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Sesión: ¿UNA RELACIÓN IMPOSIBLE? DEFENSA DE LA COMPETENCIA Y DEMANDA CAUTIVA

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Título de la comunicación: DAMAGES' CLAIMS IN THE SPANISH SUGAR CARTEL

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ABSTRACT: Competition conditions in the sugar industry are strongly affected by protectionist regulatory measures and interventions leaving narrow room for competition. Moreover, competition authorities worldwide have investigated and successfully prosecuted anticompetitive actions by sugar producers and refiners in this market.

As a prototypical example of collusive behaviour of sugar producers, this article looks at the Spanish sugar cartel, uncovered and sanctioned by the national competition authority in 1999. It then turns into the subsequent private enforcement actions that have recently concluded successfully. Indeed, these are first successful follow-on claims of damages on a cartel case in Spain. Several lessons can be extracted from the two decisions delivered on these claims by the Supreme Court in 2012 and 2013 that may have an impact in private claims for damages arising from violations of EU competition law in Spain in the future. The Supreme Court has clarified the relevance and legal force that public enforcement decisions should have for private enforcement, the legal grounds that should be used for private enforcement claims in follow on claims to cartel and a few ideas concerning damages' calculation, the pass-on defence and legal standing of indirect purchasers. In all, the Spanish Supreme Court dicta from its decisions in the sugar cartel case may well open the gateway for new private claims in the future.

SUMMARY: Introduction. 1. The Sugar Industries. 2. The Spanish Sugar Cartel (1995-1996). 3. Damages' claims in the Spanish Sugar Cartel. 4. Lessons for future claims. 4.1 Relevance for private enforcement of prior public enforcement decisions. 4.2. Legal basis for private claims. 4.3. Damages' calculation. 4.4. The passing-on defence. Conclusions.

KEYWORDS Antitrust Law, Competition Law, Cartel, Sugar Industry, Spain, Damages claim, Private Enforcement, Compensation

JEL CODES **K13, K21, K32, K42, L41, Q18**

Introduction

Until now private damages claims arising from competition law (EU and domestic) violations have been rare in Spain. Evidence points that private enforcement is sparsely being used by firms as a tool to obtain nullity of anti-competitive contracts but not many damage claims have been successful yet. Besides, the few successful damage claims to date refer to violations of TFEU article 102 (or domestic equivalent).[1]

For that reason, the judgments recently delivered by the Spanish Supreme Court successfully awarding damages on the two follow-on actions filed by confectioners in the sugar cartel case contain several

[1] See F Marcos 'Competition Law Private Litigation in the Spanish Courts (1999-2012)' (2013) *Global Competition Litigation Review*, Issue 4: 167-208, 182.

relevant holdings for future antitrust damages claims in Spain. This article will point out and assess the relevant considerations made by the Spanish Supreme Court (*infra* §4), but to understand well the context in which they are made, the functioning and singularities of the sugar industry (in Spain and elsewhere) are described (*infra* §1). The Spanish Competition Tribunal uncovered a cartel affecting the sale of sugar for industrial uses in 1995, punishing the companies involved in the cartel (*infra*§2). Once all the appeals against the public enforcement actions were rejected -and the decisions were firm- several confectioners started damages claims against the cartelists for the overcharge paid for sugar (*infra*§3).

In particular, the Supreme Court has specified the legal force that public enforcement decisions should be given by judges deciding private enforcement claims (*infra*§4.1). In addition, the legal basis over which private enforcement claims in follow on claims in cartel cases has been clarified (*infra*§4.2). Finally, several very relevant considerations are made regarding damages' calculation (*infra*§4.3) and the passing-on downstream of the harm caused by the cartel (*ie* the standing of indirect purchasers) (*infra*§4.4). In all, the Spanish Supreme Court *dicta* from its decisions in the sugar cartel case open the gateway for new private claims in the future.

1. The Sugar Industries

Certain features of sugar industries make them prone to anti-competitive practices. Everything starts with the raw materials used for sucrose production (sugarcane and sugar beet), which are subject to intense government regulation in many countries.[2] For that reason, the sugar industry competitiveness

[2] Sugar markets are described as "*one of the most subsidised and distorted of all agricultural markets*", Organization for Economic Cooperation and Development (OECD), *Sugar Policy Reform in the European Union and World Sugar Markets*, 2007, 9. For example, in the EU, since 1967 sugar beet and sugar cane growers are covered by the CAP. Aimed *inter alia* at ensuring "*that the necessary guarantees in respect of employment and standards of living are maintained for Community growers of sugar beet and sugar cane*" EU sugar policy (embodied in the CMO for sugar) includes a price support system, a quota production system, export subsidies and import barriers [see Council Regulation (EEC) nº 1785/81 of 30 June 1981, on the Common organization of the markets in the sugar sector (OJEC L177 of 01.07.1981: 4-31) as amended]. The EU regime was significantly reformed in 2006 to progressively promote the competitiveness and market orientation of the sugar industry (decrease in tariffs, quotas and subsidies), complying with WTO rules, see Council Regulation (EC) nº 318/2006 of 20 February 2006 on the common organization of the markets in the sugar sector (OJEU L58 of 28.02.2006: 1–21). An explanation can be read in European Commission, *The European Sugar Sector: A long-term competitive future*, Sept. 2006. For a brief comment of this reform and its impact in raising the price of sugar see M Busse & F Jerosch `Reform of the EU Sugar Market' (2006) *Intereconomics*, March-April: 104-107. Nevertheless, in 2010 European Court of Auditors considered that the reform had a limited impact in increasing competitiveness and efficiency of the industry and did not have the forecasted positive impact in consumer welfare (36% decrease in prices was expected), *Has the reform of the Sugar Market achieved its main objectives?,* Report 6/2010 (available http://eca.europa.eu/portal/pls/portal/docs/1/5996726.PDF visited on 20.04.2014).
The situation is not very different in the U.S. (where regulatory intervention makes the price of sugar in the domestic US market double or treble the world market price), see A H Dean 'Artificially Sweetened: An

is heavy burdened by government intervention that may distort business decisions of those involved in production and trade,[3] spreading further the risk of collusion or anti-competitive abuses through all processes of sugar processing and production.[4]

Sugar growers and processors are economically interdependent in the sugar production process, leading to long-term links and contractual engagements among them.[5] Indeed, in comparison to other agricultural products in the Common Agricultural Policy (CAP), it is not the sugar beet which is subject to the majority of the regulatory measures but the processed product (sugar itself), and that gives sugar processors a strong bargaining position vis-à-vis the individual beet growers.[6]

In addition, due to regulation and transportation costs, sugar production and processing markets have a rather limited territorial scope. Indeed, given the existence of substantial entry barriers in the sugar processing market,[7] sugar- processing industries are characterized by national markets with an oligopolistic structure, even monopolistic in some countries.[8]

Analysis of the United States Sugar Program', 27 March 2006. *CUREJ: College Undergraduate Research Electronic Journal*, U. of Pennsylvania (available at http://repository.upenn.edu/curej/28, visited on 20.04.2014). See also R O Zerbe, 'Monopoly, the Emergence of Oligopoly and the Case of Sugar Refining' (1970) *Journal of Law and Economics*, 13/2: 501-515, 505-607 ('*the most obvious way in which the sugar refining industry has failed to be competitive has been through the intervention of government'*).

[3] On the pervasiveness of protectionist policies in this industry (and how they distort worldwide trade) see D F Larson & B Borrell, 'Sugar policy and reform', *World Bank Policy Research WP* 2602, 2001 (available at http://elibrary.worldbank.org/doi/pdf/10.1596/1813-9450-2602, visited on20.04.2014). For example, innovation in the sugar industry has been found to be strongly influenced by regulatory changes, see (concerning changes in the EU's CMO for sugar), K Dillen, M Demont & E Tollens, 'European Sugar Policy Reform and Agricultural Innovation' 2008 *Canadian Journal of Agricultural Economics* 56: 533-553.

[4] The regulatory distortions present in the EU sugar industries favour anticompetitive behaviour, and removing them would help in tackling it, see N Strand, 'Tacit collusion in the EU Sugar Markets' *Swedish Network for European Studies in Business and Economics (SNEE), WP 204*, 2002 (available at http://www.snee.org/filer/papers/204.pdf, visited on 20.04.2014) 11 (who argues that sugar price levels 10-20% higher than intervention prices are due to collusion by sugar processing firms). See also Swedish Competition Authority, *Sweet Fifteen: The Competition on the EU Sugar Markets*, 80-88 (available at http://www.konkurrensverket.se/upload/Filer/Trycksa ker/Rapporter/rap_2002-7.pdf, visited on 20.04.2014).

[5] OECD, *Sugar Policy Reform* (*supra* n3) 28. On the tensions and potential conflicts among sugar growers and millers, see Larson & Borrell 'Sugar Policy and Reform' (supra n4), 14-15.

[6] Swedish Competition Authority, *Sweet Fifteen* (supra n5) 57

[7] Apart from the investment costs of building a sugar-processing factory (that cannot be far away from growers as sugar beet or cane need to be processed shorty after harvested to maximize sugar content), which can be substantial [see D Genesove & W P Mullin, 'Testing static oligopoly models: Conduct and cost in the sugar industry, 1890-1914' (1998) *RAND Journal of Economics* 29(2): 355-377, 360-361] there are protectionist interventions and quotas what draw borders in these markets, and make them geographically of national scope. See Strand, 'Tacit collusion in the EU Sugar Markets', 14. This seems to be a frequent feature of international cartels, see M Levenstein & V Y Suslow, 'Contemporary International Cartels and Developing Countries: Economic Effects and Implications for Competition Policy' (2004) *Antitrust Law Journal* 71: 801-852, 823-824 ('*to use the state as a tool for creating barriers to entry'*).

