THE ENFORCEMENT OF SPANISH ANTITRUST LAW: A CRITICAL ASSESSMENT OF THE FINES SETTING POLICY AND OF THE LEGAL FRAMEWORK FOR PRIVATE ENFORCEMENT

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Abstract

The enforcement of antitrust laws in Spain has mainly been a task for public authorities. Sanctions for antitrust infringements can only be pecuniary, as prison or other criminal penalties are not used as a punishment device. However, the competition authorities' policy in setting the amount of fines has been rather erratic, which has led to the annulment of some of its opinions by the courts.

On the other hand, private enforcement of antitrust laws through civil actions is neither frequent nor encouraged by Spanish regulation, being anecdotic those cases in which antitrust offences have led private persons to claim for damages through a civil action in court.

The discussion in 2005 of a major reform of the Defence Competition Act of 1989 provides an excellent opportunity to reflect critically on the enforcement of antitrust laws in Spain.

Keywords

Enforcement of Antitrust Laws, Administrative Fines, Antitrust Damages, Private Enforcement

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Introduction

The main legal commands contained in the Spanish 1989 Defence Competition Act (hereinafter DCA)[1] follow the traditional rules which have constantly been established in most legal systems worldwide to guarantee and protect the functioning of a competitive market[2].

The Spanish DCA introduces both behavioural mandates and structural controls. The later deal with mergers, acquisitions and other transactions that may pose problems to the maintenance of effective competition in the market, and they may be subject to scrutiny by the competition authorities in certain cases. The former are principally prohibitions of certain unilateral actions or agreements and concerted practices between undertakings that jeopardize competition in the markets for goods and services, ultimately harming the consumers. This article analyses and assesses critically the implementation and enforcement in Spain of the behavioural rules established by the DCA[3].

1. Behavioural commands of the Spanish Defence Competition Act (DCA)

The prohibition of actions or agreements which unlawfully restrict market competition opens the catalogue of substantive rules contained in the DCA (article 1). It is drafted following the model (and even the same writing) of article 81 of the European Community Treaty (hereinafter EC Treaty). The other antitrust legal command forbids the abuse of a dominant position (article 6), which is clearly built and drafted over article 82 of the EC Treaty. These two rules constitute the main weapons against anticompetitive behaviour in the market contained in Spanish Law[4].

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[1] The Spanish Defence Competition Act (*Ley 16/89 de Defensa de la Competencia*) was enacted on july 17, 1989 (Official Journal nº 170, of july 18, 1989). The first Spanish competition act was however the Repression of Anticompetitive Practices Act of 1963 (*Ley 110/63 de Represión de Prácticas Restrictivas de la Competencia*), enacted on july 20, 1963. For an analysis of the circumstances that lead to the 1963 Act, see Joan-Ramón BORRELL, "Spanish competition policy: a case of government's response to domestically perceived problems", *Antitrust Bulletin* 43 (summer 1998) 445-465. On the 1963 Act see also Joaquín GARRIGUES, *La defensa de la competencia mercantil*, sociedad de estudios y publicaciones, Madrid 1964 and Anibal SÁNCHEZ ANDRÉS, "Prácticas restrictivas de la competencia y competencia ilícita", in *Congreso Internacional de Derecho Industrial y Social*, Tarragona, Mayo 1965, 667-674.
A non-official consolidated version of the 1989 Defence Competition Act in English may be downloaded from http://www.tdcompetencia.es

[2] See *OECD, Regulatory Reform in Spain. The Role of Competition Policy in Regulatory Reform*, Paris 2001, 10-13.

[3] This paper does not purport to address the problems and questions posed by the enforcement of articles 81 and 82 of the EC Treaty in Spain, however some of the ideas expressed here (specifically those dealing with private enforcement) might prove applicable in that setting.

