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Spain

Alexandre Ruiz Feases*

Preliminary Matters

- (ES.1) Former Spanish Competition Act 16/1989 only allowed follow-on actions. Nonetheless, the new Competition Act 15/2007 makes no difference between follow-on and stand-alone actions.
- (ES.2) Additionally, the current Spanish Competition Act gives jurisdictional authority to the commercial courts - a specialized first instance - to apply Spanish and EU competition rules equally⁶⁵⁵.
- (ES.3) Spanish case-law has settled that first instance courts are the only ones allowed to assess evidence - i.e. economic reports evaluating damages - and determine the amount of the claim. Unfortunately, neither public case-law databases nor private ones have a considerable compilation of first instance judgements as they are considered as case-law of minor importance.
- (ES.4) To date, most of Spanish legal practice concerning private enforcement was about nullity of long-term agreements, as in the Spanish service station cases, and, only in a subsidiary way about damages. Hence, the two Supreme Court judgements rendered in the Spanish sugar cartel case in 2012 and 2013 are benchmark cases on private enforcement and damages claims.

Section I. General Principles

1.1. What is interest? Is there a definition?

- (ES.5) Despite the fact that several Spanish statutes refer to the concept of interest, no definition is provided.
- (ES.6) Spanish legal doctrine distinguishes between three different categories: (A) ordinary or agreed interest; (B) delay or default interest; and (C) procedural delay interest.
- (ES.7) The ordinary or agreed interest (A), according to the Supreme Court, is the one arranged by the parties to a contract.⁶⁵⁶ It has a double function. On one hand, it works as remuneration; on the other hand, it compensates currency depreciation.
- (ES.8) The delay or default interest (B) starts to accrue when the debtor falls into arrears of payment.⁶⁵⁷ It is said to have the objectives of compensating damage to the creditor caused by

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⁶⁵⁵ See Art. 86(ter)(2)(f) of the Judiciary Power Organic Law 6/1985, together with the 1st Additional Disposition of the Competition Act 15/2007.

⁶⁵⁶ Judgement of the Supreme Court (First Chamber) No. 86/1997 of 15 February 1997.

the delay in the payment, and as well as avoiding unjust enrichment of the debtor and thus incentivizing prompt payment.

- (ES.9) The procedural delay interest (C) starts to accrue from the judgement of first instance if the judgment awards a sum of money and the sentenced debtor does not pay voluntarily.⁶⁵⁸ Its function is again compensatory, but it has also a punitive nature as it is the legal interest rate plus two percentage points (see Table 1 in question 2.5).
- (ES.10) While ordinary and default interest (A and B) have to be sought *ex parte*, procedural delay interest (C) is granted *ex officio*.
- (ES.11) However, a clarification is needed. When dealing with cases about cartel damages, the concept of interest approaches the notion of damages and loss of profits. The aim here is to get full compensation. Therefore, we talk neither about procedural delay interest (C), nor default interest (B), nor ordinary interest (A), but about interest with the functions of compensating the loss of the purchasing power of the currency and to avoid unjust enrichment of the cartelist.
- (ES.12) Three periods should be distinguished. The first period (i) runs from the moment the harm occurred until the date the claim is brought to court. Here, interest is applied to update the amount. As it can be calculated up to the the date of the claim, the claimant must demand damages and loss of profits already updated according to the legal interest.
- (ES.13) Nonetheless, note that tort case-law has also admitted that the update can be made according to other factors, as the consumer price index, instead of the legal interest.⁶⁵⁹
- (ES.14) The second period (ii) runs from the day the claim was filed up to the moment of the first instance judgment. Here, courts apply a default interest (B), but it must be explicitly requested in the claim.
- (ES.15) The third period (iii) runs from the date of the judgement until the date the debt is totally paid. In this third period, procedural delay interest (C) is applied *ex officio*.
- (ES.16) For the next questions, we will refer to the different kinds of interest as A, B and C and to the different periods as i, ii and iii.

(Contd.) _____

⁶⁵⁷ See Art. 1108 of the Civil Code. See also the judgement of the Supreme Court (First Chamber) No. 843/2011 of 23 November 2011.

⁶⁵⁸ See Art. 576(1) of the Civil Procedural Act 1/2000, which reads as follows: “From its announcement, every judgement or decision awarding the payment of a liquid sum of money will determine, in favour of the creditor, the accrual of an annual interest equivalent to the legal interest plus two points or whichever it corresponds because of an agreement between parties or a special legal disposition”.

⁶⁵⁹ Judgement of the Supreme Court (First Chamber) No. 123/2015 of 4 March 2015. Sometimes other factors are used to update the amount. See for example the case on Spanish Insurance Property Cartel (commented on below in question 4.1), where the claimant applied the average rate of the State Treasury bonds for five years instead of the legal interest.

1.2. When, and under what conditions, is interest payable at all? Does this depend on whether the claim is brought in tort, breach of contract or (where applicable) restitution/unjust enrichment?

(ES.17) With regard to cartel damages matters, we are within the scope of tort law where there exist the full compensation principle and unjust enrichment correction (*nemo debet lucrari ex alieno damno*⁶⁶⁰). Art. 1106⁶⁶¹ and 1902⁶⁶² of the Civil Code devoted to non-contract civil liability are applicable here.

1.3. Is payment of interest compulsory or at the discretion of the court?

(ES.18) On one hand, both the updating interest (A) and the default interest (B) shall be sought *ex parte* and explicitly in the claim. In general terms, in Spain the adversarial principle rules on civil issues.⁶⁶³ The court cannot grant more than what was sought. On other hand, the court awards procedural delay interest (C) compulsorily (see question 1.1).

1.4. What is said to be the purpose of the interest payment?

(ES.19) As said, for cartel damages claims, the purpose of the interest payment is to achieve full compensation and avoid unjust enrichment of the cartelist.

(ES.20) During the first period (i), interest updates the damages up to the date of the claim. During the second period (ii), interest compensates the time consumed by the civil court proceedings. During the third period (iii), interest does not only compensate the time until the debt is paid, but also punishes the delay.

