G A _ P

Gómez-Acebo & Pombo

Joint and several liability of cartel members in Spain

Ángel Carrasco Perera
Professor of Civil Law, Universidad de Castilla-La Mancha
Academic Counsel, GA_P

Royal Decree Act 9/2017[1], transposing Directive 2014/104/EU[2], has not only brought about a fundamental amendment to our Competition Act[3], but also incorporates original solutions to the law of damages. In this paper, I am exclusively concerned with matters of joint and several liability among infringers.

1. Joint and several liability

(1) Royal Decree Act 9/2017 (*RD Ley 9/2017*) provides for joint and several liability of undertakings that "have infringed competition law through joint behaviour" (art. 73(1) of the Competition Act [*LDC*]), with the exceptions provided for SMEs in art. 73(2) and (3) *LDC*. Although not explicitly defined – inasmuch as understood to appertain to the law of obligations – "joint and several liability" means that "each of those undertakings is bound to compensate for the harm in full, and the injured party has the right to require full compensation from any of them until he

[1] *Real Decreto-ley 9/2017, de 26 de mayo, por el que se transponen directivas de la Unión Europea en los ámbitos financiero, mercantil y sanitario, y sobre el desplazamiento de trabajadores*.

[2] Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union.

[3] *Ley 15/2007, de 3 de julio, de Defensa de la Competencia.*

Disclaimer: This paper is provided for general information purposes only and nothing expressed herein should be construed as legal advice or recommendation.

has been fully compensated" (art. 11(1) of Directive 2014/104/EU). Infringements of competition law prior to the entry into force of *RD Ley 9/2017* will not be subject to the new joint and several liability rules (Transitory provision 1(1) *RD Ley*).

(1)

2. Joint infringement

An infringement "through joint behaviour" is an understandable factual requirement in cartel law as, at the very least, concerted practices are required between infringing undertakings. But in a situation of abuse of dominant position, joint infringements are only conceivable in the joint exercise of a concerted dominant position or similar situation. Otherwise, if there are various contractual or non-contractual harmers who do not act "jointly", joint and several liability will have to be based on the general Law of damages and the *LDC* will not apply. This is so because for the purposes of art. 73 *LDC* it is not enough that several undertakings cause harm, they must "jointly" act in the production of the infringement. Joint and several liability does not derive, as in other cases of joinders in harm, from the indetermination of the source of the harm, but from the very fact that every cartel constitutes concerted conduct in the production of unlawfulness.

(2)

"(T)hrough joint behaviour" does not mean that the contribution of each infringer to the harm is undetermined or that the person to whom the harm is imputed cannot be isolated. By definition, this indetermination does not exist in a cartel, since each purchaser knows from whom he bought with an overcharge and knows that this harm was not caused by the co-infringer manufacturer of a product he did not buy. If the claimant bought from AA, it is certain that the harm was not caused by the co-infringer BB. It is true that the infringement was committed by all, but not so the harm, which, being (mainly) of a contractual nature, can only have been caused by the provider who initiates the marketing chain of the product.

(3)

3. Follow-on / stand-alone claims

The joint and several liability of the various cartel members is not conditional on all defendants having previously been found liable by a competition authority (follow-on claims) or none of them having been found liable (stand-alone claims). Joint and several liability can be posited between infringers already found liable by a competition authority (cf. art. 75 *LDC*) and persons whose liability for the joint infringement will have to be determined in the civil proceedings in which joint and several liability is claimed, because they have not been the addressees of the administrative sanctioning decision. If several infringers (adjudicated as such already or presumed) are sued, the joinder of causes of action will be well done; another thing is, of course, that the claimant will have to prove in the latter case "without a parachute" the infringement plus the causation of harm plus the quantification of the same by the person not found liable administratively, while in a follow-on claim, the claimant will only have to prove, and with the restrictions of art. 76(2) *LDC*, the quantification of harm, given the probative rules favourable to the claimant contained in arts. 75 and 76(3) *LDC*. I state that in these follow-on claims the

(4)

(4) quantification of the harm will have to be proven because the national or EU administrative decision sanctioning the cartel more often than not refrains from asserting that there has been harm (for lack of evidence) or, more frequently, refrains from quantifying the harm caused to cartel purchasers or providers.

