

Compensation of damages in Spain

Defcomcourt Project
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Summary

1. Judicial Organisation

The creation of a specialised litigation circuit

2. Changing Times

Quantitative and qualitative importance of private actions

3. A previous path

Our legal roots and our case law

4. New Developments

Current discussions and contribution to CJEU case law

5. A turning point

Spain faces the risk of trivialisation



“Actions for damages for infringement of State aid rules are today a chrysalis, which at one time can turn into a beautiful butterfly”.

Ruiz Periz, J.I., Compensation for damages for infringement of state aid rules (...), Journal of Insolvency & Restructuring 4 / 2021.

A quote



1. Judicial organization

Spanish commercial courts

The extent of our jurisdiction for private claims

Double procedural circuit: prejudiciality and limitation periods

Spanish commercial courts

The Spanish judicial system is based on a long-established model of territorial and functional decentralisation

To serve rather purposes than accuracy is not a specialised system in almost any sense

Commercial courts are a major exception:

- (i) Do not form a jurisdiction
- (ii) Deal with commercial and non-commercial matters
- (iii) Are located in provincial capitals (50)
- (iv) This models affect the second and third level of litigation
- (v) Are composed with specialised judges

Jurisdiction and private claims

Since the creation of the commercial courts, there has been no question of their competence to deal with stand alone actions

But a controversial distribution of competences with the civil courts arose - and was overcome - due to the lack of specificity of the rules on non-contractual liability applicable to follow on actions before Directive 2014/104/UE

The choice of applicable law is still disputed, but not the nature of damage actions (AATS, 1st, 19 March and 9 April 2019)

The current problem exists in the possibility of using competition law as a defence in actions arising from commercial contracts

Public and private enforcement through jurisdiction

BINDING EFFECT&PREJUDICIALITY

- (i) Gaps EC v NCA (art. 16 R 1/2003 to 9 D 2014/104)
- (ii) Art. 75 LDC, full reception
- (iii) But our procedural rule allows the civil judge to enforce the public law to a private case, being exceptional the suspension of the proceeding (art. 42 LEC)

LIMITATION PERIODS

- (i) From the Civil Code to the LDC
- (ii) It's the counting of the period and not the extension!
- (iii) Actio nata case law
- (iv) Art. 74 LDC: facts, nature, damage and identity

A large blue geometric shape, resembling a stylized arrow or a corner cut, occupies the left side of the slide. It is composed of a solid blue area that tapers to a point on the left and then extends as a vertical bar on the right.

2. Changing times

Quantitative and qualitative impact of damage actions in Spain

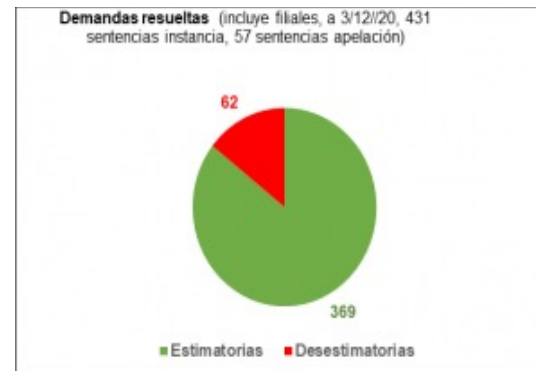
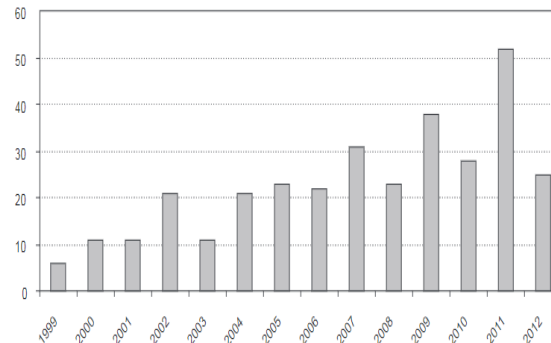
Follow on news

(I) In the whole period 1999-2013, fewer damage actions have been registered in Spain than in the period 2018-2020 (case law recension by Prof. Francisco Marcos in 2013 and 2020).