[8] On the high concentration of sugar markets, see OECD, *Sugar Policy Reform* (*supra* n3), 100-101. Although it could well be that some sugar markets are infra-national, "*since production quotas in the EU are determined at the Member State Level, it is all too easy without further thought to accept the Member State as the relevant geographical markets*" Swedish Competition Authority, *Sweet Fifteen* (supra n5) 42. On one of the few cases

Naturally, sugar markets can be distinguished depending on the use they make of sugar. Sugar in its different varieties (white granulated, liquid and specialty) can be sold to end-consumers, that being a market in itself; however the vast majority of sugar produced is used in other industries. Moreover, there are several sugar-using industries, mainly drink and food processing industries, some of which use sugar as one of their main inputs (in chocolate, biscuit and confectionary industries it accounts for up to 40% cost of final product), but also chemical and pharmaceutical industries.

Besides, several features of sugar as a homogeneous product, and the price-inelastic nature of sugar markets on both the supply and demand sides, together with the concentrated and transparency of the market (through production quotas and intervention prices) facilitates collusion.[9]

Moreover, concerning particularly with the industrial use of sugar, industrial buyers find themselves in a weak position vis-à-vis producers when bargaining for their sugar supply needs. In many occasions sugar is an input they cannot do without (*ie* it cannot be substituted with other sweetener natural or artificial). Indeed, some evidence points that producers charge their prices following official prices' lists without room for any bargaining (identical discounts being applied).[10] Thus, strong supplier power leads industrial buyers to be dissatisfied with prices paid to producers (perceptions of margins being unreasonably too high) and without alternatives available.[11]

Case law and reports in several countries are telling of the anti-competitive risk present in sugar markets (US,[12] Colombia,[13] India,[14] Kenya,[15] Korea,[16] Pakistan,[17] South Africa,[18] Zimbabwe)[19] and the

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where a subnational market was considered by the European Commission, see ¶¶26-31 of Decision of 20 December 2001, IV/M.2530 *Südzucker/Saint Louis Sucre*, OJEU L105 of 24.04.2003, 1-35.

[9] See Strand, 'Tacit collusion in the EU Sugar Markets' (*supra* n5), 5-6 (average price elasticity of demand is 0.21; '*in seven of fourteen sugar producing Member States, only one producer holds the entire sugar production quota*') and 15 ('*by subsidizing exports and the keeping of stocks the CMO Sugar provides a retaliatory mechanism enabling firms to use the threat of shifting quantities from exports or stocks to sales within the Union'*). See also J M Connor, 'The Food and Agricultural Global Cartels of the 1990s: Overview and Update' *Staff paper* 2/2002, Dept. of Agricultural Economics, Purdue University (available at http://www.agecon.purdue.edu /staff/connor/papers/SP_02_4.asp, visited on 20.04.2014) 7.

[10] Swedish Competition Authority, *Sweet Fifteen* (*supra* n5) 58-59.

[11] Id., 60-62

[12] See A S Eichner, *The Emergence of Oligopoly: Sugar Refining as a case Study* (John Hopkins University Press: Baltimore 1969) and R Zerbe, 'The American Sugar Refinery Company, 1887-1914: The Story of a Monopoly' (1969) *Journal of Law & Economics* 12(2): 339-375. See U.S. Supreme Court judgment of 30 March 1936, *Sugar Institute, Inc. v. United States*, 297 U.S. 553 (1936) concerning a collusive agreement instrumented through the trade association, commented by J L Fly, 'Observations on the Anti-Trust Laws, Economic Theory and the Sugar Institute Decisions I and II' (1936) *Yale Law Journal,* June, 1339-1372 (and December, 228-254). See also, a detailed explanation concerning the information exchange arrangement and its enforcement by D Genesove & W P Mullin, 'The Sugar Institute Learns to Organize Information Exchange', in N R Lamoreaux, D M G Raff & P Temin (eds.), *Learning by Doing in Markets, Firms, and Countries* (1999 University of Chicago Press) 103-144 and D Genesove & W P Mullin, 'Rules, Communication, and Collusion: Narrative Evidence from the Sugar Institute Case' (2001) *American Economic Review* 91(3): 379-398.
Given the increasing trend to concentration, it is not surprising that a lot of litigation in the U.S. has taken place in the merger review context, see Judgment of the U.S. Supreme Court of 21 January 1895, *United States v. E. C. Knight Co.* ("Sugar Trust case"), 156 U.S. 1 (1895) and Judgment of the U.S. Court of Appeals of the 2nd

EU has not been an exception.[20] Early evidence of collusion was subject of the famous *Suker Unie* case[21] and even few months ago the European Commission undertook several inspections at the

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Circuit of 1 October 1958, *American Crystal Sugar Company v. Cuban-American Sugar Company,* 259 F. 2d 524.

[13] See '¿Hay un cartel de azúcar en el país?', Semana, 16 March 2013 (available at http://www.semana.com/economia/articulo/hay-cartel-del-azucar-pais/337010-3, visited on 20.04.2014). See also J Cortázar-Mora, 'The Colombian Competition Authority modifies the original terms of the opening of proceedings in an investigation of a possible cartel agreement involving twelve sugar mills, two distributors owned by the sugar mills and the trade association that groups them (Sugar cartel investigation)', *Bulletin e-Competitions* April 2013, 52515.

[14] Competition Commission of India, Order 30 of November 2011, 1/2010, *In re Sugar Mills* (available at http://www.cci.gov.in/May2011/OrderOfCommission/SUGAR%20CASE%20NO.%2 01-2010%2030.Nov%202011.pdf, visited on 20.04.2014).

[15]See Kenya Anti-corruption Commission, *Review of the Policy, Legal and Regulatory Framework for the Sugar Sub-Sector in Kenya. A Case Study if Governance Controversies affecting the Sub-Sector*, February 2010 (available at http://www.eacc.go.ke/docs/sugar-report.pdf, visited 20.04.2014).

[16] See S R Yun, K J Son, I S Choi & S H Han, 'Korea', in I K Gotts (ed), *The Private Enforcement Competition Review* (2002: Law Business Research, London) 259-269. Indeed, in 2007 an informant received 210 million won for information about a sugar cartel, see D D Sokol & A Stephan, 'Prioritizing Cartel Enforcement in Developing World Competition Agencies', in D D Sokol, T K Cheng & I Lianos (ed), *Competition Law and Development* (Stanford University Press: 2913) 137-154, 147-148.

[17] See Competition Commission of Pakistan, *Enquiry Report on Collusive Practices in the Sugar Industry*, 21 Oct. 2009, S B Gilani & S U Javed (available at http://www.cc.gov.pk/images/ Downloads/enquiry_reports/enquiry_report_october_2009.pdf visited on 20.04.2014) and *Sectoral Analysis of Sugar Industry with Special Reference to Price Hike*, Syndicate nº 4, S Zareen, Directorate General of Training and Research (Inland Revenue) Lahore (available at http://www.dgtrdt.gov.pk/Research/37th_synndicate_%20rports/4.pdf, visited on 20.04.2014) .

[18] Competition Commission of South Africa 'Should the Competition Commission be bitter about the sugar industry in South Africa?' (2000) *Competition News*, September, 5-6 (available at http://www.compcom.co.za/assets/Uploads/AttachedFiles/MyDocuments/Dec-00-Newsletter. pdf, visited on 20.04.2014).

[19] K Laschinger, 'End of the road for sugar cartel?', *Finance Week* 8 November 2003, 38.

[20] Apart from the Spanish case which motivates this article, concerted practices against TFEU article 101.1 have been found in the British market from 1986 to 1990 [Commission Decision 1999/210/EC of 14 October 1998, Case IV/F-3/33.708-*British Sugar Plc*, Case IV/F-3/33.709-*Tate & Lyle Plc*, Case IV/F-3/33.710-*Napier Brown & Company Ltd*, Case IV/F-3/33.711-*James Budgett Sugars Ltd* (OJUE L76, 22.3.1999, 1-66), mostly confirmed by the Judgments of the General Court of 12 July 2001, T-202/98, T-204/98 and T-207/98, ECR II-2035 and of the Court of Justice of the EU of 29 April 2004, ECR I-4951], in the Belgian and Dutch markets from 1981 to 1989 [Commission Decision of 19 December, Case IV/32.414-*Sugar beet* (OJUE L31, 02.02.1990, 32-45)]. Likewise, the Austrian Bundeswettbewerbsbehorde (BWB) found a cartel formed by Sudzucker and Agrana (in which Sudzucker holds a stake of about 37.75%) on sugar products in the Austrian market from 2004 to 2008 (BWB/K-191 Zuckerkartell). Finally, the Hungarian Competition Authority (*Gazdasági Versenyhivatal*) investigated a possible cartel operating in the Hungarian sugar industry from 2003 to 2009 involving Agrana Magyarország Értékesítési Kft, Eastern Sugar Cukoripari Zrt, Mátra Cukor Mártavidéki Cukorgyárak Zrt, Magyar Cukorgyártó és Forgalmazó Zrt and Eurosugar SAS but terminated the case in 2012 in part because new legislation adopted permitted cartels of agricultural producers (see http://www.gvh.hu/en//data/cms998123/sk_2012_12_21_megsz% C3%BCntet%C3%A9s_cukorkartell_a.pdf and A Reger, 'The Hungarian Competition Authority puts an end to a long running investigation into a possible cartel infringement by sugar producers' (2012) *e-Competitions*, 52244).