(5) One may wonder what interest a person may have in suing companies that have not been the addressees of the administrative decision finding the cartel liable. Indeed, the person may have a great interest in doing so, for example, in order to attract jurisdiction to the forum of his domicile or that of the alleged co-infringer and to drag to it those whose domicile lies outside the claimant's jurisdiction [art. 8(1) Brussels I Regulation[4]; cf. Judgment of the Court (Fourth Chamber) of 21 May 2015 in case C-352/13, *Cartel Damage Claims (CDC) Hydrogen Peroxide SA v Evonik Degussa GmbH and Others* , paras. 15-33]; or to ensure that the substantive law of the forum (domicile of the claimant and of the "national" defendant, cf. case C-352/13, paras. 52-56) is applied to all defendants under the terms of art. 6(3)(b) Rome II Regulation[5], an interesting forum & legislation shopping if the claimant seeks, for instance, more lenient legislation with regard to limitation periods.

4. Non-proper joint and several liability

(6) The "joint and several liability" provided by art. 73(1) *LDC* remains a 'non-proper' liability. Historically, such has been the term given in case law to liability not born of "law or contract", but directly based on the judgment determining joint and several liability; for example, because in tort liability or building condemnation liability, the agent causing the harm could not be individually identified (cf. Judgment of the Supreme Court [STS] of 14 March 2003). The perspective changed when art. 17(3) of the Building Planning Act[6] created a sort of joint and several liability (although subject to a factual requirement of causal uncertainty). In theory, given its legal basis, this liability should no longer be called 'non-proper'. However, and rightly so, case law continues to call it non-proper (STS of 27 June 2017), despite the existence of a legal basis, just as it calls non-proper the joint and several liability between the insured and the civil liability insurer, which in this case necessarily requires a contract (STS of 15 September 2017).

(7) Liability for harm resulting from joint infringements of competition law is also 'non-proper' liability. And such is any liability that has not been founded among the parties who caused the harm by way of a contractual instrument prior to the occurrence of the relevant

[4] Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

[5] Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II).

[6] *Ley 38/1999, de 5 de noviembre, de Ordenación de la Edificación*.

(7) infringement/harm. It does not matter that it is the law that determines liability, if in order for liability to be finally adjudicated a double authoritative pronouncement is necessary: first, that the group of persons constitute a cartel (they had not agreed beforehand that their liability, if discovered, would be joint and several) and, second, that they have infringed through “joint” behaviour. Liability is thus non-proper when it is born directly from the liability judgment (SSTS of 17 June 2002, 21 October 2002 and 16 January 2006).

(8) The matter of ‘non-propriety’ of liability is only of practical importance in one circumstance, albeit relevant; namely, case law holds that art. 1974 of the Civil Code (*CC*) does not apply in cases of non-proper joint and several liability, when the limitation period for the action was interrupted against one or some but not against another or other joint and several debtor(s). In other words, an extra-judicial claim made against a member (or purported member) of a cartel will not interrupt the five-year limitation period for the purposes of art. 74 *LDC* against other unclaimed persons, at least whilst it cannot be presumed that they were aware of the interruption (a test that, in practice, does not usually lead to favourable results for the claimant: SSTS of 16 January 2015, 20 May 2015 and 17 September 2015 and Judgment of the Granada *Audiencia Provincial* of 6 February 2015).

(9) For this reason, what is provided in art. 74 (4) *LDC* is not exceptional. According to this sub-article, the commencement of mediation proceedings against one of the persons with standing to be sued will only interrupt the limitation period “in relation to the parties involved or represented in the judicial settlement of the dispute”. But this is true for any kind of limitation-period interruption, even in judicial claims. There is no room for an interpretation *a contrario* of art. 74(4) *LDC*.