[4] Besides, although they would not be examined in this paper, article 7 of DCA gives the Defence Competition Tribunal jurisdiction over unfair competition acts that severely distort the competitive process in the market when they gravely affect public interest. On the other hand, after the reform of DCA by Act 52/1999, article 6 includes as a prohibition the abuse of economic dependence (now article 6.1.b), whilst a similar rule is contained in the Unfair Competition Act of January 10, 1991 (*Ley 2/91, de Competencia Desleal*, Official Journal nº 10, of 11 January 1991). It remains debatable whether it is appropriate for these two rules to be included on the DCA.

An experience of over fifteen years provides a relevant number of cases in order to assess how these legal commands have been brought into practice. As it is widely known, the translation of the law on the books to practice is essential to fulfil the objectives it seeks to achieve[5]. This is even more important in antitrust laws as the threat and expected fines and damages for antitrust infringements are essential to deter anticompetitive behaviour prohibited by the DCA.

Although the legal commands contained in those rules are clear enough and there exists a wide experience at the European and comparative level of their interpretation and enforcement in various settings, the practice of the Spanish competition authorities has not been entirely satisfying.

It is not the purpose of this article to analyse and criticize the antitrust substantive doctrines underlying the decisions of the Defence Competition Tribunal (*Tribunal de Defensa de la Competencia*, hereinafter "DCT"); it will suffice to say that in many issues there is a lack of a consistent doctrine. Contradictory opinions abound, some of its decisions being revoked by judicial courts[6].

DCT's decisions are frequently not founded on a solid analysis, neither are its claims generally backed by a quantitative analysis[7]. The DCT has neither hosted any modern techniques or theories in its analysis and it is frequently prone to follow its previous decisions no matter what mistakes or defaults they may have. Of course, this results on a tremendous legal uncertainty, which is suffered by business firms and their advisors[8].

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[5] Moreover, the antitrust laws tend to be rather defective on this task, see Richard A. POSNER, *Antitrust Laws*, 2nd ed., University of Chicago Press, Chicago-Londres 2001, 266.

[6] According to the data provided by the DCT, around 12% of the appeals against the decisions rendered by the DCT in the period 1996-2002 have been admitted (see DCT, *2003 Annual Report*, 144). The DCT recognizes that there are many partial reversal judgments by the *Audiencia Nacional* which are not counted as full reversals. Besides, for a more accurate view of the reversion rate of the DCT decisions, the judgments of the Supreme Court deciding on the appeals against those judgements by the *Audiencia Nacional* confirming the decisions of the DCT should have to be taken into account.

[7] The Defence Competition Service frequently provides some sort on empirical or quantitative analysis of the cases, however, normally the DCT does not use it afterwards in its decision.

[8] Only the fact of a delayed liberalization of business activities in many areas –which of course has made the tasks of the authorities more complex- may partially discharge the DCT and the DCS of their responsibilities in the current situation. Besides, the design of the competition authorities as partially dependent of the Ministry of Economy has normally made the DCT (and undoubtedly the DCS) easily captured by the political power, lessening the technical reasoning that should be followed in its decisions.

2. Implementation and Enforcement of the DCA

Bearing in mind that, according to the Spanish 1978 Constitution, protection of free competition in the market is in the public interest[9], the DCA entrusts the DCT and the Defence Competition Service (*Servicio de Defensa de la Competencia*, hereinafter "DCS") with the implementation and enforcement of the legal commands abovementioned[10]. The DCT is a specialized administrative body in charge of the enforcement of the behavioural provisions of the DCA[11]. In proceedings brought against violations of articles 1 and 6 of the DCA, the DCT decides after the case has been examined and investigated by the DCS that proposes a non-binding to the DCT[12]. This division of tasks between the DCT and the DCS purports to provide independence to the DCT to adopt a decision on an alleged violation of the DCA. This two tier enforcement structure is currently being strongly questioned as it slows and delays the proceedings, with many inefficient duplications[13].

