Claims for damages against cartels: the Supreme Court conditions the "passing on" defence to strict requirements

Commentary on the Supreme Court Judgment of 7 November 2013
(Civil Division, Section 1, judgment no. 651/2013)

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1. The sugar "cartel"

In a decision of 15 April 1999, the Competition (Antitrust) Court confirmed the existence of a restrictive trade practice consisting in the fixing of the sale price of sugar for industrial use from February 1995 to September 1996, imposing fines totalling 1,455 million pesetas (87.45 million euros) on a number of sugar-producing companies regarded as perpetrators of such conduct.

Several companies that had purchased sugar for industrial use from the fined companies decided to bring actions for damages, claiming losses as a result of the conduct held illegal by the Competition Court. The Supreme Court judgment of 7 November 2013 has finally ruled in favour of the claimants.

2. The "passing on" defence

After recalling the existence of a restrictive trade practice, consisting in fixing price increases in sugar sold for industrial use, and of the harm caused by the payment of a price higher than would have resulted from free competition, the court of last resort moves on to consider the viability of the "passing on" defence.

In essence, the argument put forward by the defendant is that the buyers of sugar from the defendant had passed on to their own customers the premium paid. The defendant contended that as the claimants passed on the overcharge downstream to their customers, the claimants actually suffered no loss from paying said overcharge and therefore had nothing to claim from the defendant.

This defence had been allowed by the Provincial Court of Madrid in the judgment appealed in the Supreme Court. The Provincial Court considered sufficiently proven that the claimants had passed on the costs downstream and averted any loss, on the basis of which the court overturned the original judgment.

However, the Supreme Court believes that this conclusion is not consistent with the meaning and scope of the "passing on" defence in Competition Law on the basis of the following points:

— *The court does not deny the potential validity of the "passing on" defence against* claims for damages. However, the court notes that "passing on" should not be seen as a simple output price in the sense of increased prices in the downstream market in proportion to the increase in prices experienced in the upstream market; in fact, **what must have been passed on to customers is not the price increase suffered upstream, but the economic damage and loss deriving from the same, i.e. the harm**.

  Indeed, the rise in sugar prices has not only the mechanical and economic impact of having to bear a cost higher than that

resulting from free competition; such higher cost involves a l*oss of company competitiveness* - having to cope with higher than normal costs - *and a negative effect on the brand image* of said companies, all of which constitutes the harm suffered.

— The Supreme Court recognizes that increasing the selling price of sugar-derived products due to the increased cost of sugar *will cause a reduction in the volume of sales on account of falling demand.*

  In this sense, the loss of profit caused by the reduction in sales must be added to the actual loss represented by the additional costs incurred.

— Therefore, the Supreme Court concludes that proving that the direct purchaser of sugar has also increased the price of its products does not suffice to apply the "passing on" doctrine. It must also be proven that the increase of the price charged to customers has managed to pass on the harm suffered by the price increase resulting from the cartel's actions, and if the price increase has failed to pass on all the harm because there was a decrease in sales (insofar as other competitors did not suffer the cartel's actions and snatched national or internal market share from those who did, or inasmuch as the demand fell with the price increase, etc.) the "passing on" defence cannot be allowed or, at least, not in full.

The quantification of the damage and loss suffered, and, where appropriate, whether or not the harm was passed on, can be complex, since normally it must be made on the basis of an economic study that attempts to reconstruct what would have been the competition and price situation in the absence of the cartel and then compare it with the actual situation. It is on this point that the judgment makes one of the most relevant statements: who has the **burden of proof of "passing on"**.

Indeed, the Supreme Court considers that *the claimants are not the ones who have to prove that the harm was not passed on downstream, but it is the defendant who has the burden of proving that it was so*. This is consistent with art. 12 of the proposal for a Directive of the European Parliament and the Council, according to which the burden of proof in cases where it is alleged that the overcharge was passed on will fall on the defendant, i.e., the infringer.

Thus laying the burden of proof on the defendant's shoulders, the expert reports submitted by the claimants acquire crucial importance. The Supreme Court indicates that the expert report provided together with the claim "*starts off on the correct footing (the existence of the cartel and pricing agreed above that which would result from free competition) and uses a reasonable method among those proposed by economics and espoused by the courts of other countries, to quantify the harm to the claimants, as is to (i) estimate what would have happened had the restrictive trade practice not occurred by examining the immediately preceding period, taking into consideration the price of sugar in the period immediately before the start of the cartel activity, modulating them according to variations in production costs over the period that cartel activities lasted (specifically, the price of beetroot, which accounts for 58 % of the total sugar production and storage price), to the exclusion of other costs not considered relevant (due to their lower impact on the total sugar production cost), and (ii) compare this with the prices charged by the defendant to each claimant during the operation of the cartel, divided into four periods determined by the different agreed price changes. The result would be the anti-competitive premium charged to the claimants by EBRO PULEVA, which has been updated by applying a discount rate, the Bank of Spain's statutory interest rate."*

The Supreme Court recognizes that an expert report of this kind cannot "*make a perfect reproduction of what would have been the situation if there had been no unlawful conduct, but that is a problem inherent to all valuations of damage and loss consisting of projections of what would have happened if the wrongful conduct had not taken place*." The Supreme Court reminds us that the assessment of "this hypothetical counterfactual scenario" is what the proposal for directive calls for. For the Supreme Court, the difficulty arising from "*such methods should not prevent victims from receiving an amount of compensation adequate*

to the harm suffered, but rather justifies wider judicial power in assessing the harm."

What the Supreme Court requires from the expert report presented by the claimant harmed by the cartel is that it "*makes a reasonable assumption technically based on non-erroneous testable data*." The Division holds that the claimants' expert's report in this case "*contains both elements and therefore the assessment made in this report should be considered reasonable and accurate*."