WHY THERE MIGHT NOT BE MANY DAMAGE CLAIMS ARISING FROM THE SPANISH PROPERTY INSURANCE CARTEL?

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Abstract

Inherent Defects Insurance (IDI) for new housing buildings is mandatory in Spain since May 2000. The instauration of this legal requirement prompted an upsurge in the IDI market. Being confronted with wild competition, the major insurance carriers active in that market promoted a minimum price agreement involving also IDI reinsurers. The role of reinsurers was key in propagating the effectiveness of the minimum price agreement all over the market.
This article examines the features of the Spanish IDI cartel, uncovered by the Spanish National Competition Commission in 2009. The companies involved were punished with the largest fine ever imposed by competition authorities in Spain. However, potential damage claims by cartel victims may face several hurdles. Some of them are related to some specific features of the cartel itself, others have to do with the reluctance to damage claims for competition violations in Spain.

Keywords

Property insurance, cartel, inherent defects insurance (IDI), damage claims.

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INTRODUCTION

In November 2009 the Spanish National Competition Commission (NCC) sanctioned a cartel in the property insurance market that had been in effect for 84 months (from January 2002 to December 2007).

According to the NCC, the three major insurance companies selling property insurance (ASEFA, MAPFRE EMPRESAS and CASER) and the majority of the reinsurers for that kind of insurance (SUIZA/SWISS RE, SCOR and MÜNCHENER) were part of a conspiracy to raise the prices of mandatory property insurance for new buildings (inherent damages insurance, or IDI). The NCC considered those agreements to be a violation of article 1 of the Spanish Competition Act (hereinafter SCA) and of article 101.1 of the Treaty on the Functioning of the European Union (hereinafter TFEU) [2]. For that reason, the abovementioned companies were severely punished with the largest fine ever imposed by Spanish competition authorities (120.728.000€)[3]. However the NCC resolution has been appealed before an administrative court, and a decision is pending on several issues regarding the violation and the amount of the fines.

This article describes how the cartel was organized and how it operated, starting from the introduction of a legal requirement of IDI for new housing since May 2000 (*infra* § 1). Initial steps from which the cartel was formed were taken by the direct insurers, but reinsurance companies were key in spreading its anticompetitive effects all over the IDI market (*infra* § 2). Finally, this article explains why, despite being an apparent good candidate for damage claims by injured parties, there has been such a dearth of claims against the insurance or reinsurance companies involved in the cartel (*infra* § 3 & 4).

1. SPANISH DECENNIAL INSURANCE FOR NEW HOUSING

The Spanish building industry sprawl in the eighties and nineties was followed by complaints regarding the quality of the buildings and the protection of buyers. For that reason, new legislation was enacted at the end of the nineties to clarify rules in this area.

The Spanish Act nº 38/99, dated on 5th November, on building regulations (Ley de Ordenación de la Edificación hereinafter LOE) was put into effect on the 6th of May 2000. It introduced a complete and modern legal framework for the building industry in Spain. It clarified the duties and liabilities of all the agents involved in the building process, with the aim of assuring better quality of new buildings

[2] A non-official translation of the Spanish Competition Act is available at http://www.cncompetencia.com. The consolidated version of the Treaty on the Functioning of the European Union was published in Official Journal of EU, C83/210, 30.03.2010 (http://eur-lex.europa.eu/en/treaties/index.htm).

[3] See NCC Resolution of 12 November 2009, S/0037/08 Compañías de Seguro Decenal (in Spanish), hereinafter NCC Decennial IDI Resolution. In English see "La Comisión Nacional de La Competencia (CNC) imposes € 120.728.000 in Fines on Insurance Companies Cartel" (available at http://ec.europa.eu/competition/ecn/brief/01_2010/insurance_es.pdf, visited 31.07.10) and MICHAEL BRADFORD, "Spain charges big insurers developed construction coverage cartel", BUSINESS INSURANCE, Nov. 23, 2009, Vol. 43/42, pages 3 and 22.

(on its functionality, security and occupancy) and better conditions and guarantees for consumers of the new buildings acquired.

Among other relevant things, the LOE requires property promoters or developers the mandatory subscription of a ten-year inherent defects insurance (IDI) for newly constructed housing[4]. Building developers are legally responsible for 10 years following the completion of the construction for any harm resulting from the foundations and other structural elements. The LOE makes compulsory the buying of insurance for those liabilities, making the buyer of the house beneficiary of the insurance contracted[5]. IDI provides a mechanism for reducing or avoiding construction defects litigation.

The extent of decennial liability includes material damages in the building arising from inherent vices or defects in the masonry, supports, beams, framework, load-bearing walls or any other structural elements that threaten the building's solidity, mechanical resistance and stability.

The mandatory character of decennial IDI, including an obligatory 100% coverage of total construction management expenses, comprehending professional fees and permits (deductibles could not exceed 1% of the total sum insured), had the effect of providing a background in which an anticompetitive agreement could easily flourish. Neither potential policyholders (housing developers) nor insurers have much contractual choice regarding some features of the contract, mainly whether to contract and the extent of coverage to insure[6]. In this sense, demand for decennial IDI is highly inelastic (must-contract service).

Aside from the mandatory ten-year coverage insurance for building developers, optional coverage is available for the three-year liabilities the LOE decrees on water tightness of roofs and walls, and other elements that affect the stability and habitability of the building. Moreover, the LOE also prescribes a one-year liability of the builder regarding the state of finishing elements ("snagging list") and

[4] Section 9.2.d) and 19.1.c) of LOE, and Additional Disposition 2.1.The LOE gives the builder the possibility of buying the insurance on behalf of the developer), who is the one who initially should do it [section 19.2.d) of LOE]. Before 2000, liability insurance for architects and builders was available and regularly taken as article 1591 of Spanish Civil Code makes them liable for building defects over a period of 10 years from the end of the construction work, if they had to do with vices on ground, construction or direction of building work. Based on the general insurance contract law, prior to the LOE there were different insurance products (professional liability insurance, liability insurance, all-risks building insurance, decennial liability insurance) available to those involved in the building work, see BRENES CORTÉS (2005: 51-71) and CARRASCO PERERA (2005: 358-366).

[5] According to section 20.1 of the LOE, the insurance policy details must be presented to the Notary and they must be included in the public deed of the building to be registered in the Property Registry. Without that, the registration is not possible and any further sale transactions could not be notarized. See BRENES CORTÉS (2005: 357-379), JIMÉNEZ CLAR (2001: 43-45 and 61-64) and ESTRUCH ESTRUCH (2007: 855-859).

[6] Contractual freedom and choice is severely limited (if not abolished), although some authors assert that there still remains the possibility for both potential policyholders and insurers to chose their contractual parties, see PAVELEK (2001: 240). ARNAU MOLLA (2004: 295-296) alerts about possible distortions provoked by the mandatory character of IDI, ranging from insurance companies inclusion of abusive contract terms against the insured to excessive judicialization or increase on housing prices.

supplementary coverage for this liabili ty is also available. In these last two cases insurance is not required, though it is fre quent that insurance companies offer it as supple mentary and voluntary coverage to housing pr omoters buying the mandatory decennial insurance for new r esidential developments[7].

The requirement of mandatory insurance was al so the birthm ark of a new market for decennial insurance in Spain that gr ew accordingly with the growth of construction industry until 2007, but which felt dramatically thereafter (see table 1).

Table 1. The decennial IDI market in Spain (2000-2008)

Year	Number of contracts	Coverage Amount (€)	Total Price (€)
2000	2.042	2.193.975.000	15.056.000
2001	14.948	10.471.910.000	65.486.000
2002	26.143	21.922.843.000	145.258.000
2003	26.302	31.062.129.000	225.002.000
2004	32.559	41.865.225.000	312.895.000
2005	35.157	46.650.215.000	355.069.000
2006	38.111	52.080.802.000	386.404.000
2007	36.508	50.505.917.000	355.557.000
2008	17.515	25.632.962.000	174.116.000

Source: NCC Resolution of 12 November 2009, S/0037/08, Finding of Fact 2.4.

The origins and the evolution of the decennial IDI market in Spain were char acterized by substantial concentration in the offer of this class of insurance on three co mpanies. From the beginning ASEFA[8],

[7] On the a dditional coverage normally included on IDI policies exceeding the mandatory coverage see BRENES CORTÉS (2005: 180-186).

[8] ASEFA is co-owned by the French insurance company SOCIÉTÉ MUTUELLE D´ASSURANCE DU BÂTIMENT ET DES TRAVAUX PUBLICS (SMABTP) and the F rench reinsurer SCOR (see Finding of fact 1.1, NCC Decennial IDI Resolution). Apparently, ASEFA is h eavily dependent on its in surance activities in the construction market, in which it is strongly specialized.

MAPFRE and CASER held together 60% of the market. The rest of the market was fragmented in smaller shares held by around fifteen other insurance companies.

On the other hand, from its beginning, the decennial IDI market settings were deeply affected by the reinsurance contracts agreed with the four reinsurers active in this market (SUIZA, MÜNCHENER, SCOR and MAPFRE RE[9]). Firstly, two of those reinsurance companies were affiliates of two of the main IDI insurers (SCOR and MAPFRE RE). Secondly, when mandatory IDI was established in May 2000, reinsurance contracts for decennial IDI were organized as proportional quota share schemes, that shifted a higher share of risk exposure to the reinsurers, who correspondingly shared an even proportion of the premium. Premiums and losses were shared in the same pro-rata basis (more on this, see *infra* § 2.1). Because of the agreement among the four reinsurers active in the IDI market, no alternative type of reinsurance contracts were available, and that severely constrained potential competitors in the IDI reinsurance market by companies (both direct insurers and reinsurers) willing to follow other contractual schemes[10]. Only lately, in 2007, when the cartel was brought to light by the NCC, facultative reinsurance contracts and non proportional reinsurance treatises started to be used [11], either in the form of stop-loss or excess-loss, in which the basis are the losses incurred and not the risks ceded: the reinsurer covering a set amount of the losses exceeding an amount retained by the insurance carrier[12].