Any person (whether it is an interested party or not) may file a complaint with the DCS reporting a violation of the DCA, although formal proceedings will only be opened in case reasonable signs of a prohibited action being committed are found[14].

Only the DCT is empowered to punish a violation of the legal commands contained in the DCA, its decisions being subject to judicial review by the *Audiencia Nacional*[15]. The

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[9] For the first time in Spanish constitutional history, since 1978 there is a fundamental right of freedom of enterprise (article 38), although of course since the sixties there existed a clear understanding of the need to protect the competitive functioning of the markets.

[10] Article 9 and 10 of DCA. Indeed, the Preamble of the DCA establishes "The application of the Act, which aims to vouch for the constitutional economic order in the market economy with a view to defending the public interests, is entrusted in the second title to the following administrative bodies: The Defence Competition Tribunal (*Tribunal de Defensa de la Competencia*), with the functions of legal ruling and in some cases, proposals, and the Competition Service (*Servicio de Defensa de la Competencia*), in charge of instructing the proceedings." The whole idea of the existence of a public interest in the competitive process and the markets functioning freely is stressed through all the Preamble of the 1989 DCA.

[11] After the Constitutional Court judgment 208/1999, of november 11, the autonomous communities have jurisdiction for applying the DCA to practices circumscribed to their respective territory (see Edurne NAVARRO and Sergio BACHES, "The Spanish Transition", *European Lawyer*, dec 2002-Jan. 2003, 10-11). Therefore, the National Defence Competition Tribunal will only be in charge of those violations of DCA that affect the territory of two or more communities, or the whole national territory.

[12] See *OECD, Regulatory Reform in Spain. The Role of Competition Policy in Regulatory Reform*, Paris 2001, 17.The organization and institutional design follows the one established in the 1963 Act (on this, see GARRIGUES, *La defensa de la competencia mercantil*, 108-120).

[13] See Marcos ARAUJO, "Spain reunites fractured competition authority", *IFLR 2004 Guide to Competition Law*, 31, which refers to the plans of integrating the DCS into the DCT. A White paper on the Reform of the Spanish Defence of Competition System drafted by the Ministry of Economy has been recently submitted to public consultation (available at http://www.mineco.es/dgdc/sdc/Libro_Blanco%20_Reforma_Def_Competencia.pdf). Amongst the proposed reforms, is the integration of the DCT and the DCS.

[14] Article 36.1 DCA. On the other hand, any interested party may lodge an appeal before the DCT against the DCS' inactivity or decision not to open proceedings.

punishment can consist on an administrative fine, as criminal sanctions are not considered by the DCA[16].

On the other hand, as far as there may be private individuals or firms harmed or affected by the relevant violation of the DCA, within a private court litigation setting they are allowed to invoke the nullity of the agreement embodying the illegal action as well as to seek damages in compensation for the harm inflicted.

Therefore, in theory the DCA provides for two enforcement tracks. As we will analyse below, in practice only the public track has been used, as the private venue is designed in a manner that delays and deters private actions from being brought forward (*infra* 2.2). However, this is not the only reason why the enforcement of antitrust laws in Spain has been rather faulty. Apart from the defects on the regulation of the private enforcement, the regulation and experience of the DCT's policy in punishing the violations of antitrust behavioural commands also leaves much to be desired (*infra* 2.1).

2.1. Public Enforcement

The DCT is the enforcement body in charge of deciding most of the disputes involving the implementation of the DCA. Surprisingly, those procedures that lead to sanctions or punishments have decreased in the last fifteen years[17]. And this fact contrasts strongly with the increasing resources assigned thereto (see data in Table 1). Apparently this has not been translated into an increase in the number of infringement proceedings by the DCT against those firms acting in an anticompetitive manner in the market.

However, it is difficult to extract an unquestionable explanation of the situation: the decreasing number of enforcement actions may be due to fewer enforcement efforts (despite

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[15] In certain administrative and criminal matters the *Audiencia Nacional* is the highest national court in Spain, its judgments may only be appealed in some cases before the Supreme Court.

