

# COMPETITION COMMITTEE



## Quantification of Harm to Competition by National Courts and Competition Agencies

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**QUANTIFICATION OF HARM TO COMPETITION BY NATIONAL COURTS AND COMPETITION  
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## **FOREWORD**

This document comprises proceedings in the original languages of a Roundtable on Quantification of Harm to Competition by National Courts and Competition Agencies held by the Competition Committee in February 2011.

It is published under the responsibility of the Secretary General of the OECD to bring information on this topic to the attention of a wider audience.

This compilation is one of a series of publications entitled "Competition Policy Roundtables".

## **PRÉFACE**

Ce document rassemble la documentation dans la langue d'origine dans laquelle elle a été soumise, relative à une table ronde sur la quantification des atteintes à la concurrence par les juridictions nationales et les autorités de la concurrence qui s'est tenue en février 2011 dans le cadre du Comité de la concurrence.

Il est publié sous la responsabilité du Secrétaire général de l'OCDE, afin de porter à la connaissance d'un large public les éléments d'information qui ont été réunis à cette occasion.

Cette compilation fait partie de la série intitulée "Les tables rondes sur la politique de la concurrence".

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**OTHER TITLES****SERIES ROUNDTABLES ON COMPETITION POLICY**

|    |                                                                                    |                  |
|----|------------------------------------------------------------------------------------|------------------|
| 1  | Competition Policy and Environment                                                 | OCDE/GD(96)22    |
| 2  | Failing Firm Defence                                                               | OCDE/GD(96)23    |
| 3  | Competition Policy and Film Distribution                                           | OCDE/GD(96)60    |
| 4  | Efficiency Claims in Mergers and Other Horizontal Agreements                       | OCDE/GD(96)65    |
| 5  | The Essential Facilities Concept                                                   | OCDE/GD(96)113   |
| 6  | Competition in Telecommunications                                                  | OCDE/GD(96)114   |
| 7  | The Reform of International Satellite Organisations                                | OCDE/GD(96)123   |
| 8  | Abuse of Dominance and Monopolisation                                              | OCDE/GD(96)131   |
| 9  | Application of Competition Policy to High Tech Markets                             | OCDE/GD(97)44    |
| 10 | General Cartel Bans: Criteria for Exemption for Small and Medium-sized Enterprises | OCDE/GD(97)53    |
| 11 | Competition Issues related to Sports                                               | OCDE/GD(97)128   |
| 12 | Application of Competition Policy to the Electricity Sector                        | OCDE/GD(97)132   |
| 13 | Judicial Enforcement of Competition Law                                            | OCDE/GD(97)200   |
| 14 | Resale Price Maintenance                                                           | OCDE/GD(97)229   |
| 15 | Railways: Structure, Regulation and Competition Policy                             | DAFFE/CLP(98)1   |
| 16 | Competition Policy and International Airport Services                              | DAFFE/CLP(98)3   |
| 17 | Enhancing the Role of Competition in the Regulation of Banks                       | DAFFE/CLP(98)16  |
| 18 | Competition Policy and Intellectual Property Rights                                | DAFFE/CLP(98)18  |
| 19 | Competition and Related Regulation Issues in the Insurance Industry                | DAFFE/CLP(98)20  |
| 20 | Competition Policy and Procurement Markets                                         | DAFFE/CLP(99)3   |
| 21 | Competition and Regulation in Broadcasting in the Light of Convergence             | DAFFE/CLP(99)1   |
| 22 | Relations between Regulators and Competition Authorities                           | DAFFE/CLP(99)8   |
| 23 | Buying Power of Multiproduct Retailers                                             | DAFFE/CLP(99)21  |
| 24 | Promoting Competition in Postal Services                                           | DAFFE/CLP(99)22  |
| 25 | Oligopoly                                                                          | DAFFE/CLP(99)25  |
| 26 | Airline Mergers and Alliances                                                      | DAFFE/CLP(2000)1 |
| 27 | Competition in Professional Services                                               | DAFFE/CLP(2000)2 |