2. THE MECHANICS OF THE SPANISH PROPERTY INSURANCE CARTEL

According to the evidence found by the NCC, the year after the LOE entered into effect (i.e., when mandatory decennial IDI was established) there were contacts among IDI carriers and IDI reinsurers concerning the wild competition in this new market. Competition brought a dramatic decrease of IDI premiums and some of the companies active in that market decided something needed to be done to stop that. It is open to discussion how many meetings took place and who were part of those meetings, but it is well settled that there was a common understanding by ASEFA, MAPFRE (the IDI carriers) and SUIZA, MÜNCHENER and SCOR (the reinsurers) that premiums had to be increased and uniform contracting conditions all over the market should be followed[13].

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[9] MAPFRE RE mainly reinsured the decennial IDI contracted with MAPFRE EMPRESAS and later on retroceded it to the other three main IDI reinsurers, see finding of fact 2.7, paragraph 1. Despite being two independent legal persons, both companies belonged to the same corporate group, and the NCC took that into consideration when assessing their behavior, deciding they did not deserve separate fines (see Legal ground 9th, NCC Decennial IDI Resolution).

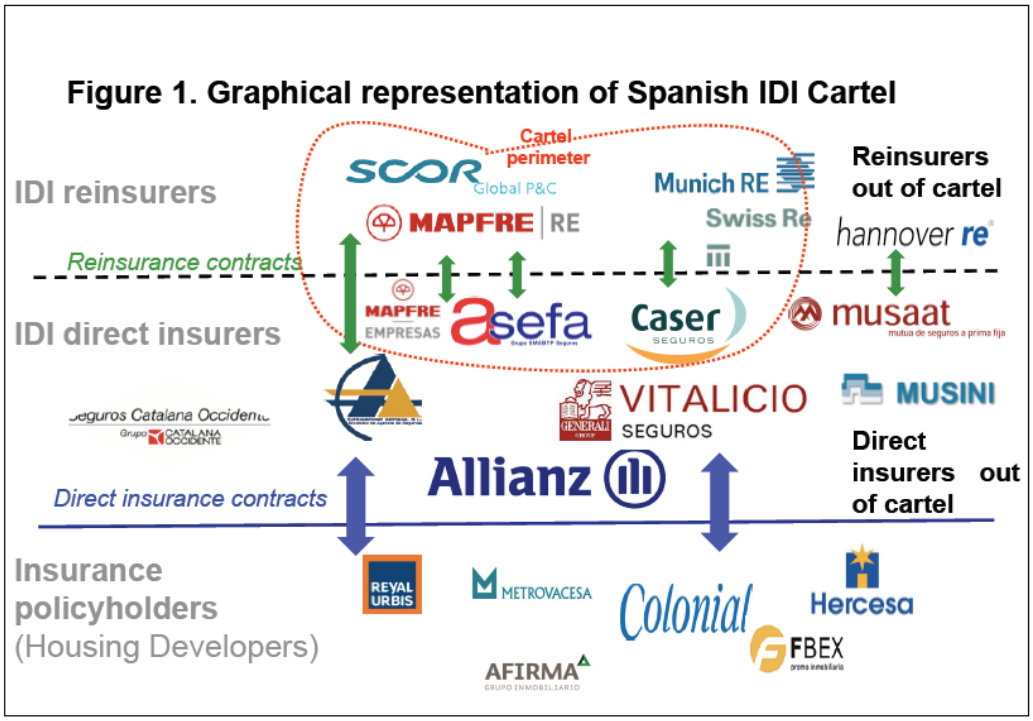
[10] It does not seem that the proportional quota share reinsurance and the refusal to write any other type of reinsurance contract was aimed at protecting reinsurers financial health, but only to ensure that none primary insurer would be able to sell IDI contracts which did not follow the premiums fixed by the cartel, see Hartford Fire Insurance Co. v. California, 509 U.S. 764, 792 (1993).

[11] Indeed, no more proportional quota share treatises were written after that time.

[12] See Findings of fact 2.6 and 2.7, NCC Decennial IDI Resolution.

[13] See Findings of fact 3, 4, 5 and 6, NCC Decennial IDI Resolution.

The main outcome of such an understanding was a draft prepared at the end of August 2001 by ASEFA entitled "*Corrective Measures Decennial Damage Insurance*", in which the technical and commercial features of decennial insurance that should be followed all over the market were set (including pricing)[14]. That document contained some technical requirements on IDI contracting and quality control but also several measures that involved a minimum price-fixing agreement. After discussion with MAPFRE and the IDI reinsurers, on December 2001, a new version of the document was finally agreed upon by ASEFA, MAPFRE EMPRESAS, MÜNCHENER, SUIZA and SCOR ("*Corrective Measures Decennial Damage Insurance-2002*")[15].



2.1. Cartel organization and operation

Although several other meetings by IDI insurers, reinsurers and even third-party IDI sellers (savings and banks) took place during 2002 to fine-tune the pricing conditions agreed for IDI contracts[16], according to the NCC, the cartel commenced producing its effects on January 2002. Since that date,

[14] See Finding of fact 7, NCC Decennial IDI Resolution.

[15] See Findings of fact 8, 9, 10 and 11, NCC Decennial IDI Resolution.

[16] See Findings of fact 13-19, NCC Decennial IDI Resolution. Several doubts were raised by some cartel members regarding the compliance of all reinsurers with the corrective measures agreed (see Finding of fact 15, NCC Decennial IDI Resolution). Apparently, the most important moment took place the 7th of May 2002 when ASEFA and all the reinsurers agreed new minimum price conditions and monthly monitoring meetings to examine defections (see Finding of fact 18, NCC Decennial IDI Resolution).

IDI reinsurance contract included the corrective measures agreed beforehand: indeed, minimum pricing conditions for direct IDI established by the cartel were annexed to reinsurance contracts from 2002 to 2007[17].

Reinsurance was key in the cartel organization[18]. The generalization of proportional quota share reinsurance treatises as the only type of reinsurance available in the IDI market gave way to a situation in which reinsurers depended greatly on the ceding insurer. Proportional quota share reinsurance "*involves the cession by reinsured of a fixed proportion of business within the scope of the reinsurance contract to the reinsurer*"[19]. Alternative reinsurance contractual schemes in which the reinsured had a choice as to what risks he would cede and the reinsurer binds himself to take whatever is ceded were not offered by reinsurance companies.

Indeed, in that situation, IDI insurers could be seen as mere agents of the reinsurers[20]. Proportional quota share treatises strengthened the influence of the later on the IDI market[21]. Being the most profitable type of reinsurance for them, it is normally used for homogeneous risks and when there is difficulty to foresee accident or loss rate. It provides reinsurers a balanced, continuous business flux,

[17] See Findings of fact 12 and 20-24, NCC Decennial IDI Resolution. The NCC assumes a year (from January to December) as minimum duration unit of cartel because that is, apparently, the typical duration of reinsurance contracts.

[18] In other competition cases in the insurance market, the authorities have found reinsurance crucial in structuring the anticompetitive behavior. See, regarding the engineering insurance in Italy, ¶¶10, 16 and 23 of Decision of 30 March 1984, relating to a proceeding under Article 85 of the EEC Treaty (IV/30.804- Nuovo CEGAM). In the famous U.S. case Hartford Fire Insurance Co. v. California, 509 U.S. 764, 775-777, 792 (1993) reinsurers were cardinal in a conspiracy by direct insurers to change certain policy terms on commercial liability insurance and property insurance (reducing risk exposure of insurance carriers), see also CORREIA (1991:62-65), MCGUIRE (1994: 334-335) and RHATHICAN (1995: 907-909). The involvement of reinsurers was also primal in some conspiracies detected in the U.S. fire insurance market [see St. Paul Fire & Marine Insurance Co. v. Barry, 438 U.S. 531, 560-561 (1978), and U.S. v. South-Eastern Underwriters Ass'n et al., 322 U.S. 533, 535-536 (1944)].

[19] LEIGH-JONES (2003: ¶33-13). See also EU COMMISSION (2007: 24-25) and PATRICK (2003: 348).

[20] See OCDE (1998: 27): "*However, as in other industries, the vertical relationships that arise through reinsurance may act to facilitate collusion. In particular, a situation might arise where the upstream reinsurance market is relatively concentrated. In this circumstance the downstream insurers may be able to utilise the reinsurer as a tool for enforcing collusive arrangements. For example, the insurers (via the reinsurer) argue that "uniformity of premiums and policy conditions is required to make the calculation of the tariffs for reinsurance possible". The reinsurer, by enforcing tariff uniformity (at the cartel price) becomes the mechanism by which collusion is enforced."*

[21] Apart from the specific type of reinsurance used in the decennial IDI market, allegedly there has been an overall shift in the relationships among insurance carriers and reinsurers, see PORTELLANO (2007: 26-27). Reinsurers are increasingly vertically integrated with insurers, through "*captive insurance firms*" (*id:* 45-49) and there is an increasing reciprocal influence or intervention in direct insurance, not only informally, but also through contractual means (*id.:* 50-51). See also EU COMMISSION (2007: 26-27).

in which a proportio nate pro quota sh are of all the IDI premiums is ceded independently of t heir amount. Of course, a similar proportion of risk exposure is also transferred to the reinsurer.

The automatic cession framework pushes reinsurer and reinsured to a comm unity of interest, in which the direct IDI contracts written by the insurance companies have a straightforward and i mmediate impact on reinsurers. As the reinsurers stake on the functioning of decennial IDI is larger, they look for controlling different features of the prem ium and the risk exposure, through imposition of conditions and requirements in the direct insurance contracts, and specifically a minimum premium.

Compared to other insurance products, prem ium setting for decennial IDI contracts requires taking into account different elements related to the ch aracteristics and area of the buildi ng and is not a straight-forward exercise, even though some sophistication by the housing d evelopers buying this insurance could be assumed. The NCC found plenty of evidence of how the reinsurers fixed minimum premiums for direct IDI insurance all over the market by requiring un iform minimum pricing conditions that should be followed by direct insurers if they wanted their IDI contracts to be subject of cession to IDI reinsurers.

Pricing conditions in IDI contracts that were agreed beforehand by cartel members included[22]: (1) the minimum percentage decennial IDI cov erage for apartments and single houses, (2) the minimum flat amount per IDI contract and per housi ng unit, (3) i dentical percentages of supplementary coverage aside mandatory IDI (water tightness of roofs and walls, and stability of non load-bearing walls), (4) extra percentages charged for resignations to clai ms against other agents in the building process and IDI price ref erences per m^2 of building area to cor rect for low- value declarations that could im ply lower premiums. The magnitudes agreed b y cartel members were exact and precise and should be applied to the coverage amount in the calculation of the commercial premiums[23].