[16] Indeed, it is prohibited by the 30/1992 Act regulating the regime of civil administration and administrative proceedings, of 26 november 1992 (article 131.1: "*The administrative sanctions may be or not of pecuniary nature but they can never suppose, directly or subsidiarily, a deprivation of freedom*"), and it what concerns imprisonment, it would be unconstitutional, as article 25.3 of the 1978 Constitution asserts: "*The civil administration may not impose penalties which directly of indirectly imply deprivation of freedom*". Of course, it is the institutional design adopted in 1989 the one that prevents from criminal sanctions being imposed, as this possibility would be open in case the punishment was decided by a judicial court. Criminal sanctions were neither provided by the 1963 Act, which expressly mentioned the issue in the Preamble, justifying the non-criminalization of antitrust violations because it was not easy to establish "*the exact and clear borderline of the prohibited matter*". Garrigues considered unconvincing this assertion, and he justified the non-criminalization on the fact that the public opinion in Spain did not considered those actions to be felonies or crimes (see GARRIGUES, *La defensa de la competencia mercantil*, 93). However, the 1963 Act included also so-called "tax fines" which allowed the imposition to the offender of an additional tax for antitrust violations.

[17] Originally, regarding the 1963 Act "*the intimidating effect of the Act and the Court's activities is seen as very weak [...] the Court's annual number of rulings was about fourteen, and these rulings affected very small cases in quantitative terms [...] [f]inally, the Court did not impose fines until 1988*" [BORREL, *Antitrust Bulletin* 43 (summer 1998) 455].

the increase in the amount of resources[18]) or to the clarity of legal standards which lead to greater respect of the antitrust laws by the firms in Spain.

TABLE 1

DCT decisions and resources in enforcing the 1989 DCA

Year	Number of infringement proceedings by DCT	Fines (total per year, in million euros)	Budget expenses (in million euros)
1990	1	0	0,88
1991	8	0,12	0,91
1992	10	2,22	1,15
1993	14	1,65	1,11
1994	17	0,22	1,18
1995	13	1,3	1,175
1996	19	1,9	1,2904
1997	27	10,7	1,3814
1998	23	4,9	1,3649
1999	37	20,6	1,3547
2000	31	16,8	1,4395
2001	29	7,4	1,7176
2002	25	12,8	2,2853
2003	19	9,5	4,6176
2004	17	N.A.	N.A.

Source: *DCT, Annual Reports, various years (until 1993 there were some decisions still applying the 1963Act under which the fines were imposed by the Council of Ministers).*

This quantitative fact needs to be further complemented with some information regarding the experience of the DCT's rulings against violations of the antitrust laws. The DCA provides a basic framework for the DCT to determine the amount of the fines to be imposed in case of finding a violation of its provisions. The general rule is that the amount of the fines may be as

[18] The Budget expenses in Table 1 incluye only those of the DCT (in order to provide a more accurate view some of the DCS expenses should be added).

large as 901.518,16 euros, but this amount may "*be increased up to 10 percent of the turnover corresponding to the financial year immediately prior to the Court resolution*"[19]. The 10% turnover threshold for antitrust fines has been reached occasionally in EC antitrust law and in other European countries but it has never been imposed by the DCT.

Besides, the DCA establishes the criteria that have to be considered in order set the fine level. The guiding principle is that the fine should be fixed at an amount high enough to make economically unwise to engage in the prohibited actions[20] and, therefore, it should be higher for those breaches that are "more important". There is however no scale to decide clearly whether one violation is more important than other.

Notwithstanding the above, the DCA assumes that the importance of the violation can be established in light of the following factors: a) the type and scope of the restriction upon competition; b) the size of the affected market; c) the market share of the corresponding undertaking; d) the effect of the violation on the actual or potential competitors, the other parties in the economic process and the consumers and users; e) the duration of the restriction upon competition; f) the recidivism of the offender.