1.4. What is the legal basis for the payment of interest (statutes, contractual agreements, case-law, soft law guidance)?

(ES.21) For the first period (i), there is case-law specifically on cartel damages where the damages and loss of profits are updated according to the legal interest rate (see the Spanish sugar cartel, question 4.1).

(ES.22) For the second period (ii), the case-law on tort law normally invokes Art. 1108 of the Civil Code.⁶⁶⁴

(ES.23) In relation to the third period (iii), it is Art. 576(1) of the Civil Procedural Act 1/2000⁶⁶⁵ that contemplates the procedural delay interest.

⁶⁶⁰ Judgement of the Supreme Court (First Chamber) No. 559/2010 of 21 September 2010.

⁶⁶¹ Art. 1106 of the Civil Code reads as follows: “*Damage compensation covers not only the value of the loss suffered, but also the value of the loss of profits of the creditor, except the dispositions stated by the following articles*”.

⁶⁶² Art. 1902 of the Civil Code reads as follows: “*Who causes harm to another by action or inaction, by negligence or fault, is obliged to repair the harm caused*”.

⁶⁶³ See Art. 216 of the Civil Procedural Act 1/2000.

⁶⁶⁴ Art. 1108 of the Civil Code reads as follows: “*If the obligation consists on the payment of a sum of money, and the debtor falls into arrears, the compensation, if there is no agreement between parties, will consist on the payment of the interest agreed, and if not, on the legal interest*”.

⁶⁶⁵ *Supra* note 4.

Section II. Calculation of Interest

2.1. What is the rate of interest that is set? How is it arrived at? Are there statutes?

(ES.24) It follows from Art. 1 of the Legal Interest Modification Act 24/1984 that the Spanish Parliament shall set the legal interest rate yearly through the General Budget Annual Act.

2.2. Is interest simple or compound? If the interest is neither simple nor compound as defined above, please elaborate.

(ES.25) Generally, the Spanish Law system considers interest simple. There is an exception in Art. 1109 of the Civil Code, which states the possibility *ex officio* to capitalize the interest accrued and apply new default interest upon the total sum. Nevertheless, this article does not apply to private competition matters.⁶⁶⁶

(ES.26) In any case, it should be noted that the default interest (B) which applies to the second period (ii) is directly calculated on the amount already updated for the first period (i). In other words, the legal interest is calculated upon the total sum claimed (see example in question 2.9).

(ES.27) As example, it can be observed the judgement of the Supreme Court no. 344/2012 in the case of the Sugar Cartel. Here, the Supreme Court approved firstly the fact that the claimant already added the interest for the first period (i) to the damages in her\his writ and secondly that the Court of Appeal granted interest for the second period (ii) to be calculated on the damages plus the interest for the first period (i).⁶⁶⁷

2.3. What is the time for which interest is calculated? When does interest start to accrue, when does the accrual of interest end? Are there any situations where the action of the plaintiff, for example delay on his part, serves to change the time for which interest is calculated? Are there provisions for suspension of the accrual of interest?

(ES.28) As stated above, the claimant shall indicate the amount on her\his claim (or, if impossible, provide the court with a formula to be applied), and the expert economic report should update the *damnum emergens* and the *lucrum cessans* according to the legal interest rate. Then, there would be a second (ii) and a third period of calculation (iii) (see above). For each period, the legal interest rate in force at that time is applied, meaning that the applicable rate changes each time the legal interest rate changes.

(ES.29) There is no provision that changes the calculation time because of any action of the plaintiff. However, the Spanish Supreme Court has developed a doctrine in tort law called “unfair delay” (“*retraso desleal*” in Spanish), according to which interest can be reduced if the court considers that the plaintiff intentionally delayed the bringing of an action to increase agreed (A) or default (B) interest upon the sum due. Nevertheless, this doctrine is unlikely to be invoked on competition matters.

⁶⁶⁶ Specifically, the Supreme Court stated that Art. 1109 of the Civil Code does not apply to imperative rules, making reference to competition rules. See judgement of the Supreme Court (First Chamber) No. 344/2012 of 8 June 2012 (*Sugar Cartel I*, commented in question 4.1).

⁶⁶⁷ See Paragraph No. 18 of the cited judgement of the Supreme Court. See also the previous judgement of the Court of Appeal of Valladolid No. 261/2009 of 9 October 2009.

2.4. Are there any specific provisions if payment is requested in a different currency than that in the state where the lawsuit is brought? (e.g. a Swedish company claims for damages resulting from an EU-wide cartel against a German cartel member in Germany. Can the court award only EUR or also Swedish Krona?)

(ES.30) There is no provision that precludes awarding an amount in a different currency. Nevertheless, court costs and procedural delay interest (C) will be calculated in Euro.⁶⁶⁸

(ES.31) Note that the Supreme Court has stated that, for future proceedings in the same case, courts will take into consideration the currency exchange rate valid on the day when the claim was filed.⁶⁶⁹ This is important as the right to appeal against the first judgement and the cassation to the Supreme Court will depend on the first amount set.

2.5. As damage claims for infringements of EU competition rules often pertain to long-running infringements, please include all applicable interest rates and the date the rate came into force from 1 January 1985 until today. Unless impossible due to national peculiarities, the rates should be listed in a two column table, containing the rate and the date it came into force. This should be accompanied by a legal retrospective that sets out any other changes to the relevant interest regime (e.g. the time interest starts to run, etc.) which occurred over this period, in order to allow a determination of which rules applied at a given point in time between 1 January 1985 and today.