The reinsurance side of the cartel heavily infl uenced direct IDI contracts written from 2002 onwards, imposing minimum premiums and even correcting for possible value changes in ho using that could lead to under-insurance[24]. The NCC sampled twenty different direct IDI contracts written b y ASEFA,

[22] See Finding of fact 25, NCC Decennial IDI Resolution. According to the NCC these conditions were the same "corrective measures" for decennial damage insurance contract agreed by the cartel members in 2001.

[23] In setting the premium to be paid, insurers start from a technical calculation of the risk covered (probability of accident), taking into account the sum insured and the contract duration (this is called the *gross premium* or the *premium at risk*), but the final premium charged (i.e. the *commercial premium* or the *net premium*) is the result of adding some other expenses (administrative and ot her charges, including the profit to be earned by the insurer) to the gross premium. According to the NCC, the cartel went into the detail of fixing the final premiums premiums to be charged by IDI carriers.

[24] Finding of fact 26, NCC Decennial IDI Resolution. A similar device was found to be essential in the operation of the fire insurance cartel in Germany, see ¶ 30 of ECJ judgment of 27 January 1987, Verband der Sachversicherer E.V. v Commission of the European Communities (Case 45/85): «*30. German re-insurance companies decided to include in their contracts of re-insurance concerning the same risks a special "premium calculation clause" according to which premium rates which fail to conform to the recommendation are to be treated in the event of a claim as under-insurance.*»

MAPFRE and CASER and found that minimum price conditions set by the cartel were strictly followed in all of them[25].

2.2. Monitoring and policing compliance

Operating at two different levels (insurance/reinsurance), the property insurance cartel faced difficulties in monitoring compliance with the minimum price conditions established. The NCC shows several examples of how the reinsurance and the insurance carriers (were they part on the cartel or not[26]), were the main agents monitoring any IDI offers below the prices set by the cartel, whilst the reinsurers were the judges and executioners acting against any potential defections[27].

Once defections by direct insurers were detected, the action moved to the higher level of reinsurance cartel members, who were in charge of adopting measures to prevent those offers to go forward. Reinsurance cartel members refused to accept the cession of any offers of IDI contracts that did not comply with the pricing conditions set by the cartel, and they even cancelled those that were agreed below cartel prices.

Apparently, the biggest challenge to the cartel took place at the end of 2006 when the insurer MUTUA DE SEGUROS A PRIMA FIJA (MUSAAT) negotiated with the reinsurer HANNOVER RE a non-proportional excess-loss reinsurance contract that altered the standard contractual setting used by IDI reinsurers in the market and which naturally violated the cartel minimum-prices[28]. The original cartel members and CASER were effective in persuading HANNOVER RE to withdraw its offer of reinsurance contract to MUSAAT[29].

However, apparently the initiative of MUSAAT destabilized the cartel and marked its breakdown in 2007. Indeed, MUSAAT finally managed to get reinsured in conditions that did not comply with the cartel requirements. Although several meetings by cartel members took place during 2007 in order to reinforce the cartel[30], the initiation of investigations by NCC put an end to the cartel at that time.

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[25] Finding of fact 28 and Legal Ground 3th, paragraph 14, NCC Decennial IDI Resolution. The NCC reckoned that technical features of some buildings may introduce additional risks that imply additional surcharges and some other circumstances may give way to further discounts and surcharges (type of soil, slope, phreatic stratum, foundations and type of structure) that were out of the minimum pricing conditions set by the cartel.

[26] The NCC mentions claims not only by cartel members but also by the reinsurer VITALICIO (see Finding of fact 36, NCC Decennial IDI Resolution), and ALLIANZ (see Finding of fact 39, NCC Decennial IDI Resolution).

[27] See Findings of fact 29-34, NCC Decennial IDI Resolution. See *supra* note 18.

[28] Findings of fact 40 and 41, NCC Decennial IDI Resolution.

[29] Findings of fact 41, 42, 43 and 44, NCC Decennial IDI Resolution. CASER was not considered to be an original member of the cartel and, initially, it only followed the conditions set by reinsurers. However, the NCC considers that its role changed in 2006 when it started playing a relevant function in monitoring defections from the minimum pricing agreement. See Legal Ground 6th, paragraph 4, NCC Decennial IDI Resolution.

[30] Findings of fact 45-58, NCC Decennial IDI Resolution.

2.3. Cartel effects: economic relevance

In order to estimate the economic significance of the cartel and its impact on the prices of decennial IDI, the NCC resorted to the available statistics on the evolution of the decennial insurance market from 2001 to 2007. Although members of the cartel were both direct insurers and reinsurers, the NCC considered that the relevant market affected by the cartel was the direct IDI market. In accordance with the data available, the NCC calculated the average premium rate per sum insured for the period 2002-2007, and that permitted to observe the increase of average premiums arising from the cartel (see *infra* table 2).

In words of the NCC, the minimum prices agreement "*eliminated all competition in prices in all the decennial IDI market, all policyholders had to pay, at least, the minimum prices set*"[31]. Surely reinsurers competed among themselves in the commissions charged and indeed reinsurers could compete in setting different proportions of the risk exposure taken, but nevertheless it is clear that they took part in an anticompetitive agreement that froze competition both in the IDI reinsurance market and in the direct IDI market[32]. Competition among reinsurers was severely restrained by the condition that only proportional pro quota share treatises were available and, consequently, by the identical pricing conditions IDI reinsurers set for the direct IDI market. Concerning the later, it is true that there were variations in the commercial conditions offered by insurance carriers over the minimum prices set by the cartel, and those may be explainable not only by the complex criteria used to set final prices but also by the existence of some competition by direct insurers above the cartel minimum prices.

The NCC considered also relevant the fact that while the cartel was in effect, cartel members, both at insurance and reinsurance levels, kept and even increased their market shares. Only the breakdown of cartel in 2007 allowed other insurance companies (v. gr., MUSAAT) to gain substantial market share once the minimum prices agreement ceased to be into effect and alternative reinsurance contracts started to become available.

The reinsurers and insurance carriers involved in the cartel acknowledged an increase in average premiums for IDI after 2002, but they denied that it had anything to do with a cartel. For them, it was the result of normal market operations. Instead, the NCC attributed all the increase of average premiums to the effect of cartel[33].

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[31] Legal ground 10th, NCC Decennial IDI Resolution.

[32] In Decision of 20 December 1989, relating to a proceeding under article 85 of the EEC Treaty (IV/32.408-TEKO), the Commission showed how a collaborative agreement among reinsurers restricted competition both in German reinsurance and in direct insurance markets for machinery loss of profits insurance and space insurance. Indeed, regarding the limits reinsurers face in exercising their influence in insurance carriers, it held that "*TEKO's coordination activity goes well beyond the influence of reinsurers that is otherwise customary on the market, since reinsurers generally confine themselves to checking the premiums and the terms and conditions worked out by direct insurers and neither calculate the direct insurers' offers for them at the outset nor serve as a permanent joint information and advisory body for a specific group of undertakings*" (¶19).

[33] Finding of fact 59, NCC Decennial IDI Resolution.

The NCC regarded the price increase in the decennial IDI market from 2002 to 2007 (measured by average premiums) as a consequence of the cartel (see *infra* table 2). According to the NCC it amounted to around 17% of the premium paid over the duration of the cartel [34]. According to NCC calculations, the total excess in decennial IDI premiums paid by residential building developers from 2002 to 2007 would have been 242.436.072€.

[34] Legal ground 10th, paragraph 6, NCC Decennial IDI Resolution. There is some controversy regarding the data used by the NCC to make these calculations. The NCC used the data available from ICEA (Investigación Cooperativa entre Entidades Aseguradoras y Fondos de Pensiones). This was first Spanish association of insurance companies founded in 1963 (see more information at http://www.icea.es). Its reports and statistics are constructed with data provided by member insurance and reinsurance companies. Cartel members complained about the inaccuracy and variability of ICEA's data and statistics. However, the NCC considered that despite possible defects and variations in the statistics used, there was enough evidence of the violation committed (Legal ground 10th, paragraphs 7-11, NCC Decennial IDI Resolution) which –moreover- the SCA and the TFEU prohibited because of its object, no matter the effect it might have had in the market (Legal ground 10th, paragraph 5, NCC Decennial IDI Resolution).

A mere 2,8% markup of all the premiums paid -according to the NCC- is much lower than the average of 20% find in prior cartel cases, see BOLOTOVA (2009: 328-329 and 338), BOLOTOVA, CONNOR & MILLER (2007: 25-28 & 31); CONNOR & BOLOTOVA (2006: 1128 & 1134); specially bearing in mind this was a services cartel with inelastic demand.

Table 2. Calculation of cartel impact in IDI prices (2002-2007)

Year	Sum Insured(A)	Total Premium (B)	B/A	B/A absent cartel[I](C)	CxA Total Premium absent cartel (D)	B-D Premium excess due to cartel
2002	21.922.843.000	145.258.000	0,66	0,63	138.113.910,90	7.144.089,10
2003	31.062.129.000	225.002.000	0,72	0,63	195.691.412,70	29.310.587,30
2004	41.865.225.000	312.895.000	0,75	0,63	263.750.917,50	49.144.082,50
2005	46.650.215.000	355.069.000	0,76	0,63	293.896.354,50	61.172.645,50
2006	52.080.802.000	386.404.000	0,74	0,63	328.109.052,60	58.294.947,40
2007	50.505.917.000	355.557.000	0,70	0,63	318.187.277,10	37.369.722,90

([I]) Total percentage of total premiums per sum insured in the year prior to the existence of cartel, year 2001 (Source: NCC Resolution of 12 November 2009, S/0037/08, findings of fact 2.4 and 59).