|    |                                                                               |                    |
|----|-------------------------------------------------------------------------------|--------------------|
| 28 | Competition in Local Services: Solid Waste Management                         | DAFFE/CLP(2000)13  |
| 29 | Mergers in Financial Services                                                 | DAFFE/CLP(2000)17  |
| 30 | Promoting Competition in the Natural Gas Industry                             | DAFFE/CLP(2000)18  |
| 31 | Competition Issues in Electronic Commerce                                     | DAFFE/CLP(2000)32  |
| 32 | Competition in the Pharmaceutical Industry                                    | DAFFE/CLP(2000)29  |
| 33 | Competition Issues in Joint Ventures                                          | DAFFE/CLP(2000)33  |
| 34 | Competition Issues in Road Transport                                          | DAFFE/CLP(2001)10  |
| 35 | Price Transparency                                                            | DAFFE/CLP(2001)22  |
| 36 | Competition Policy in Subsidies and State Aid                                 | DAFFE/CLP(2001)24  |
| 37 | Portfolio Effects in Conglomerate Mergers                                     | DAFFE/COMP(2002)5  |
| 38 | Competition and Regulation Issues in Telecommunications                       | DAFFE/COMP(2002)6  |
| 39 | Merger Review in Emerging High Innovation Markets                             | DAFFE/COMP(2002)20 |
| 40 | Loyalty and Fidelity Discounts and Rebates                                    | DAFFE/COMP(2002)21 |
| 41 | Communication by Competition Authorities                                      | DAFFE/COMP(2003)4  |
| 42 | Substantive Criteria Used for the Assessment of Mergers                       | DAFFE/COMP(2003)5  |
| 43 | Competition Issues in the Electricity Sector                                  | DAFFE/COMP(2003)14 |
| 44 | Media Mergers                                                                 | DAFFE/COMP(2003)16 |
| 45 | Universal Service Obligations                                                 | DAF/COMP(2010)13   |
| 46 | Competition and Regulation in the Water Sector                                | DAFFE/COMP(2004)20 |
| 47 | Regulating Market Activities by Public Sector                                 | DAF/COMP(2004)36   |
| 48 | Merger Remedies                                                               | DAF/COMP(2004)21   |
| 49 | Cartels: Sanctions Against Individuals                                        | DAF/COMP(2004)39   |
| 50 | Intellectual Property Rights                                                  | DAF/COMP(2004)24   |
| 51 | Predatory Foreclosure                                                         | DAF/COMP(2005)14   |
| 52 | Competition and Regulation in Agriculture: Monopsony Buying and Joint Selling | DAF/COMP(2005)44   |
| 53 | Enhancing Beneficial Competition in the Health Professions                    | DAF/COMP(2005)45   |
| 54 | Evaluation of the Actions and Resources of Competition Authorities            | DAF/COMP(2005)30   |
| 55 | Structural Reform in the Rail Industry                                        | DAF/COMP(2005)46   |
| 56 | Competition on the Merits                                                     | DAF/COMP(2005)27   |
| 57 | Resale Below Cost Laws and Regulations                                        | DAF/COMP(2005)43   |
| 58 | Barriers to Entry                                                             | DAF/COMP(2005)42   |
| 59 | Prosecuting Cartels Without Direct Evidence of Agreement                      | DAF/COMP/GF(2006)7 |
| 60 | The Impact of Substitute Services on Regulation                               | DAF/COMP(2006)18   |
| 61 | Competition in the Provision of Hospital Services                             | DAF/COMP(2006)20   |