Table 1 - Interest Rates

Date	Legal Interest Rate	Procedural Interest Rate
01/01/1985	11.00%	13.00%
01/01/1986	10.50%	12.50%
01/01/1987	9.50%	11.50%
01/01/1988	9.00%	11.00%
01/01/1989	9.00%	11.00%
01/01/1990	9.00%	11.00%
30/06/1990	10.00%	12.00%
01/01/1991	10.00%	12.00%
01/01/1992	10.00%	12.00%
01/01/1993	10.00%	12.00%
01/01/1994	9.00%	11.00%
01/01/1995	9.00%	11.00%
01/01/1996	9.00%	11.00%
01/01/1997	7.50%	9.50%
01/01/1998	5.50%	7.50%
01/01/1999	4.25%	6.25%
01/01/2000	4.25%	6.25%
01/01/2001	5.50%	7.50%
01/01/2002	4.25%	6.25%
01/01/2003	4.25%	6.25%

⁶⁶⁸ See Art. 577(1) of the the Civil Procedural Act 1/2000.

⁶⁶⁹ See Orders of the Supreme Court of 4 November 1997 and of 5 October 1999.

01/01/2004	3.75%	5.75%
01/01/2005	4.00%	6.00%
01/01/2006	4.00%	6.00%
01/01/2007	5.00%	7.00%
01/01/2008	5.50%	7.50%
01/01/2009	5.50%	7.50%
01/04/2009	4.00%	6.00%
01/01/2010	4.00%	6.00%
01/01/2011	4.00%	6.00%
01/01/2012	4.00%	6.00%
01/01/2013	4.00%	6.00%
01/01/2014	4.00%	6.00%
01/01/2015	3.50%	5.50%
01/01/2016	3.00%	5.00%

(ES.32) According to the recent General Budget Annual Act for 2016, the legal interest rate will be 3.00% until 31 December 2016.⁶⁷⁰

2.6. Please identify an official, reliable, publicly available source that publishes the pertinent legal interest rates as they change.

(ES.33) The Spanish Parliament sets the legal interest rate through the General Budget Annual Act, which is published in the State's Official Journal (*Boletín Oficial del Estado*) and it is available online at http://www.boe.es/diario_boe (in Spanish).

(ES.34) Additionally, the Spanish National Bank releases the legal interest rates valid since 1995 at http://www.bde.es/clientebanca/es/areas/Tipos_de_Interes/Tipos_de_interes/Otros_tipos_de_i/otros-tipos/Tabla_tipos_de_interes_legal.html (in Spanish).

2.7. If interest rates change on a fixed schedule, please indicate the schedule.

(ES.35) Normally, the legal interest rate is set yearly. However, Art. 2 of the Legal Interest Modification Act 24/1984 allows to the Spanish Government to change the rate during the year if the circumstances require it. In fact, this already happened in 1990 and more recently in 2009 (see question 2.5).

2.8. If part of the debt / the damage is being paid, how is interest calculated following that payment? In particular, do partial payments first cover interest or the principal amount? Is there any provision or legal practice similar to Art. 86(3)(2) of the rules of application of Regulation 966/2012 on the financial rules applicable to the general budget of the Union where it is stated that “Any partial payments shall first cover the interest”?

(ES.36) In the light of Article 1173 of the Spanish Civil Code,⁶⁷¹ if the debt generates interest, any partial payment is firstly imputed to the interest and, once this has been covered, future payments are imputed to the principal amount.

⁶⁷⁰ See 34th Additional Disposition of the General Budget Annual Act for 2016 approved the 20 October 2015 by the Spanish Parliament.

⁶⁷¹ Art. 1173 of the Civil Code reads as follows: “If the debt generates interest, the payment of the principal amount cannot be considered as done until the interests have been covered”.

(ES.37) Due to the lack of *lex specialis* for antitrust damages claims, this article would apply as it is the common law regime.

2.9. Please calculate interest in the following hypothetical case. All dates are given in the format dd.mm.yyyy. All amounts are stated without specifying the currency to abstract from implications of the introduction of the common Euro currency. Assume that the claims have not been time barred. Assume that a national court in the Member State on which you are reporting has jurisdiction to rule on the case. Assume that the cartelists are jointly liable for the damage caused by the cartel. If results differ materially depending on whether accrual of interest is based purely on national law or made in compliance with the EU principle of full compensation, provide both calculations.

There was a long running pan-European cartel for a product that materially affected trade between Member States. The cartel lasted from the beginning of 1993 until the dawn raids (unannounced inspections) of the European Commission on 02.02.2009.

On 30.11.2010, a longtime customer of the cartel, who bought the cartelised product in the Member State on which you are reporting, brings a claim for damages against three cartelists (A, B, and C). All of the three defendants have their seat in the Member State on which you are reporting. The customer only bought the cartelised product of the cartelists A and B. In the writ, the claimant specifies the damages caused by the cartel and the date on which the respective damage occurred. The claimant also specifically requests that interest be paid on the damages. The damages (always = 100) and respective dates are set out in Table 2 below. Should a subjective rate be of relevance, you will find the ROI (Return On Investment) rates of the claimant and the three defendants in Table 3 below. You will also find the average interest rate that the claimant had to pay on credit taken out in that year (claimant's average refinance rate).

On 26.11.2013 a court renders a final judgment, ordering the defendant(s) to pay damages and interest. The defendants take until 12.02.2014 to pay. Please specify the total amount the jointly liable defendants have to pay on 12.02.2014 in order to relinquish their debt towards the claimant.