2.4. Legal assessment by NCC

The evidence above lead the NCC to consider that the insurers ASEFA and MAPFRE and reinsurers SCOR, SUIZA and MÜNCHENER committed a violation of article 1.1.a) of the SCA and article 101.1 of the TFEU. As described, the cartel operated at two levels, direct IDI and IDI reinsurance, limiting the types of reinsurance contracts available for IDI carriers and setting a minimum premium for decennial property insurance in Spain. The NCC considered the horizontal side of the agreement either among direct insurers or among IDI reinsurers to be prevalent to the vertical one (of IDI carriers with IDI reinsurers and viceversa)[35], although the two-level structure of the cartel was crucial for its effectiveness. Moreover, the NCC focused its attention on the cartel impact in competition at the direct IDI market although it is clear that competition was also restrained at the IDI reinsurance market.

[35] Legal ground 6, NCC Decennial IDI Resolution.

2.4.1. Applicable Law and possible exemptions

Concerning domestic competition law, the cartel was in place when the 1989 SCA was in force, but the NCC investigation and the proceedings took place after the 2007 SCA was adopted [36]. In any case: an agreement fixing of minimum prices, like the one occurred in the decennial IDI cartel, was a violation of both, as no relevant change was introduced on this prohibition (it even keeps the same wording in both legal texts).

On the other hand, regarding EU competition Law, the cartel affected member state trade as it covered all the Spanish market and prevented the entrance in the market of new reinsurance companies offering non proportional treatises and facultative reinsurance contracts and other pricing conditions different from those set by the cartel. The NCC considers that the cartel produced the effect of fragmenting the Spanish decennial IDI market, in violation of article 101.1.a) of the TFEU[37].

As it is widely known, both in EU Law and in Spanish domestic law some business practices in the insurance markets are exempted of the application of competition prohibitions[38]. Therefore, It could be foreseen that the firms accused of organizing the IDI cartel would be raising the defense that their actions were covered by the insurance exemption. Cartel members argued that according to EC Regulation 358/2003 decennial liability constituted a "new risk" that should covered by the special regime set by the Block Exemption Regulation (hereinafter the insurance BER)[39]. According to them, mandatory decennial IDI for housing required by LOE in 2000 gave way to a new class of insurance

[36] Moreover, the NCC considers that the cartel existed and continued producing effects several months after the 2007 SCA was in force (the 1st of September 2007), so even this one would be applicable (Legal ground 1st, NCC Decennial IDI Resolution).

[37] See ECJ Judgment (Third Chamber) of 13 July 2006, Vincenzo Manfredi v. Lloyd Adriatico Assicurazioni SpA (C-295/04), Antonio Cannito v. Fondiaria Sai SpA (C-296/04) and Nicolò Tricarico (C-297/04) and Pasqualina Murgolo (C-298/04) v. Assitalia SpA, ECR 2006-I 6619, ¶52 and ECJ judgment of 19 february 2002, Wouters (C-309/99), ECR 2002-I 1577, ¶95 ["*As regards the question whether intra-Community trade is affected, it is sufficient to observe that an agreement, decision or concerted practice extending over the whole of the territory of a Member State has, by its very nature, the effect of reinforcing the partitioning of markets on a national basis, thereby holding up the economic interpenetration which the Treaty is designed to bring about* (Case 8/72 Vereeniging van Cementhandelaren v. Commission [1972] ECR 977, paragraph 29; Case 42/84 Remia and Others v Commission [1985] ECR 2545, paragraph 22; and CNSD, paragraph 48)"]. In the same vein, the European Commission's Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty assert: "*Horizontal cartels covering the whole of a Member State are normally capable of affecting trade between Member States. The Community Courts have held in a number of cases that agreements extending over the whole territory of a Member State by their very nature have the effect of reinforcing the partitioning of markets on a national basis by hindering the economic penetration which the Treaty is designed to bring about*" (¶78).

[38] See MARCOS & SÁNCHEZ GRAELLS (2010) for a detailed explanation of the insurance sector exemption both in EU Law and Spanish Law.

[39] Commission Regulation (EC) Nº 358/2003 of 27 February 2003, on the application of Article 81(3) of the Treaty to certain categories of agreements, decisions and concerted practices in the insurance sector.

and all the arrangements by insurers and reinsurers on decennial IDI were justified because of the lack of information on the risk and adequate coverage [40]. In the same vein, the proportional treatise by reinsurers surged as a natural consequence of such a situation and, moreover, it allowed reinsurers to substantially limit the risk assumed by them by controlling the direct insurance conditions[41]. The NCC dismissed all these arguments looking at the evidence of how the price-fixing agreement was conceived as the anticompetitive solution ASEFA, MAPFRE and the reinsurers designed to correct what they understood as excessive market competition. In this market, according to the documentary proof obtained by the NCC on the minutes of the meetings of cartel members, the first year the LOE was in force they considered decennial IDI premiums too low and they agreed that something needed to be done to substantially raise them[42].

Although Spanish general insurance legislation includes an obligation of each insurance company to avoid under-insurance through setting minimum premium schedules and to have adequate technical provisions, it also requires that the measures adopted to comply with these requirements respect free competition (or do not restrict competition) (article 25.3 of Royal Legislative Decree 6/2004, of 29 October, approving the revised text of the Law on Regulation and Supervision of private insurance[43]). Obviously, the agreements entered into by the direct IDI insurers and reinsurers did not comply with that provision as they agreed and imposed minimum commercial premium rates all over the Spanish IDI market[44]. Therefore, there could not exist a legal exemption applicable to the behavior of companies in the IDI market according to article 2.1 of the 1989 SCA (4.1 of 2007 SCA). Furthermore, such an exemption would not be available and operative against an application of article 101.1 of TFEU[45].

Finally, the NCC brushed aside any possible exemption of the cartel agreement thanks to its beneficial market effects or the efficiencies arising from it (in accordance to article 1.3 of 2007 SCA and article

[40] When talking about premium calculation in her study of decennial IDI, BRENES CORTÉS (2005: 242) mentions lack of experience in the Spanish insurance market on the risks covered by this type of insurance that encumber greatly the pricing process. In similar terms, see PÉREZ DE LA CRUZ (2002:46).

[41] Legal ground 3rd, paragraphs 3 and 4, NCC Decennial IDI Resolution.

[42] Legal ground 3rd, paragraphs 7-9, NCC Decennial IDI Resolution.

[43] "*The premium rates shall be sufficient, on reasonable actuarial assumptions, to enable the insurer to meet all the obligations arising from insurance contracts and, in particular, to establish adequate technical provisions. […]They also shall respect free competition in the insurance market without, for this purpose, being considered a restraint of competition the use of risk premium rates based on common statistics.*"

[44] Legal ground 3rd, paragraph 4, NCC Decennial IDI Resolution. The dissenting opinion considers this legal provision (and also Council Directive 85/384/EEC of 10 June 1985 on the mutual recognition of diplomas, certificates and other evidence of formal qualifications in architecture, including measures to facilitate the effective exercise of the right of establishment and freedom to provide services) as grounds for awarding a legal exemption to IDI insurers and reinsurers in accordance with article 2.1 of the 1989 SCA or article 4.1 of the 2007 SCA (Dissenting opinion, Legal grounds 2nd and 7th, NCC Decennial IDI Resolution).

[45] MARCOS (2010: 274-279).

101.3 TFEU)[46]. It also disregarded cartel members' arguments justifying cooperation among them on that was pushed forward by the Spanish Ministry of Development when the LOE was enacted[47].

2.4.2. Direct evidence of the cartel

Although the NCC provides strong evidence regarding the minimum-price fixing agreement and its operation, cartel members deny its existence. They acknowledge their reciprocal contacts and the participation in the meetings mentioned and proved by the NCC, but they assert that they only concerned sharing of information and experiences of purely technical character regarding decennial IDI coverage[48].

As mentioned before, cartel members alleged that their contacts and meetings were aimed at sharing technical information and cooperatively calculating coverage costs that were intercommunicated among firms within the exemption provided by the insurance BER. The NCC reputed that their behavior exceeded the strict scope and conditions imposed by article 3 of the insurance BER. This provision requires that information and data shared by insurance companies be of purely technical character (actuarial) not containing any indication of the level of commercial premiums and article 4 excludes from the exemption those agreements that *oblige* companies to use the information and data shared when conducting their insurance business[49]. The NCC showed that both final commercial premiums and mandatory premiums were established and imposed all over the IDI market by the cartel.

According to the evidence put forward by the NCC, ASEFA, MAPFRE EMPRESAS, CASER, MÜNCHENER, SUIZA and SCOR were part of a price fixing scheme: the commercial premiums were agreed and compliance was mandatorily imposed to the insurance carriers that were part of the cartel and indirectly to the rest of the market by the influence of reinsurers (see *supra* § 2.1 and 2.2)[50].

The NCC even found evidence pointing out that cartel members knew about the unlawful character of their behavior, with several references made by them at how important it was to keep all their contacts and agreements secret and away from competition authorities[51].

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[46] Legal ground 4th, paragraph 6, NCC Decennial IDI Resolution.

[47] Legal ground 4th, paragraphs 7 and 8, NCC Decennial IDI Resolution.

[48] Legal ground 3rd, paragraphs 1 and 2, NCC Decennial IDI Resolution.

[49] See also recital 10 of EC Regulation 358/2003: "*It is therefore appropriate to stipulate that agreements on commercial premiums are not exempted; indeed, commercial premiums may be lower than the amounts indicated by the results of the calculations tables or studies in question, since insurers can use the revenues from their investments in order to reduce their premiums. Moreover, the calculations, tables or Studies in question should be non-binding and serve only for reference purposes*" (emphasis added). See also DE NICOLA & PORRINI (2008: 153-155) and MARCOS & SÁNCHEZ GRAELLS (2010: §4.1)

[50] Legal ground 3rd, paragraphs 10-16 and Legal ground 4th, paragraphs 3-5, NCC Decennial IDI Resolution.

[51] Legal ground 3rd, paragraph 16 and Legal ground 11th, paragraph 3, NCC Decennial IDI Resolution.

2.4.3. Lack of an alternative explanation

If the direct evidence of the cartel was not enough, the NCC also rejected the explanations of their agreements put forward by cartel members[52]. In providing a more solid ground for its conclusions, the NCC set aside all the arguments advanced by the insurers and reinsurers involved on plausible reasons that could justify their behavior.