|    |                                                                                       |                     |
|----|---------------------------------------------------------------------------------------|---------------------|
| 62 | Access to Key Transport Facilities                                                    | DAF/COMP(2006)29    |
| 63 | Environmental Regulation and Competition                                              | DAF/COMP(2006)30    |
| 64 | Concessions                                                                           | DAF/COMP/GF(2006)6  |
| 65 | Remedies and Sanctions in Abuse of Dominance Cases                                    | DAF/COMP(2006)19    |
| 66 | Competition in Bidding Markets                                                        | DAF/COMP(2006)31    |
| 67 | Competition and Efficient Usage of Payment Cards                                      | DAF/COMP(2006)32    |
| 68 | Vertical Mergers                                                                      | DAF/COMP(2007)21    |
| 69 | Competition and Regulation in Retail Banking                                          | DAF/COMP(2006)33    |
| 70 | Improving Competition in Real Estate Transactions                                     | DAF/COMP(2007)36    |
| 71 | Public Procurement - The Role of Competition Authorities in Promoting Competition     | DAF/COMP(2007)34    |
| 72 | Competition, Patents and Innovation                                                   | DAF/COMP(2007)40    |
| 73 | Private Remedies                                                                      | DAF/COMP(2006)34    |
| 74 | Energy Security and Competition Policy                                                | DAF/COMP(2007)35    |
| 75 | Plea Bargaining/Settlement of Cartel Cases                                            | DAF/COMP(2007)38    |
| 76 | Competitive Restrictions in Legal Professions                                         | DAF/COMP(2007)39    |
| 77 | Dynamic Efficiencies in Merger Analysis                                               | DAF/COMP(2007)41    |
| 78 | Guidance to Business on Monopolisation and Abuse of Dominance                         | DAF/COMP(2007)43    |
| 79 | The Interface between Competition and Consumer Policies                               | DAF/COMP/GF(2008)10 |
| 80 | Facilitating Practices in Oligopolies                                                 | DAF/COMP(2008)24    |
| 81 | Taxi Services Regulation and Competition                                              | DAF/COMP(2007)42    |
| 82 | Techniques and Evidentiary Issues in Proving Dominance/Monopoly Power                 | DAF/COMP(2006)35    |
| 83 | Managing Complex Mergers                                                              | DAF/COMP(2007)44    |
| 84 | Potential Pro-Competitive and Anti-Competitive Aspects of Trade/Business Associations | DAF/COMP(2007)45    |
| 85 | Market Studies                                                                        | DAF/COMP(2008)34    |
| 86 | Land Use Restrictions as Barriers to Entry                                            | DAF/COMP(2008)25    |
| 87 | Construction Industry                                                                 | DAF/COMP(2008)36    |
| 88 | Antitrust Issues Involving Minority Shareholdings and Interlocking Directorates       | DAF/COMP(2008)30    |
| 89 | Fidelity and Bundled Rebates and Discounts                                            | DAF/COMP(2008)29    |
| 90 | Presenting Complex Economic Theories to Judges                                        | DAF/COMP(2008)31    |
| 91 | Competition Policy for Vertical Relations in Gasoline Retailing                       | DAF/COMP(2008)35    |
| 92 | Competition and Financial Markets                                                     | DAF/COMP(2009)11    |
| 93 | Refusals to Deal                                                                      | DAF/COMP(2007)46    |

|     |                                                                                              |                     |
|-----|----------------------------------------------------------------------------------------------|---------------------|
| 94  | Resale Price Maintenance                                                                     | DAF/COMP(2008)37    |
| 95  | Experience with Direct Settlements in Cartel Cases                                           | DAF/COMP(2008)32    |
| 96  | Competition Policy, Industrial Policy and National Champions                                 | DAF/COMP/GF(2009)9  |
| 97  | Two-Sided Markets                                                                            | DAF/COMP(2009)20    |
| 98  | Monopsony and Buyer Power                                                                    | DAF/COMP(2008)38    |
| 99  | Competition and Regulation in Auditing and Related Professions                               | DAF/COMP(2009)19    |
| 100 | Competition Policy and the Informal Economy                                                  | DAF/COMP/GF(2009)10 |
| 101 | Competition, Patents and Innovation II                                                       | DAF/COMP(2009)22    |
| 102 | Standard for Merger Review                                                                   | DAF/COMP(2009)21    |
| 103 | Failing Firm Defence                                                                         | DAF/COMP(2009)38    |
| 104 | Competition, Concentration and Stability in the Banking Sector                               | DAF/COMP(2010)9     |
| 105 | Margin Squeeze                                                                               | DAF/COMP(2009)36    |
| 106 | State-Owned Enterprises and the Principle of Competitive Neutrality                          | DAF/COMP(2009)37    |
| 107 | Generic Pharmaceuticals                                                                      | DAF/COMP(2009)39    |
| 108 | Collusion and Corruption in Public Procurement                                               | DAF/COMP/GF(2010)6  |
| 109 | Electricity: Renewables and Smart Grids                                                      | DAF/COMP(2010)10    |
| 110 | Exit Strategies                                                                              | DAF/COMP(2010)32    |
| 111 | Standard Setting                                                                             | DAF/COMP(2010)33    |
| 112 | Competition, State Aids and Subsidies                                                        | DAF/COMP/GF(2010)5  |
| 113 | Emission Permits and Competition                                                             | DAF/COMP(2010)35    |
| 114 | Pro-active Policies for Green Growth and the Market Economy                                  | DAF/COMP(2010)34    |
| 115 | Information Exchanges between Competitors under Competition Law                              | DAF/COMP(2010)37    |
| 116 | The Regulated Conduct Defence                                                                | DAF/COMP(2011)3     |
| 117 | Procedural Fairness: Transparency Issues in Civil and Administrative Enforcement Proceedings | DAF/COMP(2010)11    |
| 118 | Competition in Ports and Port Services                                                       | DAF/COMP(2011)14    |
| 119 | Crisis Cartels                                                                               | DAF/COMP/GF(2011)11 |
| 120 | Horizontal Agreements in the Environmental Context                                           | DAF/COMP(2010)39    |
| 121 | Excessive Prices                                                                             | DAF/COMP(2011)18    |
| 122 | Cross-border Merger Control: Challenges for Developing and Emerging Economies                | DAF/COMP/GF(2011)13 |
| 123 | Competition in Hospital Services                                                             | DAF/COMP(2012)9     |
| 124 | Procedural Fairness: Competition Authorities, Courts and Recent Developments                 | DAF/COMP(2011)122   |
| 125 | Remedies in Merger Cases                                                                     | DAF/COMP(2011)13    |