Table 2 - Damage Amounts and Dates

Date the Damage Occurred	Damage Amount
15/11/1993	100
17/09/1996	100
22/02/2006	100
12/08/2008	100

Table 3 - Refinance and Return on Investment Rates

Year	Claimant's Refinance Rate	Claimant's Annual ROI	Defendant's A Annual ROI	Defendant's B Annual ROI	Defendant's C Annual ROI
1993	6.00%	5.50%	4.00%	4.00%	3.00%
1994	6.00%	9.80%	4.00%	4.00%	4.00%
1995	6.00%	9.50%	4.00%	4.00%	5.00%
1996	6.00%	1.00%	0.00%	0.00%	0.00%

1997	8.00%	-3.80%	1.00%	1.00%	3.00%
1998	8.00%	1.10%	4.00%	4.00%	5.00%
1999	8.00%	2.80%	1.00%	1.00%	3.00%
2000	8.00%	1.10%	-2.00%	-1.00%	0.00%
2001	8.00%	4.51%	2.00%	2.00%	3.00%
2002	8.00%	5.30%	4.00%	4.00%	5.00%
2003	8.00%	8.21%	9.00%	9.00%	9.00%
2004	7.00%	9.00%	3.00%	3.00%	2.00%
2005	7.00%	10.00%	1.00%	1.00%	1.00%
2006	7.00%	6.00%	1.00%	1.00%	1.00%
2007	5.00%	-5.00%	4.00%	4.00%	2.00%
2008	5.00%	-7.00%	-1.00%	0.00%	0.00%
2009	5.00%	-5.00%	2.00%	2.00%	4.00%
2010	5.00%	-3.00%	4.00%	4.00%	4.00%
2011	5.00%	-2.70%	4.00%	4.00%	2.00%
2012	5.00%	1.61%	-2.00%	-1.00%	0.00%
2013	5.00%	4.40%	8.00%	8.00%	7.00%
2014	5.00%	1.41%	-4.00%	-3.00%	-1.00%

(ES.38) In the following tables calculations are reported. From Table 5 to Table 8 it can be seen the update of each damage until the date of the claim (30.11.2010). A résumé showing the total sum is provided in Table 9.

(ES.39) From Table 5 to Table 10 the legal interest rate has been applied. In Table 11, the procedural interest rate has been applied, which is the legal interest rate plus two percentage points (see Table 1 in question 2.5).

Table 5 (1st Period - Damage 1)

From	To	Amount	Interest Rate	Total Days	Days in a Year	Interest
15/11/1993	31/12/1993	100.00	10.00%	47	365	1.29
01/01/1994	31/12/1994	100.00	9.00%	365	365	9.00
01/01/1995	31/12/1995	100.00	9.00%	365	365	9.00
01/01/1996	31/12/1996	100.00	9.00%	366	366	9.00
01/01/1997	31/12/1997	100.00	7.50%	365	365	7.50
01/01/1998	31/12/1998	100.00	5.50%	365	365	5.50
01/01/1999	31/12/1999	100.00	4.25%	365	365	4.25
01/01/2000	31/12/2000	100.00	4.25%	366	366	4.25
01/01/2001	31/12/2001	100.00	5.50%	365	365	5.50
01/01/2002	31/12/2002	100.00	4.25%	365	365	4.25
01/01/2003	31/12/2003	100.00	4.25%	365	365	4.25
01/01/2004	31/12/2004	100.00	3.75%	366	366	3.75
01/01/2005	31/12/2005	100.00	4.00%	365	365	4.00
01/01/2006	31/12/2006	100.00	4.00%	365	365	4.00
01/01/2007	31/12/2007	100.00	5.00%	365	365	5.00
01/01/2008	31/12/2008	100.00	5.50%	366	366	5.50
01/01/2009	31/03/2009	100.00	5.50%	90	365	1.36

01/04/2009	31/12/2009	100.00	4.00%	275	365	3.01
01/01/2010	30/11/2010	100.00	4.00%	333	365	3.65
Total Interest (1 st P. - D.1)						94.06

Table 6 - (1st Period - Damage 2)

From	To	Amount	Interest Rate	Total Days	Days in a Year	Interest
17/09/1996	31/12/1996	100.00	9.00%	106	366	2.61
01/01/1997	31/12/1997	100.00	7.50%	365	365	7.50
01/01/1998	31/12/1998	100.00	5.50%	365	365	5.50
01/01/1999	31/12/1999	100.00	4.25%	365	365	4.25
01/01/2000	31/12/2000	100.00	4.25%	366	366	4.25
01/01/2001	31/12/2001	100.00	5.50%	365	365	5.50
01/01/2002	31/12/2002	100.00	4.25%	365	365	4.25
01/01/2003	31/12/2003	100.00	4.25%	365	365	4.25
01/01/2004	31/12/2004	100.00	3.75%	366	366	3.75
01/01/2005	31/12/2005	100.00	4.00%	365	365	4.00
01/01/2006	31/12/2006	100.00	4.00%	365	365	4.00
01/01/2007	31/12/2007	100.00	5.00%	365	365	5.00
01/01/2008	31/12/2008	100.00	5.50%	366	366	5.50
01/01/2009	31/03/2009	100.00	5.50%	90	365	1.36
01/04/2009	31/12/2009	100.00	4.00%	275	365	3.01
01/01/2010	30/11/2010	100.00	4.00%	333	365	3.65
Total Interest (1 st P. - D.2)						68.38

Table 7 (1st Period - Damage 3)

From	To	Amount	Interest Rate	Total Days	Days in a Year	Interest
22/02/2006	31/12/2006	100.00	4.00%	313	365	3.43
01/01/2007	31/12/2007	100.00	5.00%	365	365	5.00
01/01/2008	31/12/2008	100.00	5.50%	366	366	5.50
01/01/2009	31/03/2009	100.00	5.50%	90	365	1.36
01/04/2009	31/12/2009	100.00	4.00%	275	365	3.01
01/01/2010	30/11/2010	100.00	4.00%	333	365	3.65
Total Interest (1 st P. - D.3)						21.95

Table 8 (1st Period - Damage 4)

From	To	Amount	Interest Rate	Total Days	Days in a Year	Interest
12/08/2008	31/12/2008	100.00	5.50%	142	366	2.13
01/01/2009	31/03/2009	100.00	5.50%	90	365	1.36
01/04/2009	31/12/2009	100.00	4.00%	275	365	3.01
01/01/2010	30/11/2010	100.00	4.00%	333	365	3.65
Total Interest (1 st P. - D.4)						10.15

Table 9 (1st Period - Total Damage)