(II) Currently, +80% award damages in any way

(III) Some conclusions must be drawn from this:

- (i) On the obvious transition of competition law towards a compensatory one.
- (ii) On the need to adapt case law interpretations to a phenomenon of mass litigation
- (iii) On the need to rely on the jurisprudential evolution of this law in the face of legal deficiencies.





3. A previous path

Absence of a system liability for competition wrongs

The escape into tort law and company law

Another Spanish singularity: article 3 LDC

A new regulation: articles 71 LDC and 283 bis LEC

Absence of a system of liability for competition wrongs

The question of what does and does not follow from the direct application of articles 101 and 102 TFEU remains controversial

What are constitutional norms and what are development of secondary legislation or jurisprudential constructions?

CJEU, 2^a, 14 th march 2019, Skanska, 27. It is true that, in the absence of EU legislation on the matter, it is for the domestic legal system of each Member State to regulate the detailed rules for the exercise of the right to seek compensation for damage resulting from an agreement or practice prohibited by Article 101 TFEU, provided that the principles of equivalence and effectiveness are respected (see, to that effect, judgment of 5 June 2014, Kone and Others, C-557/12, EU:C:2014:1317, paragraph 24 and the case-law cited).

The escape into tort and company law

The Spanish civil judge is predominantly formalistic and conservative

This can be seen in their reactions towards the vertigo of selecting applicable national rules where the Damage Directive is temporarily unavailable

Tort law (1902 CC) has been used frequently so far, **but it does not incorporate the specialities of Competition Law**

Our LDC did not contain any provision on damages liability until the reception of Damages Directive

Significant gaps:

Selection of competence forums by LCD analogies

Regulation of access to evidence

Liability and group company law

Distribution of burdens of proof

Quantification of damages

Estimation of damage

Another spanish singularity: art. 3 LDC

A special wrong: acts of unfair competition which, by distorting free competition, affect the public interest

Communication of protected goods: freedom of competition and fairness

Transfer of rules art. 15 LCD: advantages obtained by infringement of law and infringement of competition rules

The LCD provides for particularities of imputation, actions for compensation and damages (arts. 32 to 34).

Very little practical experience and lack of doctrinal value.

A new regulation: arts. 71 LDC and 283 bis LEC

1

Late transposition

2

Reduction of the scope
of wrongs (3 LDC)

3

¿Offender?

Simplistic Disclosure

Miscommunications
(damage and pass on)



4. New developments

Our national case law (TS)

Some discussions

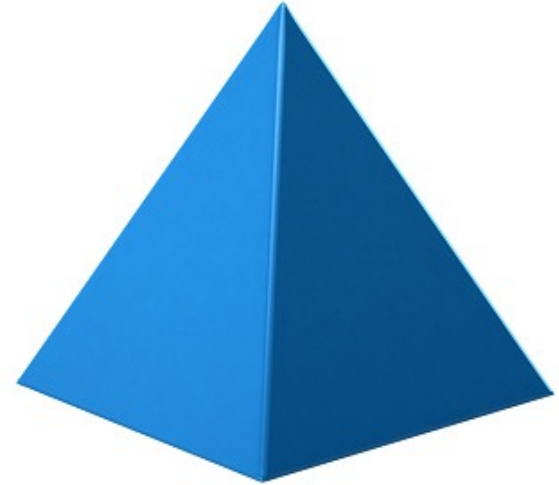
Our contributions to CJEU's case law

Spanish case law (TS)

Primacy of Community law, application by civil judges, binding effect and cooperation relations (Disa, 2000)

Full compensation (Sugar I, 2012)

Burden of proof and "maybe" some presumptions (Sugar II, 2013)



Some discussions (i)