|     |                                                                   |                     |
|-----|-------------------------------------------------------------------|---------------------|
| 126 | Economic Evidence in Merger Analysis                              | DAF/COMP(2011)23    |
| 127 | Unilateral Disclosure of Information with Anticompetitive Effects | DAF/COMP(2012)17    |
| 128 | Promoting Compliance with Competition Law                         | DAF/COMP(2011)20    |
| 129 | Impact Evaluation of Merger Decisions                             | DAF/COMP(2011)24    |
| 130 | Market Definition                                                 | DAF/COMP(2012)19    |
| 131 | Competition and Commodity Price Volatility                        | DAF/COMP/GF(2012)11 |



## TABLE OF CONTENTS

|                                     |     |
|-------------------------------------|-----|
| EXECUTIVE SUMMARY .....             | 11  |
| SYNTHÈSE.....                       | 15  |
| BACKGROUND NOTE .....               | 21  |
| NOTE DE RÉFÉRENCE .....             | 49  |
| <br>CONTRIBUTIONS                   |     |
| Chile .....                         | 79  |
| France (Version Française).....     | 87  |
| France (English Version) .....      | 93  |
| Germany .....                       | 97  |
| Greece.....                         | 103 |
| Hungary .....                       | 111 |
| Italy.....                          | 115 |
| Japan.....                          | 127 |
| New Zealand.....                    | 133 |
| Slovak Republic.....                | 139 |
| Spain.....                          | 141 |
| Sweden .....                        | 147 |
| United Kingdom .....                | 153 |
| United States.....                  | 163 |
| European Union.....                 | 173 |
| <br>and                             |     |
| Indonesia.....                      | 191 |
| Russian Federation .....            | 195 |
| BIAC .....                          | 197 |
| <br>OTHER                           |     |
| Prof. Herbert Hovenkamp .....       | 203 |
| SUMMARY OF DISCUSSION.....          | 211 |
| COMPTE RENDU DE LA DISCUSSION ..... | 227 |



## EXECUTIVE SUMMARY

*By the Secretariat*

Considering the discussion at the roundtable, delegates' written submissions, and the Secretariat's background paper, several key points emerge:

- (1) *Quantifying harm to society and/or consumers resulting from anti-competitive conduct and quantifying harm to individual firms from such conduct are two very different things.*

There was a strong consensus among delegates that if harm from anti-competitive conduct is to be quantified at all by competition authorities, their main priority should be measuring the harm to society in general, not the harm suffered by individual customers or consumers. Most delegates viewed the latter as a job for courts, not competition authorities. But some measure of the harmful effects of anticompetitive conduct on society can be useful even though competition authorities should not try to be extremely precise with their estimates. The results can be used to show more persuasively that their operations are necessary and that they benefit consumers. They can also help with case prioritisation and perhaps with advocacy.