	From	To	Amount	Interest	Total Sum
Damage 1	15/11/1993	30/11/2010	100.00	94.06	194.06
Damage 2	17/09/1996	30/11/2010	100.00	68.38	168.38
Damage 3	02/02/2006	30/11/2010	100.00	21.95	121.95
Damage 4	12/08/2008	30/11/2010	100.00	10.15	110.15
			400.00	194.53	594.53

Table 10 (2nd Period - from claim to judgement)

From	To	Amount	Interest Rate	Total Days	Days in a Year	Interest
30/11/2010	31/12/2010	594.53	4.00%	32	365	2.08
01/01/2011	31/12/2011	594.53	4.00%	365	365	23.78
01/01/2012	31/12/2012	594.53	4.00%	366	366	23.78
01/01/2013	26/11/2013	594.58	4.00%	329	365	21.44
Total Interest (2 nd P.)						71.08

Table 11 (3rd Period - from judgement to payment)

From	To	Amount	Interest Rate	Total Days	Days in a Year	Interest
27/11/2013	31/12/2013	594.53	6.00%	35	365	3.42
01/01/2014	12/02/2014	594.53	6.00%	42	365	4.10
Total Interest (3 rd P.)						7.53

Table 12 - Total Sum Due

1st Period	2nd Period	3rd Period	Total Amount
594.53	71.08	7.53	673.14

(ES.40) According to the results, the claimant must seek 594.53, plus interest from the date of the claim (30.11.2010) until the date of the judgement (26.11.2013). Thus, a delay interest of 71.08 must be added. Then, due to the delay in the payment, the procedural delay interest starts to accrue from the date of the judgement (27.11.2013) until the date the debt is totally covered (12.12.2014). Thus, a procedural delay interest 7.53 must be added. Consequently, all three defendants are jointly liable for 673.14.

Section III. Procedural Aspects

3.1. What are the procedures for the party seeking to receive interest on the damages paid? (e.g. does the claimant have to make a separate plea for the interest payments and if so, what information and evidence must be supplied? Does the judge award interest *ex officio* or does the claimant have to request it?).

- (ES.41) Concerning the first period of time (i), interest must be already calculated in order to update the *quantum*.⁶⁷² Thus, the claim shall reflect the total amount and it must seek explicitly the legal interest from the date of the claim (second period of time (ii)).
- (ES.42) With regard to the second period of time (ii), the judge will grant interest if it has been sought in the claim. After the judgement awarding a concrete amount plus interest, either the debtor pays voluntarily, or the creditor brings what is called an ‘execution claim’.
- (ES.43) As this kind of judgement awarding an amount plus interest still to be calculated is already considered as a ‘liquid decision’⁶⁷³ - because of the ease to calculate the interest -, there is no special procedure to request the payment.
- (ES.44) If the debtor pays voluntarily, he should make a judicial deposit consisting of the amount plus interest, which will be calculated by himself. He will calculate the interest in the terms stated in the judgement - i.e. if the judgement states that interest should be calculated from the date of the claim, then the debtor should proceed accordingly.
- (ES.45) If not, the creditor shall bring an execution claim making a breakdown of the amount requested. It should be explicitly indicated which is the principal amount (including the interest for the first period (i)) and which sum is the interest for the second period (ii). In addition, the creditor can request a provision for the future interest and court costs until the total payment. This provision cannot exceed the 30% of the total sum sought (for first (i) and second period (ii)).⁶⁷⁴

3.2. Can the judge award a higher interest amount than requested by the claimant or does the principle of *ne ultra petita* apply?

- (ES.46) The principle of *ne ultra petita* applies in Spain and the judgment must be congruous with what was sought by the claimant. Thus, the judge will not award a higher amount.

3.3. Can the judge estimate interest or does interest always have to be calculated?

- (ES.47) See question 3.1.

⁶⁷² See Art. 253(1), first paragraph, of the the Civil Procedural Act 1/2000, which reads as follows: “*Claimant will set and justify on his writing the amount of the claim. Such amount will be calculated, in all case, according to the previous rules*”.

⁶⁷³ Order of the Appeal Court of Jaen No. 53/2010 of 27 May 2010. Here, the court used the notion of “liquid decision” (“*sentencia liquida*” in Spanish) as equivalent to the notion of “liquid money” or “liquid asset”. The idea is that even if interest is not explicitly calculated in the judgement - only the principal amount is clearly stated -, it can be easily calculated by the parties without any special formula.

⁶⁷⁴ See Art. 575(1) of the Civil Procedural Act 1/2000.

3.4. If the claimant changes the request regarding the interest, is this regarded as an amendment of the pleadings? Is this only possible until a certain stage into the proceedings and precluded later on or can the claimant make such changes without negative procedural consequences at any time up to the judgment?

(ES.48) The opportune stage is the date of the claim. As mentioned, the *quantum* must be already set in the claim and all the future civil proceedings relating to the same case will depend on it.

(ES.49) Actually, often the claimant forgets to seek interest for the second period (ii),⁶⁷⁵ and there is no possibility to change it after the claim has been filed.

(ES.50) If it is impossible to set the exact amount claimed, the claimant must state if the *quantum* will be more or less than 6.000€. If the amount exceeds 6.000€, an ordinary civil procedure will follow. If not, the judge will conduct the case following the verbal procedure, which is shorter than the ordinary one.⁶⁷⁶

Section IV. Specific Instances

4.1. Identify any cases relating to damages claims for infringements of competition law and explain how interest was calculated. In writing these summaries, provide all relevant information about how interest and other compensation for the effluxion of time was calculated.

(ES.51) As said in the preliminary matters, there are few cases about damages claims for cartels. Most cases are about nullity of a long-term agreement, as in the Spanish service station cases.

(ES.52) In order to show what is the case-law situation in Spain, three groups of cases have been prepared. The first group contains four cartel cases. The second group is about damages claims in cases of abuse of dominant position. Lastly, the third group contains station services matters.

Group 1

1.1. Barcelona Press Suppliers Cartel

Facts: Several press suppliers (Ediciones Deportivas Catalanas SA, Gelesa SA, Diario El País SA and Ediciones Primera Plana SA) denied to supply daily press to one small newsstand (Catbelar SL). Catbelar had grounds to believe that there was a concerted practice.

