Lessons from the Damages’ claims in the Spanish sugar cartel

The Fight Against Hard Core Cartels in Europe: Trends, Challenges and Best International Practices

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A case-study of the first meaningful and successful follow-on claim for cartel damages in Spain

€5 million to be paid by sugar producers/refiners to confectioners (Supreme Court 2012-2013)

It follows a €8.74 million fine imposed by Spanish Competition Authority in 1999 (confirmed by Supr. Ct. in 2005-2006)

It may be relevant in the context of the recent adoption of Private Damages Directive, given some of the Supr. Ct.’s holding.
1. Data antitrust private enforcement in Spain (I)

323 cases (1999-2012)

- Follow On Actions
- Stand Alone Actions
- Unsuccessful claims
- Successful or Partly

- Shield
- Injunctions
- Weapon

- highest court
- appeal court
- first instance

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1. Data antitrust private enforcement in Spain (II)

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2. Competition in the Sugar Industry (I)

Prone to anticompetitive practices (in Spain & elsewhere):

- Limited territorial scope of market (transportation costs, regulation)
- Sugar growers interdependence with processors (refiners)
- Heavily regulated and intervened by governments ("one of most subsidised and distorted of all agricultural markets") CMO & CAP in EU
- Price-inelastic nature of sugar markets (weak buyers position)
- Concentrated & transparent market

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- Complaint by confectioners lead to finding of collusion and market sharing by the four Spanish sugar processors

- **Market shares**
  - Ebro: 54%
  - Azucarera Ebro: 24%
  - Ocor: 15%
  - Azucareras Reunidas de Jaén S.A.: 7%

✓ **Evidence of collusion**: Price sugar variations in the period (up and also down) departed from expectation of normal variations from intervention prices set within CMO

✓ **Market allocation agreement** by transferring production quotas to sale quotas

✓ Transparency of market facilitated control/support measures by cartel members

✓ Inspection of businesses’ premises found written evidence of information exchanges and collective decisions

✓ **€8.74 in fines** (confirmed by Supr. Ct).

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3. Follow-on Damages claims (I)

✓ Success 17 years after the initial complaint before the Spanish Competition Authority was filed 10.09.1996

✓ Two follow-on actions (Madrid & Valladolid) by confectioners

No real follow-on actions before:
- Damages not claimed in a claim by cotton cartelist for reimbursement of payments made in accordance to cartel (Prov. Court Sevilla 2012)
- Not a pure follow-on claim in the elevator maintenance market (Prov. Court Burgos 2002)
3. Follow-on Damages claims (II)

- Overall estimation of damages caused by cartel exceeded €25 million (heavily dragging competitiveness of sugar dependent industries in Spain)
- When private enforcement actions started in 20.04.2007 only two of the cartel members available (EBRO FOODS & ACOR)

- EBRO FOODS condemned to pay €4,060,119.81
- ACOR condemned to pay €900,264.66
3. Follow-on Damages claims (III)

✓ Several (legal) lessons from the case for the future of private enforcement:

(a) Relevance for private enforcement of prior public enforcement decisions

(b) Legal basis of private claims (tort)

(c) Damages calculation (more coming on this)

(d) The passing-on defence (more coming on this)
4. Damages calculation (I)

✓ Very sensible holding on the matter by the Sup. Ct., avoid the temptation of Solomonic solutions (split the difference of parties’ experts calculations…)

✓ Expert reports expected to “formulate a reasonable and technically sound hypo not founded on erroneous and not testable data”

✓ Claimed only harm caused (price effects), not quantity effects (profits lost).
4. Damages calculation (& II)

✓ Cost based approach used by plaintiff (NERA) (relevant costs + reasonable margin under normal market conditions)

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5. The passing-on defence

Sugar is input used by confectioners in manufacturing their products, *did they pass-on the (cartel) overcharge to end-consumers of confectionery goods?*

- Damages should not be paid to whom did not suffer the harm (unjust enrichment)

- Defendants have the burden of proving the passing-on rate (whole or partial and in what amount).... Desirable? Complexity of these type of calculations....

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