- (2) *Accurately measuring harm to competition is difficult even in the best of cases.*

Delegates generally agreed that while economic theory provides fairly straightforward guidance on the measurement of harm to society or consumers in cartel cases, the theory of harm for mergers and exclusionary conduct is much more complex. Even anti-competitive mergers sometimes create efficiency gains, too. Similarly, exclusionary conduct may have some positive effects on efficiency. Weighing the overall effects on society of conduct with mixed effects is especially tricky. Furthermore, both mergers and unilateral conduct may wind up stifling innovation, and estimating the harm from lost innovation is quite challenging.

Furthermore, measuring harm in practice is difficult even in straightforward cartel cases because of data requirements and the need to construct a convincing "but for" scenario (i.e. what would have happened in the market if the cartel had never existed). The more difficult cases will likely require substantial inputs from skilled and experienced analysts with detailed knowledge of the industries, too. Even with such experts, the results could still be considered estimates, with no guarantee of precision, and estimates may not be sufficiently precise for some courts.

- (3) *There are major differences across countries as to whether and why competition authorities attempt to quantify harm before prosecuting suspected violators.*

In a few countries, competition authorities are not legally obliged to make estimates of harm to competition and do not do so. Some delegates from these countries argued that estimating the harm is too difficult, that certain anti-competitive conduct is illegal *per se* regardless of the amount of the harm, and that fines do not have to reflect the actual harm to society from the conduct in question but need only deter the conduct in the future. In any event, courts in those countries do not require or request estimates of harm in competition cases.

Competition authorities in a small number of other countries are required by statute to prove that their interventions bring benefits to society. They do this by estimating the harm to competition that would have continued had they not intervened to stop abuses. One authority has also used *ex ante* estimates of harm to competition before intervening for the purpose of prioritising its interventions.

In many countries, competition authorities are not required to estimate harm to competition, but they may do so anyway because they find it to be helpful in establishing that competition enforcement benefits consumers.

- (4) *In several countries, authorities use rules of thumb and/or rebuttable presumptions when quantifying harm, often supplemented by case-specific industry information.*

Given the analytical complexity, the detailed industry knowledge needed and the extensive data requirements for producing accurate and unbiased estimates of harm to competition in particular cases, several competition authorities use information garnered from previous detailed studies. For example, a rule of thumb could be that a cartel is normally active for 6 years and raises prices by fifteen percent. Such estimates may be used for advocacy purposes, for prioritising interventions, or as rebuttable presumptions.

- (5) *Quantifying harm in civil litigation is more complicated when direct purchasers pass on the higher prices they pay as a result of anticompetitive conduct to their customers (indirect purchasers).*

The direct customers of a cartel may succeed in passing on all or part of the higher cartelised prices to indirect customers, and so on down the supply chain. From a total welfare viewpoint, the effect of the pass-on washes out and the harm to competition is measured by the lower volumes produced and sold due to the higher prices. Everything else is a transfer of wealth from some customers and/or consumers to other customers and producers. In civil actions, defendants can argue that the plaintiff has passed on all or part of the overcharge, thus reducing the amount of compensation the defendants have to pay to an amount below their overcharge. This passing-on defence is not normally permitted in the US in federal antitrust actions, though, on the grounds that it could give standing to at least one indirect customer. That would complicate court cases and increase their number, as well as lower both fines and deterrence. For the same reason, indirect customers in that jurisdiction cannot normally bring actions in civil courts. One consideration that points in the opposite direction is that direct customers may be so commercially close to cartel members that they are unwilling to sue them. Instead, they may simply be content to pass on the overcharge to indirect customers, thereby leaving violations unpunished.

- (6) *Views differ about what the most appropriate role of economists is in competition cases.*

In many civil actions against alleged competition law violators, each party employs experts – often economists – to assess the level of harm suffered. Although economists often agree on the appropriate methods to be used, in court cases they will often disagree about the results. In continental European countries, the specialised courts frequently have their own experts to assess damages. The view of the judges who participated in the roundtable discussion was that the use of court experts has to be monitored carefully. There is a risk that the judge will lean too heavily on the conclusions of the court expert, in effect delegating the judicial function to the expert. There was a consensus that, to avoid that, reports by court experts should be read aloud and be

open to challenge by either party. However, several countries referred to cases in which judges took little account of the findings of the experts of either the parties or the court.

Delegates agreed that in the more complex cases, such as those involving unilateral conduct, economic theory and empirical analysis will not always result in estimates of harm that are sufficiently reliable and precise to be admitted as evidence. It is therefore up to the judges (and juries, where relevant) to make the assessments on the information at their disposal. Provided that these assessments are not obviously unreasonable, they are not usually challenged.