Amount sought: not indicated, plus interests, plus court costs

Court: Court of First Instance of Barcelona (No. 46)

Date: 04/02/2003

Decision: 24,275€, plus court costs

Court: Court of Appeal of Barcelona (15th Section) (No. 203/2005)

Date: 03/05/2005

Decision: interests recognized

⁶⁷⁵ See the cases commented in question 4.1, as the Spanish insurance property cartel, *Céntrica Energía SLU v. Endesa Distribución Eléctrica SL* or *Estación Servicio Fontanet SL v. Repsol SA*, where the claimant did not seek for interest from the date of the claim.

⁶⁷⁶ See Art. 253(2) of the Civil Procedural Act 1/2000.

Brief comment: The court of appeal awarded interest from the date of the claim (ii). It stated that otherwise it would have been a case of unjust enrichment. Nevertheless, there are no details whether the first amount requested by the claimant was updated.

1.2. Sugar Cartel (I)

Facts: Price fixing cartel between several sugar producers from February 1995 until September 1996.⁶⁷⁷ Sugar buyers Galletas Gullón SA, Mazapanes Donaire SL, Nestlé España SA, Zahor SA, Galletas Coral SA, Productos Alimenticios La Bella Easo SA, Lacasa SAU, Chocolates del Norte SA and Bombonera Vallisoletana SA decided to sue Acor Sociedad Cooperativa General Agropecuaria (one of the cartelists producers) for damages.

Amount sought: 1,101,053.13€ (damages already updated according to the legal interest), plus legal interest from the date of the claim (20.04.07), plus court costs

Court: Court of First Instance of Valladolid (No. 11)

Date: 20/02/2009

Decision: rejected

Court: Court of Appeal of Valladolid (3rd Section) (No. 261/2009)

Date: 09/10/2009

Decision: 100% granted, plus interests, no appeal costs

Court: Supreme Court (No. 344/2012)

Date: 08/06/2012

Decision: 100% granted, plus interests, plus cassation costs

Brief comment: In the initial writ, the claimants asked for a principal sum where interest for period (i) was already added –their economic report applied the legal interest from the date when the harm was caused (February 1995) until the date of the claim. They also asked for interest for period (ii). Before this argument, the defendant argued that this supposed a compound interest, so it could not be granted. However, the Supreme Court did not follow the defendant’s argument, and stated that the interest for period (i) was not an interest itself, but an interest in order to compensate currency depreciation. Thus, this was not considered as compound interest by the court, but a method of updating the claim and the interest for period (ii) was also granted.

1.3. Sugar Cartel (II)

Facts: The same price fixing cartel as in *Sugar Cartel (I)*. Nestlé España SA, Productos del Café SA, Helados y Postres SA, Chocolates Hosta Dulcinea SA, Zahor SA, Mazapanes Donaire SL, LU Biscuit SA, Chocolates Torras SA, Arluy SL, Chocovic SA, La Casa SAU, Productos Mauri SA, Delaviuda Alimentación SA and Wrigley Co SA, against another cartelists producer, Ebro Puleva SA.

Amount sought: 4,105,212.57€ (updated according to the legal interest), plus legal interest from the date of the claim (20.04.07), plus court costs

Court: Court of First Instance of Madrid (No. 50) (No. 59/2010)

Date: 01/03/2010

Decision: 50% granted, plus interests, no court costs

Court: Court of Appeal of Madrid (8th Section) (No. 370/2011)

⁶⁷⁷ Decision of the Spanish Competition Authority of 15 April 1999, Case No. 426/98.

Date: 03/10/2011

Decision: 100% granted, plus interests, no appeal costs

Court: Supreme Court (No. 651/2013)

Date: 07/11/2013

Decision: 100% granted, plus interest, plus first instance and appeal costs

Brief comment: The claimants calculated according to the overcharge paid to the defendant. Then, that amount was updated according to the legal interest. Additionally, the Supreme Court granted interest from the date of the claim.

1.4. *Spanish Property Insurance Cartel*

Facts: Price fixing cartel by three insurance companies (Asefa SA, Scor Global SE and Caser SA) on property insurance premiums.⁶⁷⁸ Musaat (another insurance company) sued all the three cartelists for suffering from 2007 boycott actions due the commercialization of insurances under the price fixed by the cartel. The claim was filed on 19/01/2012.

Amount sought: 3,732,123€ (*damnum emergens*), plus 19,592,241€ (*lucrum cessans*), plus court costs

Court: Court of First Instance of Madrid (No. 12) (No. 88/2014)

Date: 09/05/2014

Decision: 3,550,615.70€ (*damnum emergens*)

Brief comment: The case offers some important points to be underlined. Firstly, the court stated that the claimant did not demonstrate the *lucrum cessans*. Secondly, the claimant did not expressly demand the legal interest from the date of the claim, thus the court did not award it. Thirdly, the first amount sought as *damnum emergens* was reduced to 3,082,688€. Fourthly, the economic report took into consideration the average rate of the State Treasury bonds for five years instead of the legal interest rate. The average rate was 4.16% on 2007, 4.09% on 2008, 2.97% on 2009 and 3.17% on 2010. Thus, the court set the amount at 3,550,615.70€.⁶⁷⁹

Group 2

2.1. *Football Broadcast*

Antena 3 Televisión SA v. Liga Nacional de Fútbol Profesional (LNFP)

Facts: The defendant (LNFP) impeded several broadcasts companies from accessing to football images and advertising incomes. Antena 3 sought for damages. The claim was filed on 30/12/2004.

Amount sought: 34,000,000€, plus legal interest from the date of the claim, plus procedural delay costs, plus court costs

Court: Court of First Instance of Madrid (No. 4) (No. 125/2005)⁶⁸⁰

Date: 07/06/2005

⁶⁷⁸ Decision of the Spanish Competition Authority of 12 November 2009, Case No. S/0037/08.