Of course, the NCC did not consider that the proportional share treatises agreed by reinsurers and direct IDI insurers in which some minimum direct insurance pricing terms were fixed by reinsurers were by themselves anticompetitive. Nevertheless it was suspicious that no other type of reinsurance was available and that the reinsurers members of the cartel reacted against any attempt for other type of reinsurance contracts to be written.

However, it was more than suspicious that there was not competition below certain threshold of premiums in IDI insurance (following the pricing conditions set by IDI reinsurers which were identical all-over-the market, see *supra* § 2.1). There is not a plausible explanation for uniform premiums but the minimum price-fixing agreement by reinsurers (and the three larger IDI carriers), in violation of article 1 of SCA and article 101.1 of TFEU.

2.4.4. Fines

The NCC deemed ASEFA, MAPFRE EMPRESAS, CASER, MÜNCHENER, SUIZA and SCOR part of a cartel that fixed minimum prices in IDI market from 2002 to 2007. It is true that operating at two levels (reinsurance/insurance) the cartel had an atypical shape and a complex structure, that included horizontal agreements at the two levels coupled with vertical agreements among the three IDI carriers and all the reinsurers active in the IDI market (see *supra* Figure 1)[53].

The agreement among all of them was a single and complex one and it included not only fixing minimum prices for decennial IDI insurance but also monitoring compliance by direct insurers and detecting and prosecuting defections from cartel prices. There was an intricate concerted action by some insurance carriers and all the IDI reinsurers to fix and control premiums on the decennial IDI market--boycotting and retorting against those direct insurers that did not comply with cartel conditions--and the NCC considered this a single and continuous infringement of article 1.1 of SCA and article 101.1 of TFEU[54].

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[52] Legal ground 5th, NCC Decennial IDI Resolution.

[53] Legal ground 7th, NCC Decennial IDI Resolution.

[54] Following EU case law (see General Court Judgment of 12 december 2007, T-101/2005 and T-111/2005, BASF AG and UCB v. Commission of EC et al., ¶¶159-161; Judgment of of 20 April 1999 in Joined Cases T-305/94 to T-307/94, T-313/94 to T-316/94, T-318/94, T-325/94, T-328/94, T-329/94 and T-335/94 Limburgse Vinyl Maatschappij and Others v. Commission of EC, ¶696), the NCC does not apportion the responsibility of cartel members in the conspiracy and neither it deconstructed the different parts of the complex violation. That's something the Dissenting opinion criticizes (Legal ground 2nd *in fine*, NCC Decennial IDI Resolution).

In setting the amount of the fine, the NCC applied article 10 of 1989 SCA[55]. This article gives it discretion to set the level of the fines, only with a requirement of assessing all concurring circumstances and respecting proportionality. First, the NCC considered the cartel duration from 1 January 2002 to 31 December 2007[56]. Second, being a long term violation, the NCC also took into account the severe nature of the violation, the relevant position in the market of the insurance carriers and reinsurers involved in the cartel, the mandatory character of decennial IDI insurance (which made demand inelastic), the possibility of housing developers of transferring the cost of insurance to final clients (i.e., consumers were the final victims of the cartel) and the deliberate character of the violation.

Apparently[57], to calculate the fine within the framework of article 10 of 1989 SCA, the NCC surreptitiously used its 2009 Communication on the Quantification of Sanctions[58]. First, to estimate the base amount of the fine, the sales volume affected by the violation was calculated (taking into account the duration of the violation[59]). The base amount is a percentage of the sales volume affected, ranging from 10% to 30% (varying with the severity of the infringement and with its capability of producing cascade effects in other markets)[60]. Following those criteria, the base amount of the fine is represented in table 3.

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[55] Article 10 of 1989 SCA reads: "*1. The Court may impose on the economic agents, undertakings, associations, unions or groups that have either deliberately or through negligence breached the terms of articles 1, 6 and 7, or failed to comply with a condition or obligation foreseen in Article 4.2, fines of up to 901.518,16 €, amount which may be increased up to 10 percent of the turnover corresponding to the financial year immediately prior to the Court resolution.*

2. The amount of the sanction shall be determined according to the importance of the breach, for which purpose the following factors shall be taken into consideration: a) The type and scope of the restriction upon competition. b) The dimension of the market affected. c) The market share of the corresponding undertaking. d) The effect of the restriction upon competition had on the actual or potential competitors, the other parties in the economic process and the consumers and users. e) The duration of the restriction upon competition. f) The reiteration of the prohibited conduct."

The Dissenting opinion considered (Legal ground 7th, NCC Decennial IDI Resolution) that the cap set by article 10 of 1989 SCA was inadequately exceeded by the majority opinion because the aggravating circumstance considered (policing cartel compliance and monitoring defections) was indeed part of the cartel itself, which should have meant that a 901.518,16€ cap per firm was applicable. However, that assessment is mistaken as the cap applies only to business firms and agents lacking a business turnover.

[56] See *supra* note 17.

[57] Most of the information on the quantification of the fine has been expurgated from the public text of NCC resolution (due to confidentiality issues), and that greatly hinders the analysis that can be done here.

[58] NCC Communication on the quantification of sanctions arising from violations of articles 1, 2 and 3 of the Spanish Competition Act 15/2007 of 3 July 2007 and articles 81 and 82 of the European Community Treaty, 6 February 2009.

[59] ¶¶12 y 15, NCC 2009 Communication on the quantification of sanctions.

[60] ¶14, NCC 2009 Communication on the quantification of sanctions.

Table 3. Fines basis.

Firms	Basis (€)
ASEFA	25.235.000
MAPFRE EMPRESAS/ MAPFRE RE	21.632.000
CASER	12.947.000
SCOR	16.908.000
MÜNCHENER	15.101.000
SUIZA /SWISS RE	21.563.000

Source: NCC Decennial IDI Resolution

Subsequently, the NCC adjusted the base amount applicable to each firm. In the case of ASEFA it considered as aggravating circumstances its behavior as frontrunner in organizing the cartel and policing and controlling defections. Concerning CASER, although it was a late member of cartel, a similar aggravating circumstance was considered because of its role in monitoring cartel defections[61]. The same aggravating circumstance was considered in the case of the reinsurer SCOR because of its boycott to MUSAAT and also in the case of SUIZA[62] and MÜNCHENER. Only MAPFRE[63] was considered not to have incurred in any aggravating circumstance. No attenuating circumstances were considered for any of the cartel participants. Table 4 details the final amount of fines imposed to each company.

[61] See supra footnote 25. The implication of CASER in the cartel may be one of the weakest points of the NCC Resolution. Proportionally, it got a largest fine that its fellow cartel members, specially bearing in mind it only took part in the last two years of the cartel.

[62] Legal ground 8th justified why SUIZA, being a wholly owned subsidiary of SWISS RE, should be considered responsible together and inseparably with the later, and only one fine was imposed to them.

[63] See supra footnote 9.

Table 4. Total fines.

Firms	Amount of fine (€)
ASEFA	27.759.000
MAPFRE EMPRESAS/ MAPFRE RE	21.632.000
CASER	14.241.000
SCOR	18.599.000
MÜNCHENER	15.856.000
SUIZA /SWISS RE	22.641.000

Source: NCC Decennial IDI Resolution,

The companies have rushed to appeal the fines imposed to the National Court (*Audiencia Nacional*) on several grounds, and the fate that awaits the NCC resolution is still unknown. In the recent past, several fines imposed by the NCC have been repealed and lowered by the National Court and/or the Supreme Court. For now, it suffices to say that, if NCC estimations are correct, the total amount of fines imposed (120.728.000€) is only half of the amount of the harm inflicted to the victims (which according to the data provided by the NCC would amount to 242.436.072€. If the data used by the NCC are accurate, the fines would be far below the illegal profit made (or either the consumer harm).

3. DAMAGE CLAIMS ARISING FROM THE SPANISH IDI CARTEL

The NCC resolution brought to light severe anticompetitive actions carried on by IDI reinsurers and the largest IDI carriers, freezing Spanish IDI market from 2002 to 2007. Due to the cartel the market did not evolve in a competitive manner, and this also affected reinsurance (where there was lack of competition in the types of reinsurance contracts available). Not only IDI premiums paid were raised due to the cartel, but also competition among IDI reinsurers and IDI carriers was critically hampered. Even IDI carriers that were not part of the cartel suffered its negative effects through the conditions imposed by IDI reinsurers, they were restrained (by the reinsurers) in the conditions they could offer in the market, although a damage claim by them against IDI reinsurers seems more remote as harm would be difficult to show[64].

[64] Indeed they benefited (unknowingly) from the cartel that forced them to charge higher premiums. It is true that a large proportion of them were transferred to reinsurers through the reinsurance fees, but in the long-term once

Housing developers were direct victims of the cartel and, therefore, possible damages claims by them could be considered. Moreover, Spanish IDI cartel's anticompetitive effects probably spread further to the housing developing market and even hypothetical claims by housing buyers could be hypothesized. Buyers in the downstream housing market could also potentially claim damages against IDI carriers and IDI reinsurers if they could prove that the overcharges in IDI premiums were passed-on to them by housing developers (see *infra* § 3.4). However, unless a class action is organized, a potential claim by housing buyers seems even more extraneous because of the tiny amounts of harm involved in each claim at that stage.

Nevertheless, according to the data provided by the NCC, the excess on the premiums charged by the decennial IDI cartel would exceed 240 Million €[65]. NCC calculations only looked at the cartel overcharges and not to any other harm that might have been caused by the cartel. But hitherto there has been no notice of any private claims (neither judicial non extrajudicial) against the cartel members.

At first sight, the dearth of damage actions is puzzling, as both the companies responsible for the violation and the potential claimants are easy to identify and even the NCC made an overall rough calculation of the harm suffered. Besides, in the slump of housing market in Spain and in the difficult financial situation faced by the many housing developing firms (the IDI policyholders), it is apparent that they would certainly welcome any income they could draw from a claim against the decennial IDI cartel members. Why are there no damage claims?

Several reasons may explain the situation. Firstly, although any residential developer active in the Spanish market from 2001 to 2007 has suffered the overcharge resulting from the cartel, only those who contracted with insurance carriers members of cartel (ASEFA, MAPFRE and CASER) have a direct, immediate and easy legal claim against them (see *infra* §3.2.1). For the housing developers who contracted with other carriers, claims are also possible but face more hurdles, as they would probably better target their actions against the reinsurers (SCOR, SUIZA/SWISS RE, MUNCHENER and, eventually, MAPFRE RE, see *infra* § 3.2.1).