premises of companies active in the sugar industry in several Member States suspecting of a violation of TFEU article 101 in relation to the supply of white sugar.[22] Recently, the *Bundeskartellamt* has sanctioned a cartel agreement of sugar producers in Germany.[23]

On the other hand, the highly concentrated character of this industry, which makes sugar producers dominant players in their respective markets has also lead to several enforcement actions based on TFEU article 102.[24] The transactions that led to the consolidation of the industry had also prompted merger review proceedings both at EU and national member States level.[25]

2. The Spanish Sugar Cartel (1995-1996)

The prior description of the sugar producing industry applies also to the Spanish market, which features the same issues and problems indicated thereto.[26] Indeed, one could well assume that the anticompetitive features present elsewhere may well be more pronounced in the Spanish case.[27]

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[21] See Judgment of 16 December 1975, 40/73 to 48/73, 50/73, 54/73 to 56/73, 111/73, 113/73 and 114/73, *Suker Unie* [1975] ECR 1663. The EU Court of Justice confirmed most of the holdings by the European Commission in its Decision 73/109/EEC of 2 January 1973, IV/26.918 *European sugar industry* (OJ L140, 26.5.1973, 17-47) which found practices in breach of TFEU articles 101 and 102 in the sugar industry in Belgium, France, Italy, Germany and Holland. See A Dashwood, G Diana, H Laddie G I F Leigh, 'The Sugar Industry Marathon' (1976) *European Law Review*, 479-499.

[22] See 'Antitrust: Commission confirms unannounced inspections in the sugar sector' (available at http://europa.eu/rapid/press-release_MEMO-13-443_en.htm, visited on the 20.04.2014). On 4 February 2014 the investigation was closed due to lack of evidence, see A White & I Almeida, 'EU Shuts Sugar Price-Fixing Investigation on Lack of Evidence', *Bloomberg News*, 19 February 2014 (http://www.bloomberg.com/news/2014-02-19/eu-shuts-sugar-price-fixing-investigation-on-lack-of-evidence.html, visited on the 20.04.2014).

[23] See S Szentesi 'The German Competition Authority finds that the sugar cartel agreement has been implemented under the umbrella of the national industry association (Ofeifer/südzucker/Nordzucker)' (2014) *e-Competitions* 63959.

[24] See Commission Decision 88/518/EEC of 18 July 1988, Case IV 30.178 *Napier Brown -British Sugar* (OJ L 284 of 19.10.1988, 41-59) and Commission Decision of 14 May 1997, Case IV34.621, 35.059/F-3- Irish Sugar, plc. (OJL258 of 22.09.97, 1-32) concerning discriminatory pricing in the sugar retail and industrial markets of granulated sugar by Irish Sugar (which had market share in Ireland from 1985-1995 above 85-90%), mostly confirmed by Judgment of the General Court (Third Chamber) of 7 October 1999, *Irish Sugar plc v Commission of the EC*, Case T-228/97, ECR 1999 II-02969. Appeal dismissed by ECJ Order of July 10, 2001, Case C-497/99 P. ECR 2001 I-05333. Indeed, recently Napier Brown complained to the UK's OFT that British Sugar has broken competition rules by halting supplies of sugar in contravention of the 1988 Decision (that fined British Sugar and obliged it to honour certain supply conditions). This formal complaint will be dealt with by the new CMA, after it took over from the OFT on 1 April 2014.

[25] See Commission Decisions of 30 September 1991, IV/M.062-Eridania/ISI, of 20 December 2001, IV/M.2530 *Sûdzucker/Saint Louis Sucre* (*supra* n8). Merger decisions on this industry have been adopted in every Member State (and there are too many and mostly of little interest to be listed herein) but controversial ones have been those in Italy, the Netherlands and Serbia.

[26] See the Spanish DCT 1998 report assessing the merger of EBRO and AZUCARERA (report C31/98), two of the firms later found to be involved in the Spanish Cartel. Curiously, in their appeals of the fines imposed by DCT

Indeed, following a claim filed by several business associations involved in the confectionery business in Spain, a cartel on the sale of sugar for industrial production organized by the main four manufacturers of sugar (EBRO AGRÍCOLAS, SOCIEDAD GENERAL AZUCARERA, ACOR and AZUCARERAS REUNIDAS) was uncovered and punished by the Spanish competition authorities in 1999.[28]

After an investigation of more than two years, the Defence Competition Tribunal (DCT) found evidence that these four firms had colluded the sugar prices and sale conditions and divided the market geographically among them, in violation of article 1 of the Spanish Competition Act and TFEU article 101.1.[29]

Looking at the evolution of sugar prices in Spain in 1995 and 1996, the DCT found proof of several collective decisions of raising the prices of sugar that departed from what could have been expected looking at the intervention prices set within the CMO (in one case also a price decrease).[30] Sugar market price behaviour in Spain in that period did not reflect changes in the production or input costs, with the four producers mentioned above setting a common base price in a clear and blatant violation of competition law.

Moreover, if that would not have been enough, after inspections in the premises of the companies subject to investigation, additional written evidence was found of anticompetitive agreements among the four firms and of collective decisions tinkering with sugar market prices, with the producers'

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resolution of 15th April 1999 (426/1998), they alleged the nullity of the resolution as it was addresses to two inexistent firms (due to the merger); the National Court (Administrative Ch- Sect.6) judgment of 13 September 2009 rejected this argument

[27] Unearthing the historical origins of the stronger (and many) anticompetitive features of the Spanish sugar industries, see J S McGee, 'Government intervention in the Spanish Sugar Industry' (1964) *Journal of Law & Economics* 7: 121-172, 135 ('*Whenever competition threatened it was throttled by cartels, mergers, and – perhaps most importantly- direct government intervention*'). In the last few years the concentration trend indicated above has further reduced the number producers in the Spanish market. In 2007 the market shares were the following: AZUCARERA EBRO 75%, ACOR 17% and ARJ 8% [See *Defence Competition Service Assessment* Azucarera *Ebro-sugar business of DAI of 22 March 2007*, 15 and Swedish Competition Authority, *Sweet Fifteen (supra* n5*) 51-52*] which also mentioned that ARJ was abandoning the market]. See V Maté, 'Los italianos dejan el azúcar', *El País*, 9 April 2006 (available http://elpais.com/diario/2006/04/09/negocio/1144587816_850215.html, visited on 20.04.214). Nowadays EBRO is probably monopolist producer in the centre and south of Spain, and has a 75% market share in the North (ACOR holding the remaining 25%).

[28] While the enforcement action was taking place, EBRO AGRÍCOLAS merged with SOCIEDAD GENERAL AZUCARERA, further increasing the level of concentration in the industry. The Spanish Government approved the transaction on October 1998 subject to several conditions, which had been recommended by the DCT in its assessment *(supra* n27), see OJ 249 of 17 October 1998, 34461-34462.

[29] Article 1 of the Spanish Competition Act is the equivalent of TFEU article 101.1 with not many relevant differences. Although the initial enforcement action involved the producers association (ASOCIACIÓN GENERAL DE FABRICANTES DE AZÚCAR DE ESPAÑA-AGFA) and also considered a potential violation of TFEU article 102 (though an abuse of joint dominant position in the market) none of the two were confirmed in the final decision. The complainants reiterated their abuse of dominance claim in their appeal of the DCT decision in the National Court (Administrative Ch-Sect. 6), though it was rejected by judgment of 3 June 2003.

[30] DCT resolution of 15 April 1999 (426/1998) 90-93. More precisely, there were two rises on February 1995 of 4 ptas./kg and April 1995 of 4 ptas./kg, a reduction in price of 2 ptas./kg in September 1995 and an additional rise of 1 pta./kg in May 1996.

agreements and decisions coinciding with the anomalous sugar price changes detected by the DCT.[31] The DCT found evidence of information exchanges among the firms preceding the agreements that lead to the changes in sugar prices, which together with the oligopolistic structure of sugar production in Spain lead to the conclusion that producers formed a cartel.[32] Of course, cartel members repeatedly argued that their behaviour was justified by the CMO and the CAP, and/or influenced by the restructuring measures of the sugar production industry instigated by the Spanish ministry of agriculture when Spain entered the EEC in the 1980s', but the DCT (and later the courts) rejected these arguments.[33]

Apart from the price-fixing, the DCT found also proof of market allocation agreements among the four firms, through the 'transfer' of the existing production quotas (due to the sugar CMO) to sugar sale quotas in the market, compensating among themselves for eventual excesses or deficits, and having all of them the commitment not to serve clients that belonged to other cartel members.[34] Additionally, there was evidence of the joint efforts taken by cartel members to prevent and control sugar imports and to limit production to be ensure the effectiveness of price levels agreed.