Law across time

Trucks, milk, cars,
envelopes

Jurisdiction

Trucks

Liability and intervention

Trucks

Limitation periods

Trucks, envelopes, cars

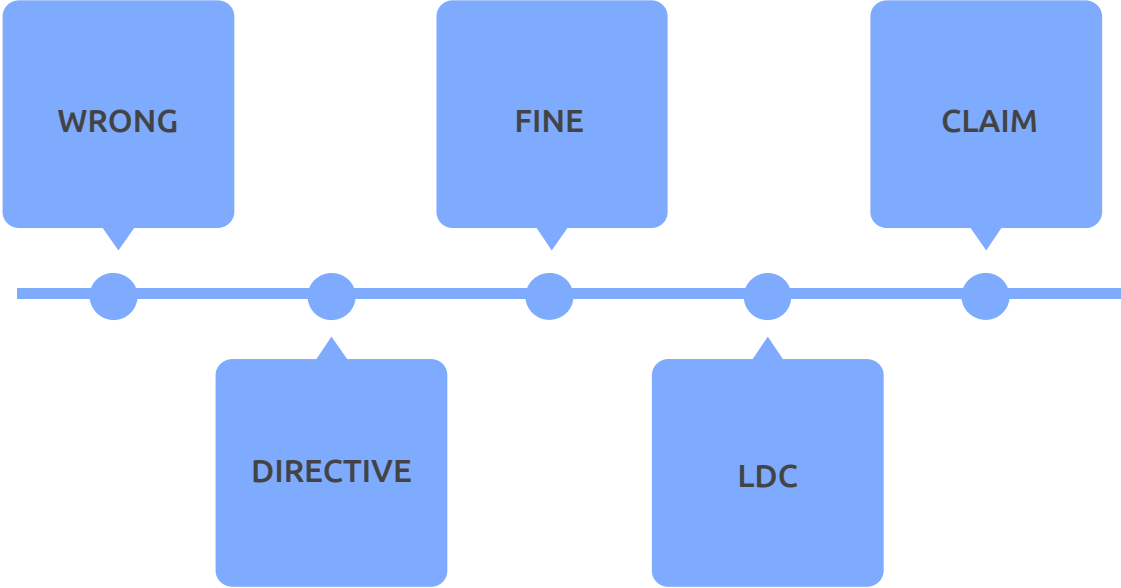
Benefits from leniency

envelopes

Umbrella effect

Ten-year insurance

Late transposition: the Trucks case



Some discussions (ii)

Case management

Presumption of damage

Standard of proof

Information asymmetry and estimation of harm

Relationship with competition authorities (milk and trucks)

Contributions to CJEU's case law

AAP Barcelona, 15ª, de 24 de octubre de 2019, economic unit (Trucks)

AJM núm. 2 de Madrid, de 23 de diciembre de 2019, jurisdiction (Trucks)

AJM núm. 7 de Barcelona, de 21 de febrero de 2020, disclosure (Trucks)

AAP León, 1ª, de 12 de junio de 2020, law across time (Trucks)

AJM núm. 3 de Valencia, de 10 de mayo de 2021, compensation and information asymmetry (Trucks)

AJM núm. 17 de Madrid, de 11 de mayo de 2021, *Superliga*.

AAP Pontevedra, 1ª, de 23 de abril de 2021, binding effect (Trucks)



5. A turning point

An idea

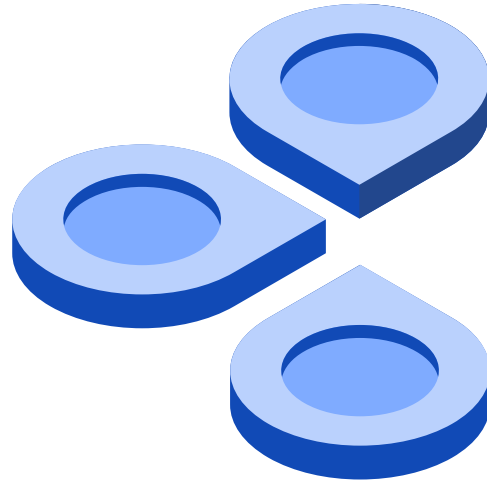
Private enforcement is a powerful tool for deterring competition wrongs, but it is still fragile



Open fronts in Spain

EC & NCA's

Full cooperation through a public application that supports the subsequent private application



CLASS ACTIONS

Consumer protection must be based on a strict authorisation of legitimised entities

JUDGES CONCERNS

The search for specialised litigation circuits requires judges alerted to the complexity of Competition Law



Spain has an efficient and specialised litigation circuit for private claims

We are concerned about the need to update our liability and procedural law

Spain is making a decisive contribution to the expansion of the CJEU's case law

We struggle with massive litigation in private claims and its complexity