Secondly, despite NCC's rough calculation of the harm, damage claims will probably face substantial difficulties in estimating the actual amount of harm suffered and recoverable (*infra* § 3.3) and they will surely confront the passing-on defense by cartel members arguing that potential premium overcharges were passed by building promoters onto final housing buyers (*infra* § 3.4).

Finally, although the SCA 2007 removed obstacles that prior legislation posed to damage claims for competition violations, there seems to be a reluctance to pursue these actions that may well be related either to lack of awareness of this potential option by the victims or the persistence of traditional view which is rather conservative in considering how and when to proceed (*infra* § 4).

IDI carriers were freed from proportional quota share contracts with reinsurers they would be allowed to keep a larger share of the premiums paid.

[65] Precisely 242.436.072€, which is the result of adding up the last column of *supra* table 2.

3.1. Constructing damages claims on the side of NCC decisions

Nowadays, any claim of damages arising from a violation of the competition rules (both in EU law and in domestic law) proceeds independently in the commercial courts. In Spain, so far, stand-alone damages claims have been rare. In practice, most of few private legal actions based on competition law follow-up a previous decision by the competition authorities.

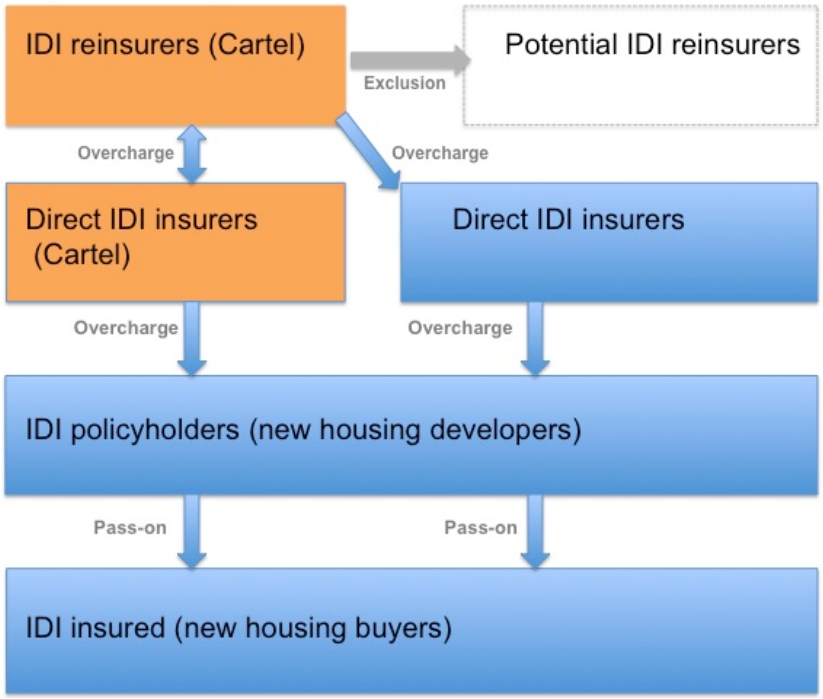
Given that background, it is not a surprise that the Spanish IDI cartel was uncovered by NCC and that damage claims would follow in time the previous decision and fines imposed by NCC. Thus, any damage claims against the IDI cartelists would come after and greatly be dependent on the material evidence provided by the NCC in the administrative proceedings against the cartel.

However, because of the pending appeal against NCC resolution, damage claims could not take it as final and firm. Nevertheless, in constructing their private claims, victims could make use of the evidence gathered by the NCC in the administrative proceedings. Damage claims arising from the Spanish IDI cartel would not only follow-up the NCC resolution but also they would be constructed using the data and evidence in NCC's docket.

3.2. Damage claims arising from the Spanish IDI cartel

The two level feature (insurance/reinsurance) of the decennial IDI cartel not only implies two different legal channels that damage claims should follow, but it also poses an interesting question regarding how the benefits from the anticompetitive behavior were shared among insurers and reinsurers (see figure 2). Undoubtedly, the cartel meant less competition in the IDI reinsurance market and the direct IDI market. In the first one, reinsurers were forced to write proportional pro quota treatises and were barred from writing other type of reinsurance contracts. In the direct IDI market, the cartel set minimum prices and price competition could only exist above the threshold fixed by the cartel. At that time, dependent on the proportional treatises entered into by insurance carriers with reinsurers, benefits from the cartel were shared by insurance carriers and reinsurers (ie., the benefit would be shared depending on the quota of risk exposure ceded to the reinsurer). For insurance carriers which were not cartel members, that would imply that they would have been benefitting from a price fixing agreement even though they were not part of it. In the long term, however, insurance carriers are the ones that benefit from the cartel, once freed from the leashes of the reinsurers (when reinsurance types different from proportional treatises were available).

Figure 2. Damages cascade from Decennial IDI cartel in Spain



3.2.1. Damage claims by clients of insurance carriers members of the cartel

Initially, one may question whether damage claims by housing developers that contracted decennial IDI with ASEFA, MAPFRE and CASER in the period in which the cartel was active could be grounded on contractual or either tort liability. It is true that housing developers were party of contractual relationship with those insurance carriers, and that may make their claim easier, at least because they know from the start whom to address their claims to.

It is debatable if the foundation of their claims is the breach of a contractual duty or the violation of the general rule of conduct established in the SCA and in the TFEU against restraints of competition and anticompetitive agreements. Lack of previous case law on antitrust damage claims in Spain makes hard to decide which alternative should be followed.

Theoretically, developers that contracted with ASEFA, MAPFRE and CASER could base their claim in the breach by these companies of their contractual duty of good faith by setting excessive premiums in

violation of competition rules[66]. Pursuing a contractual liability claim would provide developers a larger time-period to file it in court, as a fifteen-year statute of limitations would be available in such a case[67].

Alternatively, developers could file a tort claim against ASEFA, MAPFRE and CASER based on their violation of the general rule of conduct established in the SCA and in the TFEU against restraints of competition and anticompetitive agreements through their participation in a price-fixing agreement and that might have had a contractual effect (at that time, and if it would have been known by the parties, making voidable the decennial IDI contracts in accordance with article 1.2 of the SCA and article 101.2 of the TFEU[68]). Therefore, the violation of the general duty of conduct set by the SCA in article 1.1 and by the TFEU in article 101.1 (against anticompetitive agreements) may lead to a harm that needs to be repaired, but such a harm is foreign to the subject matter and duties of the contract[69].

However, considering the claim against ASEFA, MAPFRE and CASER by their clients as a tort claim, a shorter time-period is available for the claim to be filed: just one year from the moment the clients knew about the price fixing scheme violating the SCA that harmed them (when the NCC was adopted the 12 November 2009)[70]. On top of the shorter period for their suit because of being considered a tort liability claim, for a damages claim to be substained, ASEFA, MAPFRE and CASER need to be found responsible for a negligent action that provoked harm. Moreover, there needs to be a causal link between their action and the harm.

It is clear from what has been said above (*supra* 2) that ASEFA, MAPFRE and CASER willingly and knowingly violated a general duty of behavior in organizing and taking part in the decennial IDI cartel, and that there was a direct effect of their actions in the insurance contracts signed with housing developers (*supra* § 2.3). There is no way they could argue to be affected by an excusable error regarding the legality of their behavior[71]. Because of ASEFA, MAPFRE and CASER deliberately participated in the cartel, they charged higher IDI premiums to their clients while the cartel was active.

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[66] This is the venue followed in some damages claims against Italian insurers in the auto insurance cartel (as an alternative occasionally the ground has been the defect in essential elements of contract: unlawful cause or unlawful object), see Naples Court of Appeal judgment number 2513/2007 of 28 june 2007. In general, about the reimbursement claims in the Italian auto-insurance cartel, see CAFARO (2003). Among the Spanish authors discussing the possibility of a contractual liability claim against violation of competition rules see MARTÍNEZ MULERO (2005: 124).

[67] Article 1964 of Spanish Civil Code.

[68] SANCHO GARGALLO (2009: 8-13).

[69] Spanish Supreme Court case law on this area is far from unanimous, our opinion here is based in considering that the violation of the duty established by article 1.1 of the SCA and article 101.1 of the TFEU is different from a violation of the duty of good faith to which contractual parties are subject according to article 1258 of the Spanish Civil Code. For more on this, see DE ANGEL YAGÜEZ (1993: 23-49) and DIEZ-PICAZO (1999: 265 and 292).

[70] Article 1968.2 of Spanish Civil Code.

[71] In general terms, SANCHO GARGALLO (2009: 17).

That unlawful action caused an unjust harm to decennial IDI policyholders that paid more for insurance than they would have paid if there were competition in that market. Harm would be equal to the illicit gains obtained by direct insurers (i.e., excess earnings they got because of the cartel) plus any additional harm victims and consumers may have experienced (v.gr., if the amount of the overcharge was substantial they would have developed less housing –output effect-). Moreover, as the NCC resolution clearly concludes, there was a direct causality of their actions in organizing and operating the cartel in the excess prices paid for their insurance by housing developers.

Therefore, decennial IDI policyholders who contracted with ASEFA, MAPFRE and CASER were victims of an anticompetitive action and the amount of the harm was at least the overcharge suffered caused by the cartel (*infra* § 3.3).

3.2.2. Damage claims by clients of other insurance carriers

Residential developers who contracted decennial IDI with other insurance carriers different from the three involved in the cartel (and even those contracting with CASER in 2002, 2003, 2004 and 2005) would face other difficulties claiming damages. These other insurers cannot be deemed responsible for the harm as they did not commit any wrongful act from which a damage claim could proceed. Undoubtedly, no contractual claim could be reasonably filed against them, and in this case, eventually only a tort claim against IDI reinsurers would be possible.