Some of these factors are not easily applicable, indeed the first one ("*type of the restriction upon competition*") does not lead to any conclusion. Indeed, the DCA does not establish whether some restrictions are more severe than others. It is clear that there are some actions or practices which are more damaging to competition than others, but the DCA does not contain a gradation of violations.

The foregoing is further accompanied by the deficient rulings of the DCT which have not lead to a further and needed refinement and clarity of the above criteria. This is problematic as punitive law principles require so, and this principles apply to DCT's punishing powers and to the rulings rendered by the DCT whereby it imposes administrative fines[21]. It has even been argued that this may even provide a sound basis to consider that article 10 of DCA is unconstitutional[22].

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[19] Article 10.1 DCA. It is also provided for fines being imposed to the directors, managers or any other legal representatives of the offending legal entity in case they took part in the agreement or decision which has been declared to violate the DCA by the DCT (fines up to 30.050,61 euros). The DCA was amended in 1999 to include an additional section (article 10.6) introducing a fine to be imposed in case of "*lack of good faith or intentional recklessness in the actions of any of the parties before the defence of competition bodies*" (up to 30.051,61 euros)

[20] Article 131.2 of 30/1992 Act regulating the regime of civil administration and administrative proceedings, of 26 November 1992.

[21] See Loreto FELTRER RAMBAUD, "Principios de la potestad administrativa sancionadora y del procedimiento administrativo sancionador en Derecho de la Competencia español", en *Derecho de la Competencia Europeo y Español. Curso de Iniciación*, vol. III, Dykinson-Servicio de Publicaciones de la URJC, Madrid 2002, 143-176.

[22] Based on the previous doctrine of the Spanish Constitutional Court regarding other administrative sanctions which were not properly designed according to the principles and requirements of the Spanish Constitution, see Sabiniano MEDRANO y Pablo TRAMOYERES, "¿Son inconstitucionales las normas sancionadoras de la Ley de Defensa de la Competencia? (reconsideración a la luz de la doctrina de la Sentencia 100/2003, del Tribunal Constitucional)", *Gaceta Jurídica de la CE y de la Competencia* 231 (may-june 2004) 97-111.

The lack of guidelines to set the fines makes the task of the DCT more difficult and it would be desirable an utmost care by the DCT in elaborating detailed reasoning and justifications in applying the criteria provided for in the DCA to impose and set the amount of each fine. However, the DCT has not done so. Most of the decisions of the DCT are laconic and lack any justification on this point. There is a huge uncertainty regarding the amount of the fine a firm may be expected to pay for an antitrust violation.

The lack of solid grounds in order to set the appropriate amount of the fine frequently leads to small fines imposed by the DCT (may be following the intuition that if they are small they need less reasoning and they are more likely to be "accepted" by the offender and less likely to be appealed before the *Audiencia Nacional*). An overall analysis of the practice of the DCT might lead to the idea that some major and severe violations were not fined appropriately, whilst minor violations of the DCA lead to huge fines.

The proportionality principle that should inspire punishment actions by the DCT is clearly at risk. It requires a precise gradation of infringements and fines and also sufficiently reasoned rulings explaining the criteria and the parameters followed to set the fine in each case. In spite of that faulty situation, only a few judgments have overturned DCT's decisions on the grounds of lack of reasoning in setting the fine[23]. This does not necessarily mean the fines where plausible or not, neither it implies that they were adequately reasoned or supported, as many of the defects that are predicable of the decisions by the DCT could sometimes be extended to the practice of the *Audiencia Nacional* in reviewing DCT's decisions.

Notwithstanding this, some of the largest fines imposed by the DCT have been overturned or annulled by the judicial courts because of lack of reasoning concerning the criteria used in setting the fine. A good case study is provided by the some of the infringement proceedings that the DCT has brought against Telefónica de España, S.A. concerning anticompetitive practices by the former monopoly in phone services in Spain.