5. Fine-exemption beneficiary under a leniency programme

(10) According to art. 73(4) *LDC*, the beneficiaries of the exemption from fines under a leniency programme shall be jointly and severally liable (a) only to their direct or indirect purchasers or providers (e.g., first or successive distribution chain level purchasers) and (b) to “other injured parties” only where compensation in full cannot be obtained from undertakings that were involved in the same infringement of competition law. The meaning of this provision is not clear (nor that of recital 38 of Directive 2014/104/EU), as we shall show below.

(11) A person is only “jointly and severally” liable with another if he is liable for the harm caused by that other person or by an unknown other. The person liable for the harm caused by an infringement of competition law to his *own purchaser* or to another purchaser in the chain - the law assumes that in the latter case the causal relationship of the infringing conduct is maintained (arts. 78 and 79 *LDC*) - is not “jointly and severally” liable, because he is liable for the harm he has himself caused; where appropriate, it will be the other manufacturers who are jointly and severally liable with him for this kind of harm. Therefore, the case of art. 73(4) (a) *LDC* cannot exist, because if only liable to his own purchasers (direct or indirect), he is not in

(11) this sense "jointly and severally liable". Once can only talk about joint and several liability if the beneficiary of the exemption is also liable for the harm caused to the person who bought from another member of the cartel, which para. (a) rejects. This provision does say, with a poor choice of words, something that should however be said: an exemption under a leniency programme does not release from liability for harm he has caused.

(12) What matters, then, is para. (b). There is only liability "to other injured parties" where compensation in full cannot be obtained from the other undertakings involved. These other parties are, it seems, purchasers and sub-purchasers and providers of *another* manufacturer found in the cartel or even the purchaser or sub-purchaser of another manufacturer not found in the cartel but who also benefited from the price increase caused by the cartel (the 'umbrella effect'[7]). But not only in these cases; the beneficiary is also only 'jointly and severally' liable, even if vicariously ("only where full compensation cannot be obtained from the other undertakings that were involved in the same infringement of competition law"), to other persons affected by the cartel in another production chain, but who are *neither purchasers, sub-purchasers nor providers*. Example of para. (b): the manufacturer AA who is 'jointly and severally' liable for the harm suffered by shippers who had to pay more for renting trucks from the fleet sold to a haulier who bought them from the manufacturer BB: this shipper is not a purchaser or provider of the cartel.

(13) Looks like we have one more gap to fill. This is the case of the manufacturer AA, found in the cartel, and the harm caused to the shipper or bus passenger who had to pay for the services more to the carrier who bought the vehicle with an overcharge from AA; note that those are not purchasers or providers. Of course, the manufacturer AA will not be 'jointly and severally' liable to these shippers or passengers, because the harm they suffer would be harm personally caused by AA. This is not resolved either by Directive 2014/104/EU or *LDC*, however broad the wording of art. 72(1) ("Anyone who has suffered harm"), because in these cases it will still be necessary to discuss whether such lateral harm is objectively imputable to the manufacturer AA. I shall not comment on this matter here.

(14) Note the uniqueness of the "joint and several, but vicarious, liability" of art. 73(4)(b) *LDC*.

6. Action for contribution

(15) According to art. 73(5) *LDC*, the co-infringer who pays a joint and several debt has an action for contribution against the rest of the co-infringers in an amount resulting from his "relative liability for the harm caused". Again, the expression is incorrect. The "harm" suffered as a result of a price cartel by a 'downstream' purchaser has (almost) always been identified as caused by a cartel member, at least as long as we remain within the domains of contractual

[7] Regarding the 'umbrella effect', art. 11(4)(b) Directive 2014/104/EU is interpreted by LLIANOS, DAVIS, NEBBIA, Damages Claims for the Infringement of the EU Competition Law, 2015, p. 49.