Apart from the three insurance companies involved in the cartel (ASEFA, MAPFRE and CASER in 2006 and 2007) many other carriers wrote decennial IDI contracts while the cartel allegedly existed but, thanks to the two level structure of the cartel (insurance/reinsurance), those insurance companies took not part in the violation. Initially, we have to consider that they did not violate any duty of conduct. Minimum premiums were imposed by reinsurers: IDI carriers just had to apply and follow them. As mentioned before, even if it could be shown that those direct insurers knew about the existence of the cartel[72], it could be difficult to make them liable for damages. First of all, as they did not commit a violation of competition rules, they did not breach the general duty against restraints of competition set by the SCA and the TFEU. Their actions just followed those conditions imposed by IDI reinsurers, which, besides, they could consider were partially explainable due to the use of proportional pro quota treatises for reinsuring IDI. In practice, IDI carriers had no choice. No conditions were available in the reinsurance market for decennial IDI apart from those set by the cartel. Thus, there is no way to make them responsible for the overcharge paid by decennial IDI policyholders (that nonetheless logically and necessarily would follow the harm estimations made for carriers which were cartel members, *infra* § 3.3). At the extreme, even other IDI carriers could also be deemed to be cartel victims, as they suffered

[72] Which would be difficult to deny in those cases in which the insurance companies helped cartel members in alerting them on potential defections on the minimum premiums set, like it was undoubtedly the case of VITALICIO and ALLIANZ (see *supra footnote* 25).

harm by a limitation of the amount of business they carried because of the inability to compete in prices[73].

For these reasons, decennial IDI policyholders that contracted with insurance carriers different from the three involved in the cartel should address their claims directly to SUIZA/SWISS RE, MAPFRE RE, SCOR and MÜNCHENER, which are the ones that have committed a violation of competition rules that has forced them pay premiums in excess of what they would have paid in case there was not a cartel. The causality relationship would link reinsurers and policyholders. Nevertheless, such claims face several difficulties, as policyholders may not know the reinsurer that contracted with their insurance carriers. In that situation it will definitely be more convenient for policyholders to file damages claims against all IDI reinsurers jointly and severally[74]. The grounds of the claim do not differ from the ones used by policyholders against direct IDI companies involved in the cartel (excluding the impossibility of constructing a contractual liability in this case), neither the harm estimation, the only major variation would be the lengthening of the causal link to IDI reinsurers.

3.3. Harm: estimation of the overcharge

Calculating harm caused by a cartel is never an easy exercise, neither in this case. Harm was initially and primarily suffered by policyholders, as they paid excessive premiums for their insurance[75]. In this case, decennial insurance is an additional input that housing developers were mandatorily required by law to provide and write to the benefit of new houses' buyers (see *infra* § 3.4 for the argument that harm was bore by indirect purchasers- i.e., housing buyers).

Housing developers had to pay more for IDI than they would have in case there was competition in the decennial direct IDI market. Undoubtedly, that made housing developers spend more money in insurance, paying higher IDI premiums, suffering an actual loss (*damnum emergens*). Moreover, that could have also affected their business, meaning profits lost from less new residential developments (*lucrum cesans*).

Limiting our analysis to the actual losses, it is difficult to calculate the amount of the premium overcharge as the counter factual is unknown (how the premiums for decennial IDI insurance would had evolved in case there was free competition?). Nonetheless, the NCC provided in its resolution a rough calculation of the overcharges that could be used by cartel victims in their claims.

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[73] Se supra footnote 64. The same could be said about other potential reinsurers that were prevented from accessing the IDI reinsurance market if they offered direct insurers contractual schemes different from the proportional pro quota treatise.

[74] That is the solution proposed for the ham caused by an anonymous agent that was part of an identified group, see DE ANGEL YAGÜEZ (1993: 876-877).

[75] As mentioned before (see *supra* note 66 and corresponding text) In theory, other insurance carriers apart from ASEFA, MAPFRE and CASER could also be considered cartel victims as they were not allowed to compete in conditions (pricing & reinsurance) different from those set by the cartel.

If we follow NCC's reasoning, and use the data provided in the resolution (*supra* table 2), the total cartel overcharge would be estimated in 242.436.072€. NCC's calculation is simple and considers that if it were not by the cartel premium average would have remained the same that it was before the cartel commenced[76]. *Ceteris paribus*, it considered that the premium average before the cartel began operating would have remained stable absent the cartel. However, several assumptions underlie this calculation, and the *ceteris paribus* condition is difficult to fulfill, as the cartel impacted not only prices but also access to market by competing firms and also output levels, and that should also be taken into account when calculating harm. For those reasons, the average premiums calculated by the NCC reflect some fluctuations that may be explained by circumstances other than the cartel itself, and thus cartel overcharge should not comprehend all price increases during all the time the cartel was into effect[77].

This calculation method takes into account pricing in the market before and after the cartel. However, the decennial IDI market poses an additional problem in this regard because decennial IDI is a new market, created in May 2000 and, thus, there was a short span of time from the market inception to the beginning of cartel to gather information and data regarding pricing and market behavior before the cartel began operating in 2002. Besides, pricing behavior after the cartel should be regarded suspiciously as there is always the risk that prices still are resilient to the anticompetitive violation and carry some of its effects in them[78].

[76] NCC's assessment does not need to be followed by judicial courts deciding the damage claim, although special deference should be given to it due to the specialized and authoritative character of NCC when deciding on competition matters (SANCHO GARGALLO 2009: 26).

[77] See BRANDER & ROSS (2006: 343-344).

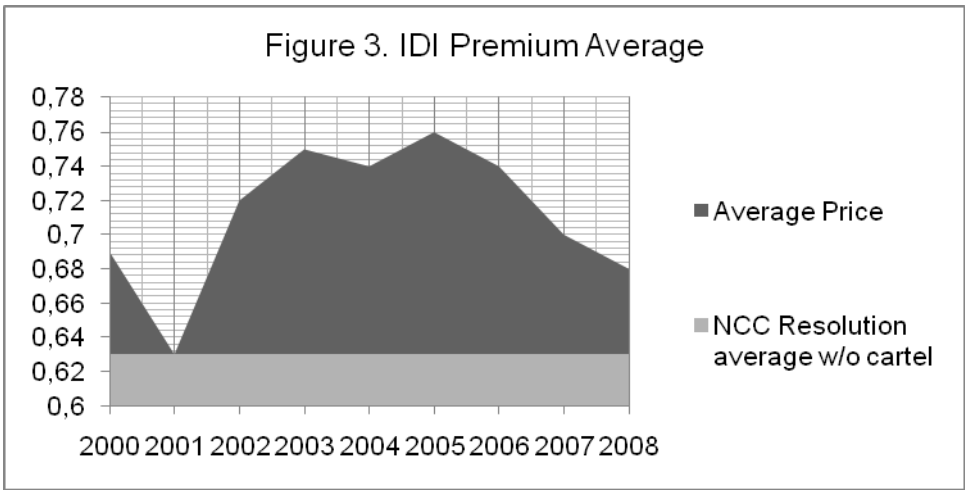
[78] See HARRINGTON (2004), this would normally result in an underestimation of the level of damages, which is greater if the longer the cartel was in place and the more concentrated is the industry.

Table 5. IDI Premium Average

YEARS	PREMIUM AVERAGE	EXCESS DUE TO CARTEL
2000	0,69	N.A.
2001	0,63	N.A.
2002	0,66	0,03
2003	0,72	0,09
2004	0,75	0,12
2005	0,76	0,13
2006	0,74	0,11
2007	0,70	0,07
2008	0,68	N.A. (0,5)

Source: NCC Decennial IDI Resolution, 2.4. Finding of Fact.

According to NCC's calculations (see table 5, extracted from *supra* table 2), 2001 represented the IDI premium price in co mpetitive conditions and the sub sequent upsurge of prices was due to the cartel that dropped back in 2008, once the cartel was unveiled (see the graphical representation in figure 3).



This amount would include the excess amount charged in the decennial IDI contracts from 2002 to 2007. Consistent with the information provided by the NCC, 142.697.938€ could be claimed to insurance carries involved in the cartel (either ASEFA, MAPFRE or CASER, allotted by their market shares, see table 6). The rest would correspond to the excess premiums paid to other insurance companies and only could be claimed against IDI reinsurers (99.738.134€, see *supra* § 3.2.2).

Table 6. Decennial IDI premium excesses charged by insurers involved in Cartel

Year	Cartel excess premiums (A)	ASEFA market share % [I](B)	ASEFA overcharge (=AxB)	MAPFRE market share % [I](C)	MAPFRE overcharge (=AxC)	CASER market share % [I](D)	CASER overcharge (=AxD)
2002	7.144.089	32,775	2.341.475	19	1.357.376	13	N.A. [II]
2003	29.310.587	31	9.086.282	22,5	6.594.882	16	N.A [II]
2004	49.144.082	29,225	14.362.358	26	12.777.461	16	N.A [II]
2005	61.172.645	27,45	16.791.891	24,05	14.712.021	19	N.A.[II]
2006	58.294.947	25,675	14.967.227	22,1	12.883.183	19	11.076.040
2007	37.369.722	23,9	8.931.363	26	9.716.127	19	7.100.247
Total	242.436.072		66.480.598		58.041.053		18.176.287

(I) Market shares according to NCC Resolution of 12 November 2009, S/0037/08 and extrapolation by the author[79].

(II) CASER was only considered to be active member of cartel since 2006.

[79] Documents in possession of the NCC that may further clarify the conduct and harm extent could be claimed by courts (SANCHO GARGALLO 2009: 29).

In developing a more reliable and accurate calculation of the harm provoked by the cartel, and overcoming the limitations in NCC analysis, victims could perhaps look at the evolution of the decennial IDI market in neighbor countries that can help building a more plausible "but-for the abuse" scenario[80]. In the same vein, the evolution of pricing and output in the downstream market (new housing market) as well as premium evolution in similar insurance markets in Spain could be observed. That would allow building a cartel-unaffected yardstick, against which a picture of the real harm provoked by the decennial IDI cartel could be drawn. Finally, the calculation of the magnitude of overcharge in the decennial IDI cartel in Spain could benefit from the growing and recent literature regarding the experience on the estimation of cartel overcharges that looks at several circumstances ranging from legal and market environment, market share of cartel participants, their number and their size, etc.[81].