In 1999 Telefónica was condemned by the DCT for practices of monopolization against British Telecom (mainly through price discrimination) in the market of digital phone lines rental for international communications, imposing Telefónica a fine of almost 3,5 million euro[24]. The DCT's decision was partially reversed by the *Audiencia Nacional* in 2002 -which confirmed it on the merits-for defects on the calculation of the amount of the fine[25].

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[23] See Mercedes PEDRAZ CALVO, "Algunas cuestiones relativas a la determinación del importe de las sanciones en defensa de la competencia", *Comunicaciones en Propiedad Industrial y Derecho de la Competencia* IDEI 34 (2004) 137-153, surveying the general principles that should inform the imposition of fines by the DCT; she highlights the requirement of an adequate reasoning of the fines imposed (although she introduces the controversial concept of "implicit reasoning", *id.* 151-152)

[24] DCT, Resolution 412/97 of 21 january 1999, BT vs. Telefónica. For an English summary of this case, see OCDE, *Spain: Competition Law and Policy in 1999-2000*, 4.

[25] Judgment of Audiencia Nacional of 8 may 2002 (JUR 2003\59505).

Afterwards, Telefónica was condemned in 2000 by the DCT because certain marketing practices of the company in the market for fixed telephone services (which was recently open to competition) were considered an abuse of dominant position. The DCT imposed a fine of almost 8,5 million euro[26]. The decision did not dear to reason how it did arrived to that amount and that lead to the partial reversal of DCT's decision because of lack of reasoning as to the amount of the fine[27].

Finally, in 2004 the DCT imposed the highest fine ever imposed in an antitrust proceeding in Spain. Certain practices of Telefónica in the market for fixed telephony at the beginning of liberalization of this market were considered abuses of its dominant position which prevented the access and the competition in that market of other companies[28]. The DCT imposed a fine of 57 million euro. The case was appealed by Telefónica, and the judgment of the *Audiencia Nacional* is still pending, but for the moment, the payment of the fine has been suspended due to its excessive and exorbitant amount, which could negatively affect Telefónica's business. These three cases provide good examples of monopolization practices that severely distorted competition in the market and which clearly deserved a strong punishment (similar to the fines imposed by the DCT), that were knocked down due to the lack of reasoning by the DCT in the setting of fines[29].

2.2. Private Enforcement[30]

Apart from the public institutions in charge of the application of the antitrust laws in Spain, the DCA declares the automatic nullity of those decisions or agreements in which the anticompetitive practice is embodied[31]. Therefore, any court may so declare in case a suit is

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[26] DCT, Resolution 456/99 of 8 march 2000, Retevision vs. Telefónica (Planes Claros).

[27] Judgment of Audiencia Nacional of 22 september 2003 (JUR 2004\84628). The fine was reduced to the amount of 901.528,16 euros, which is the highest amount specifically considered in the DCA.

[28] DCT, Resolution 574/03 of 1 april 2004, ASTEL c. Telefónica (Preasignación).
The abuses concerned the pre-selection system (a mechanism that permits clients to chose its fixed phone company without need of dialling a selection code eventhough Telefónica's access network is used). A complaint was brough by the Asociación de Empresas Operadoras y de Servicios de Telecomunicaciones (ASTEL) because Telefónica discriminated against pre-selection requests, and implemented confusing marketing strategies in order to recover clients, including claims that some of its services (as the access network operator) were conditional upon clients not being pre-selected with a competitor.

[29] That cannot be said yet in the second case, although a reading of the decision can provide a good guess of why my forecast may be right.

[30] Only the instruments for private enforcement provided through the Spanish antitrust laws are considered. Articles 81 and 82 of the EC Treaty and the Unfair Competition Act may serve as possible foundations of private enforcement actions in the judicial courts but they are not analysed here.