The enforcement of the price-fixing and the market allocation agreements could be guaranteed by the continuous exchange of detailed production information, sales and forecasts.[35] Through this well organized and support system, cartel members could anticipate and agree beforehand on sugar price changes in the market.[36]

Of course, there was evidence of several instances in which customers found out they were paying more than their EU counterparts from their basic sugar inputs, customers making clear their annoyance to cartel members.[37] In addition to already higher sugar prices in the EU due to the CAP (which makes them be twice more expensive than world market prices)[38], prices in Spain used to be higher than rest

[31] DCT resolution (*supra* n31) 10-12 and 93-94.
[32] In many cases a positive association has been found between industry concentration and likelihood of collusion/ cartel formation, M C Levenstein & V Y Suslow, 'What determines cartel success?' (2006) *Journal of Economic Literature* 44/1: 43-95, 58-61 (the role of the existing industry/trade associations being found also relevant).
[33] Much to the contrary, and as recurrent cartels in agricultural goods in Spain (and elsewhere) seem to show, the CAP and CMOs (and/or the equivalents used in other countries) provides a structure (repeated interaction, transparency, artificial-regulatory barriers to entry, etc.) in which collusion seems to be a likely outcome. For an example taken from U.S. experience, see E Hoffman & G D Libecap, 'The Failure of Government Sponsored Cartels and Development of Federal Farm Policy' (1995) *Economic Inquiry* 33: 365-382. Indeed, according to Connor, 'The Food and Agricultural Global Cartels of the 1990s' (*supra* n10) 19 '*The number and size of international cartels in food and agricultural markets far outweighs the cartels discovered in all other markets'*.
[34] DCT resolution (*supra* n31) 19-22.
[35] DCT resolution (*supra* n31) 23-25.
[36] For more details on the inter-relationships between information, communication and collusion for cartels' stability see J E Harrington Jr, `How do cartels operate?' (2006) *Foundations and Trends in Microeconomics* 2(1): 1-105, 43-72 and M Levenstein & V Y Suslow, 'Cartel Bargaining and Monitoring: The Role of Information Sharing', in Konkurresverket, *The Pros and Cons of Information Sharing* (Swedish Competition Authority: Stockholm 2006), 8-48.
[37] DCT resolution (*supra* n31) 54.
[38] OECD, *Sugar Policy Reform* (*supra* n3) 68. Of course, it should be taken into account also that EU market Price support measures also artificially depress world sugar market prices, production and trade; creating further distortions in the sweetener market (id. 44). See also A Schmitz 'The European Union's high-priced sugar support-regime', in A Schmitz, T H Spreen, W A Messina & C B Mos (eds), *Sugar and Related Sweetener*

of EU, and price increases in 1995 and 1996 did not reflect changes in production costs (being 5-10% higher in Spain).[39] The DTC decision showed further evidence of the relevance of sugar as an input in confectioners business, with calculations of the overcharges that Spanish confectioners were experiencing in comparison to their French and UK rivals.[40] In the end, the sugar producers were sanctioned with fines totalling €8.74 million.[41]

Markets: International Perspectives (2002 Wallingford: CAB International) 193–213, 210 (the direct cost to EU consumers of this highly protectionist regime would amount to €6,500 million per year).

[39] DCT resolution (*supra* n31) 59 (Ebro repeatedly acknowledged a price differential of 2,5-3% but due to Spanish productivity gap).

[40] DCT resolution (*supra* n31) 72-73 and 118 further limiting their suitability to being exported [to which a substantial part (15-45%) of the production was generally aimed].

[41] At that time 1,455 million pesetas (€8,744,726.119). The case is reported in OECD, *Hard Core Cartels*, 2000, 22 (available http://www.oecd.org/competition/cartels/2752129.pdf visited on 20.04.2014). The DCT resolution was confirmed in seven separate judgments both by the National Court (four) and by the Supreme Court (three). See National Court Judgements (administrative Ch., Sect.6) of 4 July 2002 (ACOR); 13 September 2002 (EBRO); 6 of May 2005 (ARJ) and 3 of June 2003 (complainants). See Supreme Court Judgments (administrative Ch., Sect. 4) of 26 April 2005 (EBRO); of 26 April 2004 (ACOR) and of 22 March 2006 (ARJ).

3. Damages claims in the Spanish Sugar Cartel

Damages caused by the Spanish sugar production cartel uncovered by the DCT exceeded €25 million.[42] For that reason, once the DCT decision was confirmed by the Supreme Court some confectioners filed damages claims against EBRO FOODS and ACOR, the two main cartel members.[43] Confectioners were the main force behind public enforcement and it was natural to expect that they would initiate also private actions aimed at obtaining compensation for the harm caused by the cartel.

For private litigation to begin, together with the DCT resolution, individual confectioner firms presented in court expert economic reports calculating the harm suffered by them in the 1995 and 1996, while the cartel was in operation. The damages claimed by confectioners refer only to the amount of the cartel mark-up during that period. Against that defendants opposed that the claimants did not suffer the harm in the alleged sugar price mark-up as would have passed it onto consumers and also that the one-year statute of limitation for this type of claims had lapsed (article 1978.2 of the Spanish Civil Code).[44] Defendants also denied the existence of harm and questioned the damages calculation made by the plaintiffs.

All the court judgments delivered by the courts in the case were appealed by the defendants in all the instances but, at the end, damages awards totalling more than €5 million were successfully confirmed by the Supreme Court.

These actions have been the most relevant follow-on competition litigation on a cartel case conducted in Spain to date.[45] In practice, there were organized as two different sets of claims, which followed two different proceedings and reached to separate final judgments, depending on the court they were filed -Madrid or Valladolid- (see the sequence from initial claim to different judgments in Table 1).

TABLE 1. PRIVATE ENFORCEMENT IN THE SPANISH SUGAR CARTEL

VALLADOLID CLAIM	DATE	DAMAGES (€)	SUCCESS (%)
Plaintiffs Suit	20 April 2007	Claim of 900,264.66+ interests accrued since suit	

[42] Overall harm estimation from sugar cartel was €25,2 million see OECD, *Fighting Hard Core Cartels: Harm, Effective Sanctions and Leniency Programs,* 2002, 97 (available at http://www.oecd.org/competition/cartels/2474442.pdf, visited on 20.04.2014), though no explanation is given of where this figure comes from.

[43] ARJ abandoned the market in 2006 (*supra* n 26), and there is no evidence at all that any claim was filed against it.

[44] Once the Supreme Court (administrative) confirmed DCT resolution on April 2005, the claimants sent extrajudicial claims to both ACOR and EBRO (both in 2005 and 2006) which according to Spanish Law allowed the statute of limitations not to lapse (article 1973 of Spanish Civil Code). For this reason the Madrid judgment of first instance nº 50 of 1 march 2010 rejected this argument.

[45] See S Vande Valle, *Private Antitrust Litigation in the European Union and Japan* (Maklu: Antwerpen 2013) 230 (describing it as one of the leading cases in Europe) and Marcos (2013) *Global Competition Litigation Review (supra* n2) 179.

		was filed+ legal expenses	
1st instance (nº 11)	20 February 2009	0 (unsuccessful)	0
Provincial Court (Sect. 4)	9 April 2009[46]	900,264.66+ interests accrued since suit was filed+ legal expenses	100
Supreme Court (Civil Ch.)	8 June 2012	900,264.66+ interests accrued since suit was filed+ legal expenses	100

MADRID CLAIM	DATE	DAMAGES (€)	SUCCESS (%)
Plaintiffs Suit	26 April 2007	4,060,119.81+ interest accrued since suit was filed+ legal expenses	
1st instance (nº 50) nº 59/2010	1 March 2010	2,030,059,90 + interest	50 (partial)
Provincial Court (Sect. 8) nº 370/2011	3 October 2011	0 because passing-on occurred	0
Supreme Court (Civil Ch.) nº 651/2013	7 November 2013	4,060,119.81+ interest accrued since suit was filed+ legal expenses	100

In November 2013 the Supreme Court decided the damages claims filed in Madrid by fourteen confectioner firms against EBRO FOODS, awarding them more than €4 million (€4,060,119.81 plus interest accrued since the suit was filed on the 26 of April 2007 and legal expenses).[47] On the other hand, as it was mentioned before, a similar claim was filed by nine confectioners against ACOR in Valladolid,[48] which was finally decided by the Supreme Court on June 2012, condemning ACOR to pay more than €900.000 (€900,264.66 plus interests accrued since the suit was filed on the 20 of April 2007 and legal expenses)[49].

[46] See P Perez, 'A Spanish Court provides for the first time ever for compensation of damages caused by a cartel (Sugar Cartel)' (2007) *e-Competitions* 40557.
[47] See Supreme Court Judgment of 7 November 2013, *Nestlé et al. v. Ebro Foods* (STS 5819/2013).
[48] Four of the claimants coincided with the plaintiffs in the other (Madrid) case: NESTLÉ, ZAHOR, MAZAPANES DONAIRE and LA CASA.
[49] See Supreme Court Judgment of 8 June 2012, *Galletas Gullón et al. v. ACOR* (STS 5462/2012); referred by P Pérez, 'The Spanish Supreme Court confirms the Judgment of the Valladolid Provincial Court in the sugar cartel (Nestlé, Gullón, Zahor)' (2012) *e-Competitions* 49040 and further commented by P Pérez & T Schreiber, 'Case Comment: Judgment of the Spanish Supreme Court in ACOR (344/2012) June 8, 2012', *Global Competition Litigation Review*, vol. 1/2013, pages 37-41.