3.4. Passing-on defense

Damage claims by IDI policyholders will surely face the argument that they passed-on the cartel overcharges to housing buyers. As decennial insurance is an input that housing developers were mandatorily required by law to provide and transfer to buyers of new houses, defendants in damages claim will argue housing developers passed on the additional cost of insurance to the later[82]. The cost of cartelized input is a residual one of the many costs that may impact the final price of new houses.

It is probably true that some passing-on of the cartelized overcharges to final clients occurred, but the extent of the passing-on is highly debatable. Additional efforts by claimants in arguing this issue would be required. First, competition conditions in the market for new houses in Spain will determine the degree of pass-on to housing buyers. More competition would presumably have meant more pass-on, whilst less competition would have meant the opposite. The competitive nature of that market will

[80] See, for example, the look at the evolution and experience similar foreign market (opened to competition at approximately the same time) that was used as the (competitive) counterfactual in the damages calculation in the abuse of dominance case in the market for Directory Enquiry Services in Spain, see MARTÍNEZ-GRANADO & SIOTIS (2010). The judgments of the Conduit case (the latest so far is judgment of the Provincial Court of Madrid of 25 may 2006, but the case is pending before the Supreme Court) gave the plaintiff a fraction of the direct costs arisen from the abuse (639.003€, far from the lower estimate of damages at 6,071 million €) are a good sample of lack of effectiveness of private enforcement claims in Spain due to systemic obstacles, see MARTÍNEZ-GRANADO & SIOTIS (2010: 43). For more on this, see *infra* § 4.

[81] ASHURST (2004); BOLOTOVA (2009); CONNOR (2008); BOLOTOVA, CONNOR & MILLER (2007, 2009); CONNOR (2010); CONNOR & BOLOTOVA (2006); FISHER (2006) and OXERA (2009).

[82] Decennial IDI is contracted by housing developers on behalf of housing buyers [see BRENES CORTÉS (2005:140-152)] and this could be an additional argument in favor of the passing-on defense (i.e., the passing-on was indeed an structural feature of mandatory decennial IDI, as insurance follows the house no matter how many times it may be transferred). Apparently, additional and strong support to this thesis would exist if the insured is made liable to pay remaining premium if its payment is fractioned in several payments, although there exist general consensus on the making the housing developer liable for the payment of pending premiums, see BRENES CORTÉS (2005: 250-251). PÉREZ DE LA CRUZ (2002: 46) assumes that the premium is passed-on to the insured, diluting it in the housing price.

doubtless run in favor of a higher degree of pass-on as it will also be the fact that all competitors in the downstream market (i.e. new housing developers) were affected by the overcharge[83].

Calculating the degree of pass-on requires isolating the impact of IDI premium in housing selling prices controlling for other factors, and that demands substantial resources and data[84]. Changes in the profit margins of housing developers during the cartel timeframe and afterwards will undoubtedly have meant less than in full pass-on of the cost increase, but the extent to which the cartelized input was responsible for those variations would require further study[85]. Nevertheless, aside from the pass-on to final clients, which eventually permitted policyholders to reduce the harm suffered by them (transferring it to the insured), costs imposed by cartel overcharges probably have affected the volume of their activity, either reducing the number of houses developed or/and lowering their sales (output effect)[86].

4. A PERSISTENT RELUCTANT VIEW TOWARDS COMPETITION DAMAGE CLAIMS IN SPAIN

As shown above, the specific features of the Spanish decennial IDI cartel encumber damage claims, but the general background surrounding damage claims for competition violations in Spain may not help them either.

Competition claims in Spanish courts based on EU Law have been possible since 2000 [87]. After Regulation 1/2003, that expressly recognizes courts power to apply articles 101 and 102 of TFEU[88],

[83] VAN DER VEER & LOFARO (2010:3); BRANDER & ROSS (2006: 359-360).

[84] PARLAK (2010: 37-40). Como afirma, "*the calculation of passing-on requires complex economic analysis […] which is one of the reasons to reject the defence*" (id. 38).

[85] FONSECA FERRANDIS (2001) refers to some economic studies made before the LOE was adopted and affirms that the builder will undoubtedly pass-on the IDI contracting costs to the housing buyers, but limits the pass-on rate to 0,6 or 0,8%. See MINISTERIO DE FOMENTO, MEMORIA ECONÓMICA DEL PROYECTO DE LEY DE ORDENACIÓN DE LA EDIFICACIÓN, pág. 2 (a simple explanation given of how reach at those figures describes that the execution costs of developing represent 50% of the selling price and the premium costs would be 1,2% and 1,6% of such costs; but this calculation mixes IDI and other quality controls introduced by LOE).

[86] VAN DER VEER & LOFARO (2010: 4). In general, see VERBOVEN & VAN DIJK (2009).

[87] See Supreme Court Judgment of 2 June 2000 (DISA, case 540/200), before that case the Supreme Court had held in Judgment 30 December 1993 (CAMPSA, case 211/91) that a prior firm administrative decision by competition authorities (either by the European Commission or by the Spanish Competition Tribunal) was required prior for courts to consider a judicial claim against the anticompetitive behavior of a company. On the evolution of this case law see COLOMER (2008: 446-449); BROKELMAN (2006) and SANCHO GARGALLO (2009: 6-7).

[88] Article 6 of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty. BROKELMAN (2006: 545-552) reviews some of the Spanish relevant case law (the service station litigation and damages in the Spanish Football case, damages from TELEFONICA's abuse of dominant position regarding access to its databases by telephone directory service

damages claims grounded on violation of those rules, which did not follow any administrative decision, and were able to proceed "stand-alone"[89].

On the other hand, until recently Spanish domestic law only considered the possibility of "follow-up" claims after the NCC had effectively pursued an anticompetitive violation. The SCA of 1989 required for damage claims to proceed that the NCC resolution finding the anticompetitive violation under which the claimants would be acting to be firm[90]. Given the delay that the judicial review introduces, it is not a surprise that it took more than ten years for the first claims to be filed[91].

In a series of recent cases, substantial damages have been awarded on follow-up claims in cartel cases in accordance to domestic law. For example, once the sugar cartel NCC decision of 15 April 1999 was firm[92], several food-processing companies have recently been successful in claiming damages against the sugar producers[93].

The new 2007 SCA dropped the requirement of the administrative decision to be firm in order to allow judicial damage claims to proceed [94]. It also gave jurisdiction to commercial courts in all the proceedings regarding claims based on article 1 or 2 of the SCA. For that reason, following what happens with EU competition rules, courts are now allowed to directly apply articles 1 and 2 of the SCA[95], and they do not need to wait for an administrative decision by competition authorities to be taken.

Currently, stand-alone actions are possible, although few of them have occurred in practice. As the decennial IDI cartel shows, it will not normally happen that "stand-alone" claims easily spring. They will frequently follow a prior administrative decision and, even when the decision has been taken and the cartel members have been sanctioned.

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provider CONDUIT, injunction against hostile takeover bid of ENDESA by GAS NATURAL, abuse of dominant position by SGAE-Copyright collecting Society).

[89] See judgments of Madrid Provincial Court of 25 may 2006 Conduit vs. Telefónica and Supreme Court judgment of 30 june 2009 (CANOVEN V. SHELL).

[90] Article 13.2 of 1989 SCA.

[91] In one of the first cases known, following NCC resolution of 18 de May 1992, nº 267/90 (ASEMABYL) the Provincial Court of Burgos Judgment of 26 July 2002 (RAFAEL L/ASCENSORES RYCAM, S.L, THYSSEN BOETICHER, S.A., ORONA S. COOP, SCHINDLER S.A., ZARDOYA OTIS, S.A. Y ASCENSORES CENIA, S.A.), which however rejected the damages claim (grounded on the 1991 Unfair Competition Act) against elevator companies because lack of damages quantification. See ASHURST (2004: 52-53).

[92] NCC resolution of 15 April 1999 (426/98, Sugar), confirmed by the National Court and Supreme Court in several judgments.

[93] See Judgment of Valladolid Provincial Court of 9 October 2009 (damages claim against ACOR) and Judgment of Madrid Fist Instance Court nº 50 of 1 march 2010, nº 59/10 (damages claim against EBRO PULEVA).

[94] COLOMER (2008: 455-457).

[95] Additional Disposition 1, 2007 SCA

Notwithstanding, like the decennial IDI cartel shows, there might still be a dearth of damage claims. This may probably be explained by path-dependence or inertia from the prior regulation. Cartel victims believe they do not have a solid ground for their claim until the administrative decision of the competition authority has been confirmed by courts. Moreover, the peculiarities of damages actions from cartels may hinder potential claimants. First of all, although it might be assumed that there is a harm arising from the overcharge imposed by cartel members, some evidence problems may be paramount. Again, the decennial IDI cartel provides good proof: accurately calculating their amount and determining whether it sits on the housing developers or in housing buyers will definitely constitute a complex exercise (*supra* § 3.3 and 3.4). Indeed, the conservative views shown so far by the Spanish courts in rejecting complex economic estimations provided by cartel victims may well constitute an insurmountable barrier. Finally, the general civil procedure rule burdening with the payment of court costs to the losing party may deter victims from initiating any judicial action that may easily face a somber future on account of the evidence problems mentioned[96].

CONCLUSION

After expounding the complex organization and dynamics of the decennial IDI cartel in Spain and the NCC's analysis in its resolution of 12 November 2009, this paper provides a possible explanation of the paucity of damage claims against decennial insurance carriers and reinsurers.

Several recent legal changes have facilitated claims against antitrust violators in Spain, but few victims have yet dared to bring suit. Moreover, courts have shown great wariness in dealing with them, especially with the calculation of amount of harm. Moreover, the peculiar features of the Spanish decennial IDI cartel will not make the courts' task easier. Not only estimating harm would be a difficult exercise, but the two-level structure of the cartel (insurance/reinsurance) will encumber claims from those victims that did not buy their insurance from any of the cartel members. Besides, the invocation by cartel members of the passing-on defense against any potential damage claim by housing developers would make it even harder. Finally, with those dark perspectives for claimants in several fronts, the risk of being charged with the costs of litigation if their action is not sustained will definitely disincentive most of claims. In sum, a somber future for any damage claims following the Spanish IDI cartel case can be predicted.

[96] EU COMMISSION [2008A: 9 (§2.8); 2008B: 74-80; 2005: 14 (¶43), 61 (¶217)].

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