- (7) *Competition authorities are generally reluctant to become involved in civil cases, and in any case, judicial views diverge as to whether such interventions are useful.*

Delegates from some competition authorities stated that they are neither equipped nor required to quantify harm to competition and that this is true *a fortiori* in civil cases. Most authorities do attempt some type of overall quantification of harm to competition from the conduct they decide to intervene against, sometimes using rules of thumb. However, many of them also believe they do not have the resources necessary to quantify damages routinely in civil actions. Quantifying harm to a direct or indirect customer of a cartel, for example, to a level of precision and reliability that would satisfy a court requires a great deal of data. That data would need to include estimates of price elasticities up and down the supply chain and deep knowledge of the industry in question.

In a handful of countries, though, courts may ask competition authorities to give (possibly non-binding) estimates of the prejudice suffered by victims of anti-competitive conduct. One reason is that victims may otherwise hesitate to bring actions because, lacking the means to accurately quantify their damages themselves, they may be deterred by the prospect of a lengthy and costly court case with an uncertain outcome. In Japan, it was mandatory until early 2010 for the civil courts to ask the competition authority's opinion on damages for that reason. It is now optional but remains customary. In Hungary, intervention is permitted in cases where the authority already established that there was an infringement, and where a large group of consumers is concerned. Competition authorities are most likely to be required or requested to intervene in private actions in countries where private actions are uncommon.

One judge on the panel said that it would be both difficult and undesirable for a competition authority to intervene in civil cases. The authority might not be well-equipped to quantify damages and might not be a completely neutral source of information, either, which rules out an *amicus curiae* role. In some countries, the competition authority is under the responsibility of a Minister, which could create political problems. Another judge, however, believed that the *amicus curiae* role had worked well for a long time in Germany. He added that, in cases where the violation had resulted in a large number of consumers individually suffering very little, the authority could arrange for the violator to pay damages in return for dismissing the case.

- (8) *There were diverging views on the relationship of quantifying harm to competition to quantifying the appropriate level of fines.*

The general consensus among delegates was that it is neither necessary nor desirable for fines to be aligned directly with the harm to competition. Delegates also generally agreed that the level of fines should include elements of punishment for the detected misconduct and deterrence for future misconduct. The authorities' quantifications of harm to competition, in the administrative cases in which it is estimated, could serve as a guideline, though.

On the other hand, a minority thought that it would be so much more difficult and resource intensive to provide quantitative estimates of harm suffered by victims in civil actions that the end-result would be that fewer actions would be brought and deterrence would be weakened. Punishment and deterrence is a task for public actions: civil actions should focus on compensation. However, in the US, successful civil actions result in damages that are three times the assessed damages. The reason for that feature of the US system is that it encourages victims to sue and compensates for the cases of anti-competitive conduct that go undetected and unpunished.

(9) *Settlements as an alternative to court procedures*

An increasing number of competition cases, particularly civil actions, are terminated by settlements. The parties agree on the damage caused and the appropriate compensation for victims, without the need for a judicial decision. The advantage for the victims is that they receive compensation relatively quickly, instead of having to wait several years. A key question is why settlement procedures are relatively swift. One possibility is that when economists from both parties are in the same room without lawyers present, they can quickly agree on damages and compensation because they “speak the same language”. A similar argument applies to lawyers from both parties being in the same room without economists being present. An alternative view is that in courtrooms, the lawyers and economists of each party are paid to fight. In settlement negotiations, they are paid to settle.

An interesting possibility would be to combine a settlement with the competition authority on harm to competition, involving a reduced fine, with agreement on compensation for the victims, thus avoiding the expense and delays of follow-on civil actions. This approach would likely work better in cases where the number of victims was small, and compensation individually large, than the contrary.

In any event, for settlement procedures to be effective there have to be incentives to settle. These could include, for example, reduced fines. There must also be a clear procedural context and, preferably, a facilitator, who should not be a staff member of a competition authority.