[31] Article 1.2 DCA.

brought before it based on a decision or agreement which violates articles 1 or 6 of the DCA[32].

Besides, there is always the possibility of bringing a claim before a judicial court against the offender to obtain compensation of any harm coming from an anticompetitive and prohibited practice[33]. That is the general rule contained in Spanish Tort Law, which of course is extended to antitrust laws.

However, the DCA introduces a substantial condition in how and when that claim has to be brought: "*Compensation for damages, based on the illegal nature of the acts prohibited by this Act, may be requested by the injured parties, once there is a final administrative decision and if it needs to be, jurisdictional ruling. The substantive and procedural regime applicable to the compensation for damages shall be as foreseen in the civil legislation*"[34]. The rule clearly follows the path established by the 1963 Act which affirmed laconically that "*Those harmed by the restrictive practices declared prohibited by the DCT may bring a damage claim before the civil jurisdiction in the year following the final decision by the DCT*", implicitly requiring a prior opinion by the DCT[35].

This requirement introduces a significant obstacle in any claim of damages by private parties injured by an action or an agreement violating the antitrust laws. The delay for a decision on

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32 When the 1963 Act was in force, even the declaration of nullity was reserved to the DCT (which presumably was considered a pseudo-judicial organ), see Jose Luis FERNÁNDEZ RUIZ, "La acción de resarcimiento de daños y perjuicios en la Ley de Represión de las Prácticas Restrictivas de la Competencia", en *Estudios Jurídicos en Homenaje a Joaquín Garrigues*, tomo II, Tecnos, Madrid 1971, 25 José Luis FERNÁNDEZ RUIZ, "La acción de resarcimiento de daños y perjuicios en la Ley de Represión de las Prácticas Restrictivas de la Competencia", en *Estudios Jurídicos en Homenaje a Joaquín Garrigues*, tomo II, Tecnos, Madrid 1971, 257-258 and GARRIGUES, *La defensa de la competencia mercantil*, 98. Despite some contradictory judgments by the Supreme Court on the nineties (mainly judgment of 30th december 1993 and judgment of 4 november 1999), nowdays –after judgment of 2 june 2000- that is not anymore the case, see Julio COSTAS COMESAÑA, "En torno al sistema español de aplicación compartida del derecho de defensa de la competencia (Comentario a la STS de 2 de junio de 2000)", *Actas de Derecho Industrial y derecho de autor*, tomo XXI (2000) 243-248 and also Alfonso GUTIERREZ y Antonio MARTÍNEZ, "Nuevas perspectivas en la aplicación de las normas de defensa de la competencia por la jurisdicción civil", *Actualidad Jurídica Uría & Menéndez* 1/2002, 39-55.

33 Indeed not only a tort action may be brought but also, when applicable, criminal actions may be possible, and the DCA recognizes this implicitly when it asserts that "*[t]he sanctions mentioned in the present Act shall be understood without prejudice to the other liabilities which arise in each case*" (article 13.1).

34 Article 13.2 DCA. Moreover, since 1999 article 13.3 provides for the possibility of the DCT assisting the judicial court issuing a report regarding the cause and amount of the compensation that must be paid to the plaintiffs and other third parties for the acts violating the DCA.

35 Article 6 of the 1963 Act. It could easily take fifteen (15) years to the private plaintiff to obtain a final judgment awarding damages compensating the harm inflicted by an antitrust violation, see judgment of the Spanish Supreme Court of 6 may 1985, chamber 1 (deciding over the harm inflicted to the plaintiff by a price fixing agreement of the glass manufacturers of Santander made in august 1970, which forced the plaintiff to close his business in 1971, the final decision of the DCT was given on june 1977), published in *La Ley*, 1985-4, 251-258, and commented by Manuel AREAN LALIN, "La Indemnización de daños y perjuicios por violación del derecho antitrust", *La Ley*, 1985-4, 251-260.

damages is too long, and it deters potential plaintiffs from using these actions[36]. This barrier to private actions by injured parties against the antitrust offender has proved to be quite effective, as the number of cases brought based on it remains anecdotic[37].