⁶⁷⁹ Actually, the amount should be 3,526,286.79€ instead of 3,550,615.70€ (i.e. €24,328.79 less). It is possible that there is a minor error in the transcription of the judgement in the private case-law database, or perhaps an arithmetic error in the calculations of the same judgement.

⁶⁸⁰ The First Instance decision was finally rejected by both the Court of Appeal of Madrid (Judgement of the 8th Section of 18 December 2006) and the Supreme Court (Order of 14 April 2009) for reasons other than interest calculation.

Decision: 25,500,000€, plus interest from 30/12/2004 (date of the claim) to 07/06/2005 (date of the judgement), plus procedural delay costs (C)

Brief comment: It is not mentioned if the amount sought was updated according to the legal interest. The court of first instance awarded legal interest from the date of the claim (B) and, if applicable, procedural delay interest (C).

2.2. *Football Broadcast*

Cableuropa SAU v. Sogecable SA and Audiovisual Sport SL

Facts: The two defendants had exclusive rights to broadcast the Spanish football league. The claimant sued Sogecable (parent company) and Audiovisual Sports (affiliated company) because they did not apply a progressive discount to other operators as they were obliged in order to keep the exclusivity. The claim was filed on January 2008.

Amount sought: 4,790,913€ (for the season 2003/2004), plus 5,793,798€ (for the season 2004/2005), plus 8,659,859€ (for the season 2005/2006), plus an amount resulting from an arithmetical calculation for the seasons 2006/2007, 2007/2008 and 2008/2009, plus interest for each season, plus court costs

Court: Commercial Court of Madrid (No. 7)

Date: 04/03/2010

Decision: season 2003/2004: 4,790,913€ plus interest of 390,544€ = 5,181,457€; season 2004/2005: 5,793,798€ plus interest of 472,297€ = 6,266,095€; season 2005/2006: 8,659,859€ plus interest of 705,931€ = 9,365,790€; season 2006/2007: 9,007,374€; season 2007/2008 and 2008/2009: to be calculated in an ulterior execution procedure.

Brief comment: The case offers some important points to be underlined. Firstly, the damages have been calculated in the economic report according to the overcharge paid. Secondly, interest for the first period (i) was not calculated but for the second period (ii) until 15 July 2009. There is no explanation why it was calculated until 15 July 2009, unless it was the end of the season 2008/2009. Thirdly, for the amount related to the season 2006/2007, there is no explicit mention to interests. Fourthly, the court stated that legal interest had to be applied because it was a delay interest (B). Fifthly, the court also granted the procedural delay interest (C). This sounds strange as this is a first instance judgement, and the procedural delay interest is calculated within an ulterior execution procedure if the debtor does not pay the amount granted by the court.

2.3. *Electra Caldense SA v. Endesa Distribución Eléctrica SL*

Facts: The Spanish Competition Authority imposed a fine to Endesa because of abuse of dominant position. Electra Caldense sued Endesa seeking nullity of their agreement and damages.

Amount sought: nullity of the agreement, plus 3,492,919.29€

Court: Commercial Court of Barcelona (No. 7)

Date: 03/11/2010

Decision: claim rejected

Brief comment: There is no mention of interest in the economic report submitted by the claimant. He did not request interest from the date of the claim, thus the court did not grant it.

2.4. *Céntrica Energía SLU v. Endesa Distribución Eléctrica SL*

Facts: The monopolist electricity distributor (Endesa) must provide electricity to the other commercial electricity suppliers with information about supplying points connected to its network. The claimant Céntrica sued Endesa because of its refusal to provide such information. The Spanish Competition Authority considered this an abuse of dominant position.⁶⁸¹

Amount sought: 33,308.33€ (*damnum emergens*), plus 5,232,175€ (*lucrum cessans*), plus procedural delay interest (C), plus court costs

Court: Commercial Court of Barcelona (No. 2)

Date: 20/01/2011

Decision: 673,699.10€ (*damnum emergens* plus *lucrum cessans*) for damages on low-power market, plus an amount to be calculated afterwards for damages on high-power market, plus interest from the judgement date (C)

Court: Court of Appeal of Barcelona (15th Section) (No. 153/2012)

Date: 19/04/2012

Decision: amount increased and rest of the first instance judgement confirmed

Court: Supreme Court (No. 260/2014)

Date: 04/06/2014

Decision: the appeal judgement confirmed, plus cassation costs

Brief comment: The *quantum* sought by the claimant was updated in the economic report according to the monthly consumer price index, instead of the legal interest rate. Nevertheless, the court mentioned that there were some interest updates that were not sought by the claimant. In addition, the claimant did not seek interest from the date of the claim (B) - this is why it was not granted - but procedural delay interest (C). This was unnecessary as the procedural delay interest is granted *ex officio*.

Group 3

3.1. *Service Station*

Estación Servicio Fontanet SL. v. Repsol SA

Facts: The claimant Fontanet sought the nullity of two long-term agreements with Repsol, the reimbursement of an amount, damage and loss of profits.

Amount sought: nullity of both agreements, plus 43,410€ (reimbursement) and its corresponding interest, plus 891,067.83€ (damage and loss of profits)

Court: Commercial Court of Palma

Date: 03/03/2009

Decision: nullity, plus 43,410€, plus 218,958.98€, plus procedural delay interest (C)

Court: Court of Appeal of Balearic Islands

Date: 01/09/2010

Decision: first judgment confirmed

Court: Supreme Court (No. 272/2013)

⁶⁸¹ Decision of the Spanish Competition Authority of 2 April 2009.

Date: 08/05/2013

Decision: appeal judgement confirmed

Brief comment: The calculation of the amounts requested by the claimant included an update according to the consumer index price. Interest from the date of the claim was not granted as the court considered that the claimant did not seek it specifically, even if the sentence '*its corresponding interest*' was present in the claim.