The judgments by the Supreme Court in this case are well founded and cover several relevant legal issues that may be crucial for future damage claims in antitrust cases and which are worth commenting. They touch upon several relevant issues some of which are also dealt with by the EU Proposed Directive on Damages.[50]

4. Lessons for future private claims

Following the case of law of the EU Court of Justice,[51] the Spanish Supreme Court has awarded all the compensation that was claimed by the victims of the sugar cartel, ruling on various issues that may be relevant for private competition litigation in the future. Compensation was awarded on the understanding that the claimants were victims of a tortious action of the defendants: it was their behaviour as participants of the cartel that gave rise to the plaintiffs' cause of action.[52]

On the other hand, the Supreme Court faced some of the typical issues raised on cartel follow-on damages claims, regarding the existence and causal link to the harm caused by the sugar cartel, and also the damages' calculation. In particular, the Supreme Court clarified the link between follow-on private enforcement claims and decisions taken by competition authorities (*infra* §4.1). Additionally it made some relevant considerations concerning the measurement and calculation of damages and the role of expert testimony for that purpose (*infra* §4.2). And finally, it ruled on the passing-on defence opposed by cartel members, which alleged that the plaintiffs (confectioners) had passed-on the cartel overcharge to their customer (*infra* §4.3).

4.1 Relevance for private enforcement of prior public enforcement decisions

Follow-on claims tend to have higher success rates,[53] as they benefit from the prior investigations and holdings made by the competition authorities. Binding force of European Commission decisions is set by EU Regulation 1/2003 (article 16) but that is not (yet) the case with the decisions of member States' competition authorities.[54]

[50] See *Proposal for a Directive of the European Parliament and of the Council 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*, COM (2013) 404 final- 2013/0185 (COD).
[51] See EU Court of Justice judgments of 20 September 2001, *Courage v Crehan*, C-453/99 ECR [2001] I-6314 and of 13 July 2006, *Manfredi,* joined cases C-295/04 to C-298/04 ECR [2006] I-6619.
[52] Excluding that there was a case of contractual liability/validity, see Legal Ground 12nd of Supreme Court Judgment of 8 June 2012 (supra n50). On this alternative, see M P Bello, 'Una explicación sobre la posibilidad de alegar responsabilidad contractual en acciones de daños derivados de infracciones de la LDC: A Propósito del caso «Acor»', in J A Gómez & A García (ed), *El derecho mercantil en el umbral del siglo XXI. Libro homenaje al Prof. Dr. Carlos Fernández-Novoa con motivo de su octogésimo cumpleaños* (M Pons: Madrid 2000) 265-270.
[53] See Marcos (2013) *Global Competition Litigation Review (supra* n2) 170 (compared to a overall success rate of 26%, follow-on success rate is much higher: 66.7%).

In the Spanish sugar cartel case, the private claims followed a prior decision by the DCT, confirmed by review courts, (see *supra* §3) and the final civil decision by Supreme Court includes relevant considerations on the effect prior public enforcement decisions might have in private litigation.[55] For that purpose, the Supreme Court distinguishes the facts and their legal assessment by the competition authorities, from other *dicta* that judgments made in the public enforcement arena related to potential private claims. The rationale in which the Supreme Court makes this consideration is that of procedural efficiency and legal certainty (which run against re-litigation of the facts).[56]

Firstly, concerning the factual evidence and their assessment, the Supreme Court clearly holds that, the anti-competitive conduct which was subject to the public enforcement sanctions is at the root of any future compensation claims by the victims and, therefore, all the factual evidence in that regard and concerning its unlawfulness is very useful for private enforcement purposes:

> "*The factual scenario to which the both public and private enforcement relate, as to the existence of a practice restrictive of competition, is the same one, because the private claim in the civil jurisdiction is seeking the compensation of damages caused by the cartel whose performance was the subject of the judgment of the administrative jurisdiction that punished the anti-competitive behaviour from the public enforcement perspective*".[57]

Secondly, however, any holding by the public enforcement authorities concerning causation and damages calculation, should be ignored, given the different nature and scope of public and private enforcement. In this regard, as the Supreme Court assumes that the cartel punished by the public enforcement authorities led to an overcharge that negatively affected confectioners' costs, raising

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[54] Article 9 of the Proposed Directive (*supra* n51) would change that. See C Esteva, D Calisti & L Haasbeek, 'Towards an Effective Right to Full Compensation: The Proposal for a Directive on Antitrust Damages Actions', Anuario de la Competencia 2013: 33-43, 37.

[55] Given that the Madrid Provincial Court had quashed the plaintiffs' claim ignored several of the findings by the DCT related to the existence of a cartel.

[56] Avoiding inconsistency in the application of competition law provisions within public and private enforcement (and the re-litigation of the case), see recital 31 of the Proposed Directive. It is true, that it extends the binding effect to NCA decisions that may still be under review by courts (something that article 13.2 of the 1989 Spanish Defence Competition Act did not permit, see Third Legal ground, section 4 of Supreme Court Judgment of 7 November 2013), see S Grassani, 'The Binding Nature of NCA Decisions in Antitrust Follow-on Litigation: Is EU Antitrust Calling For Affirmative Action', (2013) CPI Antitrust Chronicle 5 ('*If competition decisions are to a smaller or larger extend, immune from judicial review on the merits, damages awarded by a civil judge would become the poisonous fruit of the poisonous administrative proceeding they relate to*').

[57] See Third Legal ground, section 5 of Supreme Court Judgment of 7 November 2013 (*supra* n48). Indeed, this is not very different from what the White paper held (European Commission, *White Paper on Damages Actions for Breach of the EC antitrust rules* COM(2008) 165 of 2 April 2008, 5) . See also C Tudor, 'La admisión de la defensa passing-on en el cartel del azúcar' (2012) *Revista de Derecho de la Competencia y Distribución* 11: 277-291, 287-288. The Madrid Provincial Court had considered prices were result of bargaining, which by definition contradicted the decisions by public enforcement activities ('*by holding that the prices were the result of individual bargaining between the defendant and each of the plaintiffs, it frontally contradicts the facts fixed in the judicial review and it does not include any reasoning that may justify such divergence*'). On this very same point see F Cachafeiro, 'Damages claims for breach of competition law in Spain' in H Rosenau & T Van Nghia (eds), *Competition Regime: Raising issues and lessons from Germany*, Nomos 2014, 6 (in press).

them, but it rightly considers that the power of public enforcement authorities "*did not reach the issue of the impact of damage by direct buyers to their customers*". It is only in the private enforcement setting by civil courts that it can be decided "*who had suffered injury and exactly how much*".[58]

4.2. Damages calculation

The calculation of damages caused by anti-competitive actions is one of the most complex issues faced by private competition law claims.[59] Civil judges and courts are frequently criticized for their lack of knowledge and expertise on these matters,[60] though normally parties provide them with expert opinions supporting the damages they seek. The difficulties raised by these issues have pushed the European Commission to adopt a Communication on quantifying the harm in actions for damages based on breaches of TFEU articles 101 or 102 accompanied by a Practical Guide.[61]

In this case, at least for the Madrid claim, plaintiffs presented together with their suit a damages' estimate by NERA,[62] which was confronted by a rebuttal of defendants by COMPASSLEXECON,[63] which alleged not only the inexistence of the overcharge claimed, defects in the damages calculation and passing-on of it to the confectioners customers.

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[58] Id. In this point the holding by the Supreme Court is ultimately related to the issue of the possible passing-on of cartel overcharge, analysed *infra* §4.3.

[59] For an account of the (little) experience on the matter in Spain, see J Delgado & E Pérez, 'Economic evidence in private-enforcement competition law in Spain' (2011) *ECLR* 32/10: 507-512. One of the most controversial cases to date was decided by Judgment of Provincial Court of Madrid (Sect. 28) of 25 May 2006, *Conduit Europe v. Telefónica*, see M Martínez-Granado & G Siotis, 'Sabotaging Entry: An Estimation of Damages in Directory Enquiry service Market' (2010) *Review of Law & Economics* 6/1: 1-57.

[60] See F Diez, 'Resarcimiento de daños en la aplicación del Derecho antitrust: ¿La gran asignatura pendiente? Análisis de jurisprudencia reciente' in P Velasco San Pedro et al. (dir.), *La aplicación privada del Derecho de la Competencia* (Lex Nova, Valladolid 2011) 215-228, 228. In this case the arbitrariness that may exist in damage calculation is well seen in the judgment of the Madrid court of first instance of 1 March 2010, which reduced the award to half of the amount claimed by the plaintiff on the "*reasonable basis*" than the defendants' expert had affirmed that in any case, if causality existed, damage could exceed 50% of what the plaintiff was claiming. Critically, when the Supreme Court finally ruled on the issue considered this outcome to be a '«Salomonic» solution lacking necessary justification' (Seventh Legal Ground. Section 4 of Supreme Court Judgment of 7 November 2013).

[61] See Communication from the Commission on quantifying harm in actions for damages based on breaches of Article 101 or 102 of the TFEU, C(2013) 3440 of 11 June 2013 (Official Journal C167 of 13 June 2013, 19-21) and *Commission Staff Working Document. Practical Guide on Quantifying Harm in Actions for damages based on breaches of Article 101 or 102 of the TFEU*, SWD(2013) 205 (available at http://ec.europa.eu/competition/antitrust/actionsdamages/ quantification_guide_en.pdf).