## SYNTHÈSE

*Par le Secrétariat*

Les points suivants ressortent du document de référence du Secrétariat, des contributions écrites des délégués et des débats qui se sont tenus lors de la table ronde :

- (1) *Quantifier l'atteinte subie par la société et/ou les consommateurs du fait d'une pratique anticoncurrentielle et quantifier le préjudice causé par ces mêmes pratiques à des entreprises données sont deux exercices très différents.*

Pour la grande majorité des délégués, si l'on part du principe que les autorités de la concurrence doivent quantifier le préjudice causé par les pratiques anticoncurrentielles, leur priorité doit être de mesurer l'atteinte portée à la société dans son ensemble et non le préjudice subi par chaque client ou consommateur. La plupart des délégués estiment que cette dernière tâche incombe aux tribunaux et non aux autorités de la concurrence. Quoiqu'il en soit, il peut être utile de mesurer sous une forme ou une autre les effets préjudiciables que les pratiques anticoncurrentielles peuvent avoir sur la société, étant entendu toutefois que les autorités de la concurrence ne doivent pas viser un degré de précision trop élevé dans cet exercice. Les résultats de ces travaux peuvent servir à démontrer de manière plus persuasive la nécessité de leur action et l'avantage qu'en retirent les consommateurs. Ils peuvent par ailleurs aider à hiérarchiser les affaires, et éventuellement promouvoir l'action des autorités.

- (2) *Même dans les meilleures conditions, il est difficile de mesurer précisément l'atteinte à la concurrence.*

Globalement, les délégués conviennent que la théorie économique fournit des pistes relativement simples pour estimer l'atteinte à la société ou aux consommateurs dans les affaires d'entente, mais que la théorie du préjudice est bien plus complexe dès lors que l'on aborde les fusions et les pratiques d'exclusion. Même les fusions préjudiciables à la concurrence créent parfois aussi des gains d'efficacité. De la même manière, les pratiques d'exclusion peuvent avoir des effets favorables sur l'efficacité. Jauger l'impact global sur la société de pratiques aux effets ambivalents est un exercice particulièrement délicat. Les fusions et les comportements unilatéraux peuvent en outre brider l'innovation. Or, il est très difficile d'estimer le préjudice causé par la perte d'innovation.

Dans la pratique, il est en outre difficile de mesurer le préjudice, même dans les affaires d'entente simples, en raison des données que cela exige et la nécessité d'élaborer un contre-scénario convaincant (à savoir un scénario illustrant ce qui se serait passé sur le marché si l'entente n'avait jamais existé). Les affaires les plus complexes requerront probablement d'importantes contributions de la part d'analystes compétents et chevronnés dotés en outre d'une connaissance approfondie du secteur concerné. Malgré l'implication de ces experts, les résultats obtenus ne pourraient être considérés comme autre chose que des estimations, sans garantie de précision. Or, des estimations peuvent ne pas être suffisamment précises pour certains tribunaux.

- (3) *Aux questions de savoir si les autorités de la concurrence s'efforcent de quantifier le préjudice avant de poursuivre les contrevenants présumés, et dans quel but elles le font, les pays apportent des réponses très variées.*

Dans un petit nombre de pays, les autorités de la concurrence ne sont pas légalement tenues d'estimer l'atteinte à la concurrence et ne le font pas. Des délégués de ces pays ont fait valoir qu'il est trop difficile d'estimer le préjudice, que certaines pratiques anticoncurrentielles sont illégales en soi quel que soit le montant du préjudice et que, par ailleurs, les amendes ne doivent pas nécessairement être proportionnelles au préjudice effectivement subi par la société du fait de la pratique incriminée mais doivent seulement décourager ces comportements à l'avenir. Quoiqu'il en soit, dans ces pays, les tribunaux n'exigent ni ne demandent une estimation du préjudice dans les affaires de concurrence.

Dans quelques autres pays peu nombreux, les autorités de la concurrence sont légalement tenues de prouver que leurs interventions sont bénéfiques à la société. Elles le font en estimant l'atteinte à la concurrence qui aurait perduré si elles n'étaient pas intervenues pour mettre un terme aux pratiques abusives. L'une des autorités évalue également l'atteinte à la concurrence *ex ante*, avant d'intervenir, afin de hiérarchiser ses actions.

Dans de nombreux pays, les autorités de la concurrence n'ont pas l'obligation d'estimer l'atteinte à la concurrence mais peuvent tout de même le faire, jugeant cet exercice utile pour démontrer que les consommateurs tirent profit de l'application du droit de la concurrence.