harm (purchasers, providers and their successors in title). We will take as an example the 'truck cartel', settled by the EU Commission's decision of 19 July 2016. The harm caused to the person who bought from the manufacturer AA was caused entirely by this manufacturer, without any involvement of the manufacturer BB. Consequently, the proportional apportionment will be based on the degree of liability for the administrative infringement, which may be less or greater than the actual harm actually caused by this infringer[8]. This is tantamount to arguing that there will be no real possibility of contribution if the joint and several liability of several parties has arisen from stand-alone proceedings and the judgment has not 'apportioned' the imputable part in the infringement of competition law. (15)

(16) The aforementioned article does not settle the question (it was not its task either) of whether the co-infringer who paid can subrogate to the claimant's rights against the co-infringers. And it is clear that he cannot, because otherwise the payer could in turn obtain joint and several contribution from the rest of the co-infringers.

(17) It should be noted that the contribution cannot be made conditional on the payer having satisfied *the entire debt* resulting from the cartel, because the liability amount is as undetermined in principle as the number of potential persons affected by the cartel's overcharge and potential claimants.

(18) The second paragraph of art. 73(5) *LDC* is gibberish. The circumstances are as follows. A cartel member has paid and seeks contribution from one who is a fine-exemption beneficiary under a leniency programme. Under these conditions, the latter is only liable in contribution up to the amount of harm caused (*by him*) to his own direct and indirect purchasers or providers. This provision should be applied irrespective of whether it is the purchasers/providers of the beneficiary of the leniency programme who have sued and obtained satisfaction from the cartel member bringing the action for contribution. In other words, even if the purchasers of the AA chain have been compensated by the manufacturer BB, and the AA producer is the beneficiary of the leniency programme, the action for contribution could be possible within this limit. But if you stop to think about it, the hypothesis is impossible; if the purchasers/providers of the AA chain (beneficiary of the exemption) have not been compensated by the manufacturer of the BB chain (but purchasers in another chain have been), one cannot know as a rule what harm has been suffered by purchasers/providers of the AA chain, which is the maximum reimbursement amount against the AA manufacturer in an action for contribution.

(19) However, the provision goes on as follows: "where the harm is caused to an individual or undertaking other than the direct or indirect purchasers or providers of the infringers [infringers, it seems, other than the beneficiary of the exemption], the amount of any contribution of the above-mentioned beneficiary to other co-infringers shall be determined on the basis of his

[8] The exemplary criteria used in recital 37 of Directive 2014/104/EU cannot be decisive in determining whether there is involvement in the (civil) harm, but at most in the infringement and its penalty.

(19) relative liability for that harm". The provision is impenetrable. It could refer to direct purchasers of the defendant co-infringer BB, who are not direct purchasers of the co-infringer AA who in turn is a beneficiary of the exemption. But it could just as likely refer to the harm caused by BB in the BB chain to persons (e. g., shippers, bus passengers, etc.) other than BB providers and purchasers. That is, when the manufacturer BB has had to compensate anyone other than a provider/purchaser of his. In such cases, the liability in contribution is limited by the "relative liability for such harm". And with this uncertainty returns, because AA has no part in the harm caused to persons harmed in BB's marketing chain; he may have a part in the liability for the infringement of competition law, but this can only be known if the administrative decision has determined it before exempting him from the appropriate fine.