[62] A presentation by the F Jiménez (at Association of Competition Economist- ACE 2010 Conference, Norwich), who also acted as expert in court, 'Damages in the Sugar cartel in Spain', 12 November 2010 (available at http://www.competitioneconomics.org/ visited on 20.04.2014).

[63] A presentation by N Watson (also at ACE 2010 Conference, Norwich), who also acted as expert in court, 'The Spanish Sugar Cartel', 12 November 2010 (available at http://www.compe titioneconomics.org/ visited on 20.04.2014).

On this point, the Spanish Supreme Court makes several relevant considerations on how to measure damages caused by the cartel. The starting point is the "*impossibility of a perfect reproduction of what would have been the situation if there had been no unlawful conduct*".[64] Given the difficulties and problems existing in establishing the proper hypothetical counter-factual or but-for scenario (although in this case strong intervention of sugar prices by CMO should have made calculation of the cartel-free prices simpler), the court sets the threshold of what should be required to the calculation made in the expert reports prepared by the plaintiffs in these cases: that they "*formulate a reasonable and technically sound hypothesis not founded on erroneous and not testable data*".[65] Thus, it is requiring that the experts' report is based on reliable principles and methodology and those are applied to the facts of the case (that need to be sufficient and accurate) to estimate the harm caused by the cartel.[66]

On the other hand, he general principle of effective and adequate compensation of damages caused by anti-competitive actions implies that is not enough for the defendant to question the accuracy of the quantification made by the plaintiff, it should justify an alternative better-founded and more plausible calculation.[67]

In assessing the specific calculation made by the plaintiff (in this case to calculate the overcharge by Ebro), the Supreme Court positively considers that the report produced by the plaintiff "*is constructed over correct bases (the existence of a cartel and the concerted prices fixed above those that would result from free competition) and it uses a reasonable method, among the several provided by the economic science and accepted by the courts in other countries, for the calculation of damages caused to plaintiffs, as is to estimate what would have happened if the practice restrictive to competition had not occurred practice by examining the immediately preceding period, taking into consideration prices of sugar in the period immediately before the beginning of the cartel activity, modulating them according to changes in production costs over the performance period that the cartel lasted (specifically, the price of beet, which accounts for 58 % of price of sugar production and storage expenses), not taking into account other costs not considered relevant (for their lower incidence in total manufacturing cost of sugar), and comparing the prices charged by the defendant to each plaintiff during the cartel's operation, divided into the four periods following the different concerted price changes".*[68]

[64] Mirroring ¶16 of *Practical Guide on Quantifying Harm* (*supra* n61).
[65] The Supreme Court is clearly considering the necessary trade-off in damages quantification 'accuracy versus practicality', OECD, *Background Note: Quantification of Harm to Competition by National Courts and Competition Agencies*, DAF/COMP (2011) 25, Nov. 2012, 39-46. At the end, it means, that '*the calculation of damages has to be done on the basis of hypothetical situations that did not occur in reality may justify a greater flexibility in the estimate of damages by the court'* [Seventh Legal Ground, Section 4 of Supreme Court Judgment of 7 November 2013 (*supra* n50)].
[66] And also claimants' standing (see *infra* §4.3) see J E Lopatka & W H Page, 'Economic Authority and the limits of expertise in antitrust cases' (2005) *Cornell Law Review* 90: 617-703684-693
[67] Moreover, this is very consistent with article 16.1 of the Proposed Directive (*supra* n51), which requires Member States to "*ensure that the burden and the standard of proof required tor the quantification of harm does not render the exercise of the right to damages practically impossible or excessively difficult*".
[68] See Seventh Legal ground, section 2 of Supreme Court Judgment of 7 November 2013 (*supra* n48).

The damage calculation by the plaintiffs in this case looked to the *price effects* of the cartel (higher), despite the cartel probably had also major impact in the *quantity* of goods sold (lower).[69] Given that CAP and sugar CMO together with high concentration of the market, price competition would not have been very intense in absence of the cartel, but as no input substitution was feasible for confectioners, their demand for sugar being rather inflexible, they had to pay higher price that they would have had the cartel not existed. Nevertheless, the main reason why the plaintiff calculation probably did not look at the reduction in the consumption was surely that the *quantity effect* was rather felt downstream, by the consumers of sugar-based produced goods (confectionery), who may have bought less of them because of their higher prices as part the cartel overcharge was passed on to them.[70]

In sum, the damage calculation claimed by the plaintiffs included only the cartel mark-up (ie the illegal gain made by cartelists), looking at what competitive prices would have been applicable to their purchases in that period if the conspiracy had not existed. They used for that purpose a *cost-based approach*.[71] In this case, the main input in the sugar production process is sugar beet (58% of the cost), whose price is strongly influenced by regulation and market intervention through the sugar OCM. Damages calculation looked at the anomalous changes in sugar prices that could not be explained by changes in the costs (see Figures 1 and 2 for the graphical representation of damages calculation by plaintiffs' expert). Although, this method may be less reliable in many cases because typically the costs are not independent of the infringement,[72] in this case the operation of sugar OCM and CAP made it independent.

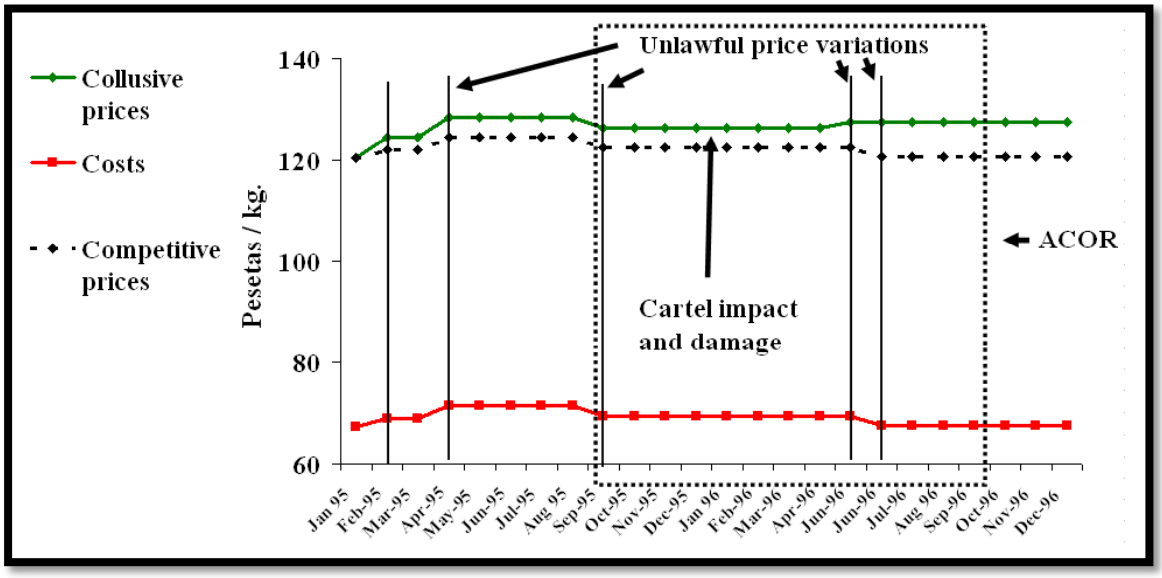
[69] For a clear explanation of this distinction, see F Maier-Rigaud & U Schwalbe, 'Quantification of antitrust damages' in D Ashton & D Henry, *Competition Damage Actions in the EU. Law and Practice* (E Elgar, Cheltenham-Northampton 2013) 210-262, 214-215, they also point out that '*it is usually easier to demonstrate that a higher price has been paid on units of the good bought in contrast to demonstrating that a certain number of goods were not bought but would have been had the price not increased*', and therefore '*quantity effects have often been neglected*' (id 219). See also D L Rubinfield, 'Antitrust Damages' in E R Elhauge (ed), *Research Handbook on the Economics of Antitrust Law* (E Elgar, Cheltenham-Northampton 2012), 378-393, 385.

[70] OECD, *Background Note: Quantification of Harm to Competition (supra n65) 26.*

[71] OECD, *Background Note: Quantification of Harm to Competition (supra n65)* 36 ['*constructs the but-for price "bottom up" by measuring the relevant costs of the affected product and adding a reasonable profit margin (which would emerge under normal market conditions)*'].