3.2. *Service Station*

Sociedad Expendedora de Gasolinas y Aceites SA v. Repsol SA

Facts: The claimant sued Repsol seeking for nullity of the long-term supplying agreement of fuel. In the claimant's opinion, the agreement was anti-competitive because of indirect resell price fixing.

Amount sought: nullity of the agreement, plus an amount regarding the surcharge paid to the supplier (Repsol) between 14/01/1993 and 17/08/2008, plus interest, plus court costs

Court: Commercial Court of Madrid (No. 3)

Date: 19/06/2013

Decision: only nullity

Brief comment: Despite the fact that the court did not award any amount, it is interesting as it mentioned the case *Manfredi*, stating that the *lucrum cessans* should have been calculated considering the damage resulting from being obliged to sell at a higher price and therefore lose customers, plus interest.

3.3. *Service Station*

Estació de Servei Cornellà S.L, v. Cepsa SA

Facts: The claimant sued Cepsa seeking for nullity of the long-term supplying agreement of fuel. In its opinion, the agreement was anti-competitive because of direct and indirect resell price fixing.

Amount sought: nullity of the agreement, plus an amount still to be calculated (*damnum emergens*), plus interest, plus court costs

Court: Commercial Court of Madrid (No. 3) (No. 40/2014)

Date: 25/02/2014

Decision: nullity, plus 97,444.78€ (*damnum emergens*), plus interest from 2013

Brief comment: The court did not award any amount as *lucrum cessans* since it was not sought explicitly. The *damnum emergens* was caused in 2012, thus it calculated the legal interest from 01/01/2013 until the date of the judgement. The court mentioned the draft of the Directive 2014/104/EU and stated that interest should have been calculated from the moment the harm was caused. Here, since no concrete amount was sought in the claim but only a formula because of the difficulties to state the exact amount of the claim, the court calculated interest according to the new Directive. Thereby, interest starts to accrue as from the date of the harm but in order to be granted, it must be claimed.

4.2. Are the rules on the award of interest specific to the kinds of claim or general principles? Are there any specific approaches/rules that you can identify in national or EU competition cases, or in other cases where the claim is brought by business against business (B2B) and are there any specific approaches/rules in business versus consumer (B2C) cases?

(ES.53) The Spanish legal system does not make any difference between B2B and C2B cases.

(ES.54) Nevertheless, it should be taken into account that in case of collective actions relating to consumers, only consumers' associations are entitled to initiate proceedings.⁶⁸²

Section V. Evaluation, Interpretation in conformity with EU Law, and Intertemporal Aspect

5.1. Throughout the reports, evaluate how satisfactory are the rules on the calculation of interest perceived to be? In considering this question, identify any law reform proposals in the last 15 years or so, or any major judgments by the higher courts that call into question or change some of the issues pertaining to the award of damages. Please identify changes of relevant national law on interest that will come into force or are currently considered.

(ES.55) Traditionally, in Spanish tort law, it can be stated that the right to full compensation is achieved quite satisfactorily. The claimant can demand an amount including damages and loss of profits updated according to the legal interest (first period of time (i) plus interest from the date of the claim until the date of the judgement (second period of time (ii)). Generally speaking, the Spanish interest regime thus ensures that the claimant is not overcompensated and that the cartelists are disgorged of their illegal profits.

(ES.56) Concerning future changes, it should be noted that the new General Budget Annual Act for 2016 establishes the legal interest rate at 3.00% (see Table 1 in question 2.5).

5.2. For each question, where it is relevant, assess the compliance of the national interest rules with the minimum standard prescribed by EU law ('full compensation'). If national law does not grant full compensation, please try to identify an interpretation of national law that guarantees full compensation in conformity with European law.

(ES.57) Spanish courts normally award interest from the date the claim was brought until the date of the judgement if it has been sought. Then, procedural delay interest is applied until the debt is fully covered.

(ES.58) It can be stated that the weakest point is that it depends on the actions of the claimant. If the claimant does not update the amount sought or does not request interest from the date of the claim, the court will not grant it.

(ES.59) Nevertheless, it should be noticed that more often courts are recognizing the importance of granting interest for losses resulting from infringements of competition law from the date the harm occurred (see the service station case *Estació de Servei Cornellà SL v. Cepsa SA* in question 4.1).

5.3. Finally, when assessing the overall compliance of national law with the principle of full compensation based on directly applicable EU law, please confirm that national courts

⁶⁸² See Art. 11 of the Civil Procedural Act 1/2000.

have to apply it also in relation to past infringements of EU competition law or the equivalent provisions of the EEA agreement (e.g. cartels starting in the 1990ies and ending in the 2000er years).

(ES.60) National courts invoke Art. 101 and 102 of the TFEU and national law with no distinction; and they are awarding interest in relation to past infringements whether it is EU competition law or national law. The Spanish sugar cartel is an example as it began on February 1995 (see question 4.1).

5.4. Regarding the secondary subject of investigation (interest on damages due to infringements of national competition law only) Recital 12 of the preamble of Directive 2014/104/EU summarises the EU law principles regarding interest as follows:

“Anyone who has suffered harm caused by an infringement can claim compensation for the actual loss (damnum emergens), for the gain of which he has been deprived (loss of profit or lucrum cessans) plus interest. This is irrespective of whether the national rules define these categories separately or in combination. The payment of interest is an essential component of compensation to make good the damage sustained by taking into account the effluxion of time, and it should be due from the time the harm occurred until compensation is paid, without prejudice to the qualification of such interest as compensatory or default interest under national law. This is also without prejudice to whether effluxion of time is taken into account as a separate category (interest) or as a constituent part of actual loss of profit. It is incumbent on the Member States to lay down the rules to be applied for that purpose”.

Would the right to full compensation as set out by Recital 12 of the proposed directive apply to interest calculation for damages in cases where only national competition law has been infringed and the damage occurred before the implementation of the directive came into force?

(ES.61) Yes, it would apply. As mentioned, neither the Spanish law nor the case-law differentiate between the breach of EU or national competition law.