhance the prospects of successful claims. Additionally, the limitation period for damages claims has been extended to five years and new rules introduced for interrupting this period.

On the other hand, eleven new articles are introduced in the CPA [articles 282bis.a) to k)] that allow parties to petition the court for access to sources of evidence in support of their claims. This new disclosure regime represents a significant procedural change within the Spanish legal system. How these new disclosure mechanisms play-out in practice will depend on the command and interpretation of judges hearing motions from claimants and defendants as they are brought before them in future proceedings.

Finally, several rules to limit access to leniency applications and other documents submitted to the Spanish competition authorities have been transposed into Spanish law. As a result, the use documents related leniency applications and settlement proceedings will not be available for damages claimants. Moreover, successful leniency applicants are further protected by limiting their liability to their direct clients and victims. Ultimately, these provisions are aimed at protecting and enhancing the effectiveness of public enforcement of the competition prohibitions and preventing interferences of private damages claims that may undermine the attractiveness of Competition authorities' leniency programmes.

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ANNEX I. TABLE OF REFERENCE: FROM DIRECTIVE TO TRANSPOSITION DECREE

Directive	Transposition	Comment
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Article 1. <i>Subject matter & Scope</i>	Statement of Reasons, Decree (III), paragraphs 2 and 3	None
Article 2. <i>Definitions</i>	DCA Additional Provision 2 and 3, Article 71.2.a)	10 definitions introduced from Directive (out of 24)
Article 3. <i>Right to full compensation</i>	Article 71.1 and 72 DCA	Adapted copy out
Article 4. <i>Principles of Effectiveness & Equivalence</i>	Additional Provision 2 of Transposition Decree	Adapted copy out
Article 5. <i>Disclosure of Evidence</i>	Art. 283bis a) and b) CPA	Adapted copy out, only 283bis b) is new, article 5.7 missing, but 283 bis.f)
Article 6. <i>Disclosure of Evidence included in the file of a Competition Authority</i>	Art. 283bis i) CPA	Adapted copy out
Article 7. <i>Limits on use of evidence obtained in Access to file of a Competition Authority</i>	Article 283 j) CPA	Adapted copy out
Article 8. <i>Penalties</i>	Art. 283bis h) and 283 bis k) of CPA	Adapted & Elaborated
Article 9. <i>Effect of National Decisions</i>	Article 75 DCA	Adapted copy out
Article 10. <i>Limitation Periods</i>	Article 74 DCA	Adapted copy out
Article 11. <i>Joint & Several Liability</i>	Article 73 DCA	Adapted copy out
Article 12. <i>Passing-on of overcharges and the right to full-compensation</i>	Article 78.1 and 2.	Adapted copy out
Article 13. <i>Passing-on Defence</i>	Article 78.3 DCA	Adapted copy out
Article 14. <i>Indirect Purchasers</i>	Article 79 DCA	Adapted copy out
Article 15. <i>Actions for damages by claimants from different levels in the supply chain</i>	Article 80 DCA	Adapted copy out
Article 17. <i>Quantification of Harm</i>	Article 76 DCA	Adapted copy out
Article 18. <i>Suspensive and other effects of consensual dispute resolution</i>	Articles 74.3 and 81 DCA	Adapted copy out
Article 19. <i>Effect of consensual settlements on subsequent actions for damages</i>	Article 77 DCA	Adapted copy out
Article 22. <i>Temporal application</i>	Transitory Provision 1, Decree	Adapted