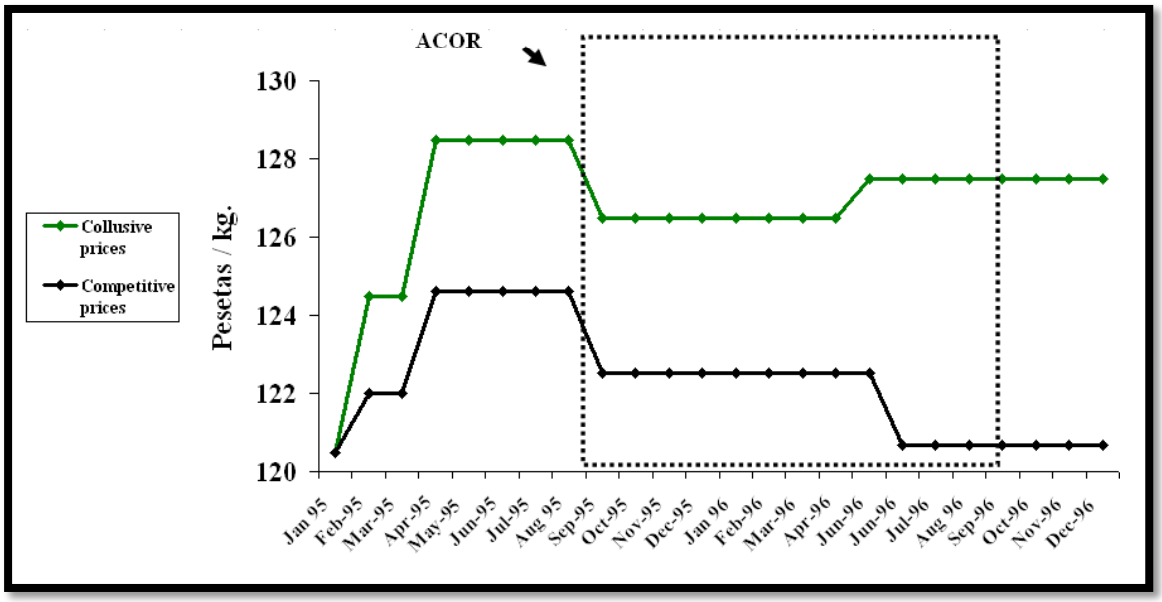
[72] R De Conink, 'Estimating private antitrust damages', in *Competition Damage Evaluation: A Short State of Play* (Concurrences 3-2010) 4-8, 6.

FIGURE 1. DAMAGE CALCULATION MADE BY THE PLAINTIFF I



Source: F Jiménez 'Damages in the Sugar cartel in Spain' (supra n62) 6.

FIGURE 2. DAMAGE CALCULATION MADE BY THE PLAINTIFF I-CLOSE UP



Source: F Jiménez 'Damages in the Sugar cartel in Spain' (supra n62) 7.

Finally, in order to compensate for the present value of the damages, given that the competition infringement and harm thereby occurred eighteen years ago, interests are included in the award. If that were not the case, inflation would end up radically diminishing the purchasing power of the sum once overpaid.[73] In this case the Supreme Court included only statutory interest to be applied to the damages claimed by the confectioners, though it does not meet the requirements of EU Proposed Directive (article 2).[74] The Supreme Court considers the lapse time the suit for private damages was brought to court, whilst the Directive affirms it should be the occurrence of the harm caused by the infringement (*ie* when the historical damages were incurred). The difference between considering one date or the other is not negligible.[75] In this case, the damages were incurred on 1995-1996, and that is the date according to the Directive that should be considered in setting the interest, whilst the court in this case set it more than 10 years later (20 April 2007).

4.3. The passing-on defence

As sugar is an input confectioners use in the manufacturing of their products, defendants opposed that any potential overcharge by the cartel would have been passed-on to the final consumers of the confectionery goods.[76] This defence was also opposed in the US in the massive class action that followed public enforcement actions against the sugar cartel in the U.S. in the 1970s[77], in that case one of the plaintiffs that was a wholesaler of candy, beverage syrup and other products that claimed damages against the sugar refiners (STOTTER) was successful in its claim despite being an indirect purchaser because it bought its products from a firm which was owned by one the cartel members (AMSTAR).[78]

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[73] For a recent and comprehensive treatment of this issue, see E Bueren, K Hüschelrath & T Veith, 'Time is Money- How much Money is Time? Interest and Inflation in Competition Law Actions for Damages', ZEW Discussion Paper nº 14-008, 3 (available http://ftp.zew.de/pub/zew-docs/dp/dp14008.pdf, visited on 20.04.2014).

[74] "*Full compensation […] shall therefore include […] payment of interest form the time the harm occurred until the compensation in respect of that harm has actually being paid*". See also recital 12 of Proposed Directive (*supra* n51) and ¶20 of *Practical Guide on Quantifying Harm* (*supra* n61)

[75] Interest in the €900,264.66 award is €208,189.33 (compounded 234,212.99) and it would had been €802,172.86 (compounded 1,294,130.00) if the date when the violation started (1Feruary 1995) were considered. In the €4,060,119.81 award interest is 938,916.76 (compounded 1,056,281.76) but it would have been 3,617,733.74 (compounded 5,836,414.58) if the 1 February1995 date was considered. These calculations are rough and approximate as more accurate measures would require consideration of different dates (from February 1995 to May 1996) and other information unknown to the author.

[76] One of the arguments used by the Ebro in their defence is that the claimants had recognized in their November 1999 filing before the National Court that they had passed-on the cartel overcharge to their customers (but see *infra* n83).

[77] See Judgment of 21 October 1976 of US District Court E.D. Pennsylvania, *In re Sugar Industry Antitrust Litigation*, 73 FDR 322 (1976).

[78] See Judgment of 3rd Circuit US Court of Appeals of 6 March 1978, *In re Sugar Industry Antitrust Litigation, Stotter & Co., Inc., Appellant, v Amstar Corporation, Borden, Inc., and Its Subsidiaries, Colonial Sugar Company, North American Sugar Industries, Industrial Sugars, Inc., Sugar Refinery of Palm Beach, Inc. (formerly Florida Sugar Refinery, Inc.), Cpc International, Inc, Michigan Sugar Company, National Home*

In the Spanish case the passing-on defence was also used in the public enforcement proceedings to unsuccessfully argue for a reduction of the fine.[79] Moreover, it was this argument that led the Madrid Provincial Court to quash the plaintiffs' claim in 2011[80] and the Supreme Court ruled definitively on the issue in late 2013, revoking the judgment of the Madrid Provincial Court.

On its first decision on the case (in the Valladolid claim), the Supreme Court rejected out of hand the passing-on defence due to lack of proof,[81] on its second judgment (the Madrid claim) the rejection is more elaborate and the construction may have deep implications in future claims. As the Supreme Court began its argument in more fragile grounds in this case (because the passing-on defence had been estimated by the Provincial Court) its construction on this point tries to be more robust and clear-cut: "*for the claim to be successful not only is needed that there was price collusion causing their artificial rise, but also that such harm was not passed-on by the direct purchasers (who are those that now are claiming) to their clients.*"[82]

Naturally, the starting point that there was a mark-up in the price of sugar due to the existence and operation of the cartel, compensation for direct purchasers of sugar should be available unless it was proof that they were not those who suffered the harm (*ie* the harm was transferred to their downstream clients).[83]

Although the Spanish Supreme Court mentions the US case law excluding the passing-on defence (*Hanover Shoe*)[84] and the broad EU discussion on the issue, it deems the case to be solved by tort and basic compensation rules in force.[85] It considers admissible to oppose the passing-on defence to a

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Products corporation, the National Sugar Refining Company, Savannah foods and Industries, Inc & Sucrest Corporation, Appellees, 579 F.2d 13, 18 (1978) ("*True, the price-fixed commodity had been combined with other ingredients to form a different product. But just as the sugar sweetened the candy, the price-fixing enhanced the profits of the candy manufacturer. The situation is the same as if the general contractor which sold the building to the plaintiff in* Illinois Brick *were the manufacturer of the concrete block which went into the structure. In that situation, the concern which the Supreme Court expressed about the proration of overcharge among a number of entities in the chain would not have been present"*).

[79] By ACOR, see National Court (Sect. 6) judgment of 4 July 2002.

[80] See Judgment of Provincial Court of Madrid (Sect. 8) of 3 October 2011, *Nestlé et al. v. Ebro* (JUR/2011/386351) and P. Pérez, 'The Provincial Court of Madrid accepts the passing-on defence in the sugar cartel' (2011) *e-Competitions* 51098.

[81] See 16th Legal ground of Supreme Court Judgment of 8 June 2012 (supra n50), also Fourth Legal ground, section 3 and Fifth Legal ground, section four of Supreme Court Judgment of 7 November 2013 (*supra* n48).

[82] See Third Legal ground, section 6 of Supreme Court Judgment of 7 November 2013 (supra n48). In this point there is a link to the binding force of public enforcement decisions (*supra* §4.1), the Supreme Court rejects any assessment that in the public enforcement arena could have been made on the issue of "passing-on".

[83] Otherwise, there would be overcompensation (or unjust enrichment); so pass-on adjustments on the overcharge would need to be done, see F Maier-Rigaud, 'Towards a European Directive on Damages Actions' (2014) *Journal of Competition Law & Economics*, advance access, *in press*, 5-6.

[84] Judgment of the US Supreme Court of 17 June 1968, *Hanover Shoe Co v United Shoe Machinery Corp*, 392 US 481 (1968), concerning a claim by a shoemaker to the manufacturer of shoe machinery for monopolization (in which the later opposed the plaintiff had not suffered any injury because it had passed on any overcharge in the form of higher prices for its shoes).