7. Settlements

(20) According to art. 77(1) *LDC*, the right to compensation for harm suffered by the injured person who was a party to an out-of-court settlement shall be reduced by the settling co-infringer's share of the harm that the infringement of competition law inflicted upon the injured party. Since joint and several debtors are involved, four solutions were possible. Either the settlement entailed a defence of general termination of the original debt of all co-infringers (art. 1146 CC, cf. STS of 18 June 2017), with the settling co-infringer having the right to contribution from the other co-infringers for their "share" in the amount paid (or their share in the "harm", greater or lesser than the former); or the settlement with one of the co-infringers gives rise to a personal defence of the latter, which the other co-infringers may use to reduce the overall debt (with the claimant) "by the share the (settling co-infringer) was liable for" (art. 1148 CC); or the settlement produces the effects of part payment, and the co-infringers may deduct from their compensatory debt what has already been paid by the settling debtor; finally, it could be established that no co-infringer can rely on, in whole or in part, another person's settlement, but having an unconditional right to proportional contribution. The second option is the solution chosen by art. 77(1) *LDC*, and it should be noted that a settlement does not reduce the overall debt in the *amount settled and paid* by the joint and several co-debtor (which is what the third possible solution that we have presented postulates), but by the share (more or less than the price paid under the arrangement) that this co-debtor had in the infringement, which will have to be determined by his share in the overall fine - which cannot be known if the co-debtor benefits from a fine exemption under a leniency programme! Nor can it be, contrary to what the rule wants, "the proportionate share in the harm", but rather the share "in the infringement", because, as it has already been explained, the harm suffered by a market player has always been caused by an overcharge *entirely* attributable to the cartel member with whom the market player or his seller engaged.

(21) According to art. 77(2) *LDC*, co-infringers with whom no settlement has been reached may not claim a contribution for the remaining compensation from the co-infringer who was a party to a settlement. These are the other co-infringers, who have had to pay to the claimant (who settled with a co-infringer) the remainder of the debt minus the compensation already received by way

(21) of settlement. The provision is unclear, because if the settlement was notified to the rest of the co-infringers, these could have raised it as an objection in respect of their share in accordance with art. 1148 CC, without contribution. And if it was not notified to the others, and one of them pays “everything”, it is fair that such payer should have an action for contribution against the co-infringer who settled, as he would have if there had been no settlement (art. 1146 CC). And in fact that is what happens, because settlements have not had in fact any influence on actions for contribution, since there is always a contribution for “the proportionate share” that the settling debtor would have had in the “harm”, whether or not there is a settlement.

(22) Art. 77(2) *LDC* also has a different scope. If one of the infringer beneficiaries obtains contribution, and another of the co-debtors is insolvent, the co-debtor who settled would not have to resort to the proportional cover of insolvency, as would strictly be the case with joint and several liability.

(23) Under art. 77(3) *LDC*, *notwithstanding the preceding sub-article* (?), where co-infringers who have not reached an out-of-court settlement are unable to pay the remaining compensation, the injured party may, unless otherwise agreed, claim it from the party with whom he reached a settlement. This is an exception under the rules of joint and several liability, because it is only right that the co-debtor who settled and paid should be able to raise this defence against the entire debt when it is reclaimed. However, the possibility of agreeing otherwise greatly reduces the applicability of this provision.

(24) Finally, according to art. 77(4) *LDC*, “in determining the amount of the contribution that a co-infringer can recover from any other co-infringer in accordance with his relative liability for the harm caused by the infringement of competition law, the courts shall give due consideration to compensation paid in the context of a prior out-of-court settlement involving the relevant co-infringer”. But who is the “relevant co-infringer”? This co-infringer bearing contribution should not be the co-infringer who reached a settlement, because this case is already covered by art. 77(2) *LDC*, but a third-party infringer who did not settle either. But this does not explain the provision well either; because the infringer who did not settle and pay might have invoked the settlement reached by another debtor or could not on account of not having notice of it. If such infringer could and did not raise it as an objection, the third-party co-infringer, who bears the contribution, can raise the same defence in an action for contribution against the co-infringer who paid; if it was not raised as an objection on account of not having notice of the same, his contribution from the settling co-infringer or other third-party co-infringers is not affected in any way.

If you have any questions regarding the contents of this document, please contact any one of the following GA_P lawyers:

Íñigo Igartua

Partner, Barcelona
Tel.: (+34) 93 415 74 00
iigartua@ga-p.com

Miguel Troncoso

Managing Partner , Bruselas
Tel.: 32 (0) 2 231 12 20
mtroncoso@ga-p.com

For further information please visit our website at www.ga-p.com or send us an e-mail to info@ga-p.com.