It may even be considered to constitute a rule against the constitutional right of due process, which requires among other things a timely decision by the judicial courts: it does not seem to be "timely" a decision regarding damages given fifteen years after the harm was inflicted.

Besides, the requirement of a DCT final decision before a civil action for damages may be brought is somehow incoherent with the power that the DCA recognizes to the judicial courts in asserting the nullity of those agreements or actions violating its rules. If the judicial courts are capable of deciding on this issue why are they not capable to decide about the potential damages to be awarded to compensate those harms that the anticompetitive act may have provoked?

3. Proposals for reform

Fifteen years after the 1989 DCA was enacted, the instruments for the enforcement of antitrust laws in Spain have proven not effective enough. Public Enforcement is open to criticism due to lack of any guidelines or reasoned rulings in setting the fines imposed in the infringement proceedings brought against antitrust offenders. The experience in EU antitrust law and in other countries makes desirable the adoption of regulatory guidelines in Spain that should be followed by the DCT in imposing the fines for antitrust infringements. That may provide some legal certainty as to what are expected fines in any case. Besides DCT's rulings need to be more reasoned, arguing all the circumstances and factors used by the Court in setting the amount of the fine. This would probably increase the deterrent effect of Spanish antitrust laws.

Whilst fine-tuning may be enough in order for the public enforcement to work properly, private enforcement mechanisms need to be largely overhauled. So far the system has prevented and deterred most of the private plaintiffs from claiming damages for antitrust violations. Abrogating or reforming article 13.2 of the DCA may open the door to increasing private enforcement of antitrust laws in Spain[38], potential injured parties should be recognized

[36] This relevant circumstance is apparently missing in *OECD, Regulatory Reform in Spain. The Role of Competition Policy in Regulatory Reform*, Paris 2001, 18 (which expressly affirms –mistakenly- that DCA's provisions "*gives the courts jurisdiction to award damages under the Civil Code*").

[37] See the information in the Report regarding in Spain (pages 35-40) attached to_*Study on the conditions of claims for damages in case of infringement of EC competition rules. Comparative Report* (prepared by Dennis Waelbroeck, Donald Slater and Gil Even-Shoshan), Bruselas 2004.

[38] It remains doubtful whether this is desirable of not. On this See Wouter P. J. WILS, "Should Private Antitrust Enforcement Be Encouraged in Europe?", *World Competition* 26/3 (2003) 473-488, who considers public enforcement more efficient and even rejects a supplementary role for private plaintiffs, based on the costs and inefficiencies the private damages system carries with it.

the right to act before the judicial courts in defence of their private interests without having to wait for administrative decisions (as it happens with claims for damaged based on EU competition law)[39]. Apparently, this would question the existence of the DCT itself as a "monopolist jurisdiction" on the decisions and opinions applying the DCA, however the justification of its existence should be based not only its character as an specialized "jurisdiction" but mainly the fact of being in charge of the protection of the public interests involved in the competitive functioning of markets[40].

[39] Luis BERENGUER FUSTER y César A. GINER PARREÑO, "Comentarios críticos sobre la reforma de la Ley de Defensa de la Competencia", *Derecho de Los Negocios* 114 (2000) 33 and GUTIERREZ y MARTÍNEZ, *Actualidad Jurídica Uría & Menéndez* 1/2002, 53-54 (available at www.uria.com).

[40] Even if article 13.2 is abrogated it is possible to design mechanisms of assistance to the judicial courts by the DCT concerning the antitrust laws at issue in the case, see the proposal by Antonio CREUS, "La privatización del Derecho de la Competencia", *Gaceta Jurídica de la UE y de la competencia* 200 (abr./mayo 1999) 65-66.

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