[85] The Supreme Court also mentions EU case law on the exception to the principle of refund of taxes incompatible with EU Law based on an unjust enrichment of the taxable person, EU Court of Justice, Judgments

damages claim based on a competition law violation if the harm was transferred downstream "*given that a damages award for a competition law violation is grounded on compensation and that in this area it applies the principle forbidding unjust compensation, it is not reasonable to give damages to whom did not suffer the harm*."[86]

Nevertheless, the Spanish Supreme Court sets the record straight by imposing on defendants the burden of proving the eventual passing-on (in accordance to article 217.3 of the Spanish Civil Procedure Act),[87] but "*it is not enough to show that the direct purchasers have also raised the price of his products. It is necessary to prove that with such rise he has charged on his clients, he has managed to transfer the harm suffered by the price rise because of the cartel overcharge*". And if it was not clear enough that it was somehow elevating the threshold for the passing-on defence to operate and be effective, it continued -on the negative- if "*the price rise did not managed to transfer all such harm because there had been a sales diminution (due that other competitors did not suffer from the cartel action and had gained some market share, nationally or internationally, to those that did suffer it, or because of the demand contraction due to the rise of prices, etc.) the passing-on defence cannot be accepted or cannot be accepted in its totality*".[88]

Apparently, the holding of the Spanish Supreme Court may seem to be in contradiction with article 13 of the Proposed Directive, which reads: "*Member States shall ensure that the defendant in an action for damages can invoke as a defence against a claim for damages the fact that the claimant passed on the whole or part of the overcharge resulting from the infringement of competition law*". However, it's not the case: the Supreme Court is not requiring *whole* passing-on for the defence to be operative,[89] it also provides room for the possibility of the defendant proving *partial* passing-on, the only thing it does in that case is deferring it to a question of proof. And applying that rule to the case, there was a

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of the Court of 14 January 1997, Grand Chamber, *Société Comateb et al. v Directeur général des douanes et droits indirects*, C-192/95 to C-218/95, 1997 ECR I-00165; of 6 September 2011, Grand Chamber Lady & Kid A/S and Others v Skatteministeriet, C-398/09, 2011 ECR I-7375, and of 17 May 2013 (Seventh Chamber, Alakor Gabonatermelő és Forgalmazó Kft. kontra Nemzeti Adó- és Vámhivatal Észak-alföldi Regionális Adó Főigazgatósága, C-191/12 (not reported yet).

[86] Fifth Legal ground, section 1 of Supreme Court Judgment of 7 November 2013 (*supra* n48).

[87] As article 13 of the Directive Proposal requires ("*The burden of proving that the overcharge was passed on shall rest with the defendant who may reasonably require disclosure from the claimant and from third parties*"). On the techniques used for this calculation, see T Van Dijk & F Verboven, 'Quantification of Damages', in *Issues in Competition Law and Policy* (ABA Section of Antitrust Law 2008) 3: 2331-2349, 2339-2344.

[88] Fifth Legal ground, section 3 of Supreme Court Judgment of 7 November 2013 (*supra* n48).

[89] It is true, however, that the force of the argument is put in the whole passing-on defence, but it seems that the Supreme Court was probably doing so in order to enable the claims to be successful, due to the impossibility of compensation to indirect purchasers (confectioners' clients) in case the passing-on defence was accepted. However, the Proposed Directive has a solution for that situation in article 14 when it makes easier indirect purchasers' claims in such situations. Looking at our case, this would have meant that compensation to direct purchasers (confectioners) was due because it would legally be impossible, instead, for indirect purchasers to be compensated. On this point see Esteva, Calisti & Haasbeek, 'Towards an Effective Right to Full Compensation' (*supra* n55) 41 and –critically- Maier-Rigaud, 'Towards a European Directive on Damages Actions' *(supra* n70) 15-16.

complete lack of evidence by the defendants on the possible passing-on (and for that reason the Provincial Court of Madrid Judgment had to be revoked).[90]

Indeed, the Supreme Court decision contains relevant hints for procedural and lawyering strategy in future cases for both claimants and defendants. Given that whole passing-on will probably never be a plausible scenario (as the mere transfer of the overcharge would not compensate all the harm caused by the cartel), the issue rather turns to the amount of the passing-on. Returning to the sugar cartel, not only it is very difficult that the confectioners had wholly passed to their indirect purchasers the amount of the overcharge[91], but there could also be lost profits due to sales reduction that would not be adequately or effectively compensated.[92]

Indeed, given the complex analysis and the evidentiary difficulties that will surely be faced by the defendant in proving the passing-on defence (rather specifying the rate of pass-on),[93] the Supreme

[90] According to the Supreme Court, the evidence presented by the defendants concerning the amount passing-on was insufficient, not being enough to claim that passing-on existed on the sole basis that the plaintiffs raised the prices of their products, see Fourth Legal ground, section 4 of Supreme Court Judgment of 7 November 2013 (*supra* n48). Commentaries of the case have wondered why defendants did not make efforts to properly argue and proof the passing-on, see O Retortillo, 'Primeros Pasos de los Tribunales Españoles en la Aplicación Privada del Derecho de la Competencia. Especial referencia a la reclamación de daños en los casos de cárteles' (2011) *Revista de Competencia y Distribución* 8: 221-232, 232.

[91] Concerning whether cuts in subsidies (lower farm and wholesale price) may lead to sugar prices reductions, OECD, *Sugar Policy Reform in the European Union (*supra n*3)*, 40 ["*elements of imperfect competition in downstream sugar using sectors (e.g., industrial users) may lead to some part of producer cuts being absorbed as improved margin and additional profits rather than being passed on to final consumers of refined sugar and sugar contained products*"].

[92] And eventually, more speculative damages which would have been caused to those direct purchasers that got priced out of the market, see R D Blair; W H Page, 'The Role of Economics in Defining Antitrust Injury and Standing', (1996) Managerial and Decision Economics (Special Issue: The Role of Economists in Modern Antitrust),17/2: 127-142, 130 ('*It would seem that they also suffered antitrust injury. This, of course, is correct as an economic matter, but is problematic as a practical matter. […] The difficulty lies in identifying those who are injured by the deadweight loss. Anyone could claim that he or she would have purchased at the competitive price, but was priced out of the market. Thus, courts are likely to find that the claims of those who refused to purchase at the cartel price are speculative*').

[93] Something that is at the basis of why the US Supreme Court excluded this option, see 392 U.S. 492-493 (1968) ('*We are not impressed with the argument that sound laws of economics require recognizing this defense. A wide range of factors influence a company's pricing policies. Normally the impact of a single change in the relevant conditions cannot be measured after the fact; indeed a businessman may be unable to state whether, had one fact been different (a single supply less expensive, general economic conditions more buoyant, or the labor market tighter, for example), he would have chosen a different price. Equally difficult to determine, in the real economic world rather than an economist's hypothetical model, is what effect a change in a company's price will have on its total sales. Finally, costs per unit for a different volume of total sales are hard to estimate. Even if it could be shown that the buyer raised his price in response to, and in the amount of, the overcharge and that his margin of profit and total sales had not thereafter declined, there would remain the nearly insuperable difficulty of demonstrating that the particular plaintiff could not or would not have raised his prices absent the overcharge or maintained the higher price had the overcharge been discontinued. Since establishing the applicability of the passing-on defense would require a convincing showing of each of these virtually unascertainable figures, the task would normally prove insurmountable. On the other hand, it is not unlikely that if the existence of the defense is generally confirmed, antitrust defendants will frequently seek to establish its*

Court is potentially opening the door to defendants spending a significant amount of resources in protecting themselves with this tool. That may well overwhelm the courts with economic analyses and reduce the effectiveness of private enforcement of competition law (in its compensatory fashion) because if the defence is successful, potential claims by indirect purchasers would be less.[94]

In the end, one may wonder if *de lege ferenda* it would not have made more sense to limit standing for claim compensation to those which are better placed and with best incentives to claim damages (or at least do so, if no indirect purchasers do claim).[95] At the end, it is obvious that the confectioners have an information advantage in comparison to other potential claimants and that through them it was possible to concentrate a meaningful proportion of the harm (in comparison with the dissemination among final consumers).

Conclusion

This paper has looked at the €5 million award for damages caused by the Spanish sugar cartel as one of the most relevant developments in private enforcement of competition law in Spain to date. The final decisions on the case by the Spanish Supreme Court include several relevant rulings that will affect civil redress for victims of competition violations in Spain in the future.

The Supreme Court holdings are in line with the Proposed Directive on EU Damages for competition infringements. Firstly, it has clarified the legal force that prior public enforcement decisions by competition authorities as a ground for follow-on private litigation claims. Secondly, it has also spells out the assessment of expert forensic opinions in court. Finally, It also delineated how the conventional civil rules on compensation apply to these claims, leaving room for the passing-on defence to operate if proof enough is provided by the defendants. Although the Supreme Court is merely making clear the rules set by black letter law, it is difficult to hide the unsurpassable difficulties and complexities they introduce for litigants and how negative it may have be for the effectiveness of private enforcement of competition law and its compensatory goal.

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applicability. Treble-damage actions would often require additional long and complicated proceedings involving massive evidence and complicated theories') footnote omitted. However, *Hannover Shoe* allowed the passing-on defence to operate if the defendant could easily prove that the plaintiff was not damaged, see 392 US 494 *

[94] '*In consequence, those who violate the antitrust laws by price fixing or monopolizing would retain the fruits of their illegality because no one was available who would bring suit against them'*, 392 U.S. 494 (1968).

[95] Following, for example, what was advocated by the dissenting opinion by justices Brennan, Marshall and Blackmun to the US Supreme Court judgment of 9 June 1977, *Illinois Brick Co et al v Illinois*, 431 US 720, 748, though clearly this would amount to an asymmetrical treatment in the use of the argument as a shield (by defendants) and as weapon (by indirect purchasers).