- (4) *Pour quantifier le préjudice, les autorités de nombreux pays ont recours à des méthodes empiriques et/ou à des présomptions simples, qu'elles complètent souvent avec des données sectorielles propres à chaque affaire.*

Estimer précisément et sans parti pris l'atteinte à la concurrence dans des affaires particulières nécessite, compte tenu de la complexité de l'analyse, de bien connaître le secteur et de disposer de données considérables. C'est pourquoi plusieurs autorités de la concurrence utilisent les informations collectées lors d'études détaillées antérieures. Une méthode empirique pourrait par exemple consister à présumer qu'une entente s'étend normalement sur une période de 6 ans et entraîne une augmentation des prix de 15 %. Ces estimations peuvent être utilisées pour promouvoir l'action des autorités, pour hiérarchiser leurs interventions ou en tant que présomptions simples.

- (5) *Il est plus compliqué de quantifier le préjudice dans les procédures civiles lorsque les acheteurs directs répercutent sur leurs propres clients (les acheteurs indirects) le surcoût qu'ils subissent en raison de la pratique anticoncurrentielle.*

Les clients directs d'une entente peuvent réussir à répercuter intégralement ou partiellement l'augmentation de prix due à l'entente sur les clients indirects, et ainsi de suite tout au long de la chaîne d'approvisionnement. Du point de vue du bien-être total, l'effet de la répercussion des surcoûts s'estompe et l'atteinte à la concurrence se mesure par la baisse des volumes de production et de ventes que l'augmentation des prix a induite. Tout le reste n'est que transfert de richesse de certains clients et/ou consommateurs à d'autres clients et producteurs. Devant les tribunaux civils, les défendeurs peuvent faire valoir le fait que le demandeur a répercuté la totalité ou une partie du surcoût, ce qui ramène les dommages qu'ils doivent verser à un montant inférieur à leur surfacturation. Toutefois, dans les procédures fédérales pour pratique anticoncurrentielle aux États-Unis, les défendeurs n'ont en principe pas le droit d'invoquer la répercussion des surcoûts car ce moyen de défense pourrait donner qualité à agir à au moins un

client indirect. Outre le fait que cela compliquerait les recours et les multiplierait, cela réduirait à la fois les amendes et les effets dissuasifs. Pour les mêmes raisons, les clients indirects ne peuvent normalement pas tenter d'action civile aux États-Unis. Cela étant, les clients directs étant susceptibles d'entretenir des liens commerciaux étroits avec les membres de l'entente au point de ne pas souhaiter les poursuivre en justice – et de se contenter de répercuter les surcoûts sur les clients indirects – il est possible que les infractions demeurent impunies, ce qui plaide en faveur d'un dispositif inverse.

- (6) *Les opinions sont partagées sur le rôle que doivent jouer les économistes dans les affaires de concurrence.*

Dans de nombreuses actions civiles à l'encontre d'auteurs présumés d'infractions au droit de la concurrence, les deux parties ont recours à des experts – souvent des économistes – pour estimer l'ampleur du préjudice subi. Bien que les économistes s'accordent souvent sur les méthodes appropriées à utiliser, devant les tribunaux, leurs avis divergent couramment sur les résultats. En Europe continentale, les tribunaux spécialisés disposent fréquemment d'experts judiciaires pour évaluer les dommages. Selon les juges qui ont pris part à la table ronde, le recours à ces experts judiciaires doit faire l'objet d'une surveillance attentive. Il est en effet possible que les juges se reposent trop sur les conclusions des experts judiciaires, leur déléguant *de facto* la fonction judiciaire. Les participants s'accordent à dire que pour éviter ce risque, les rapports des experts judiciaires devraient être lus publiquement et être soumis à la contradiction. Plusieurs pays ont toutefois évoqué des affaires dans lesquelles les juges n'avaient guère tenu compte des conclusions des experts, qu'ils soient judiciaires ou désignés par les parties.

Les délégués reconnaissent que, dans les affaires plus complexes, comme celles impliquant un comportement unilatéral, la théorie économique et l'analyse empirique n'aboutiront pas toujours à des estimations du préjudice suffisamment fiables et précises pour être admises comme preuve. Il incombe donc aux juges (et aux jurés, selon le cas) de formuler des estimations d'après les informations dont ils disposent. Dès lors que ces estimations ne sont pas, de toute évidence, complètement déraisonnables, elles ne sont généralement pas remises en question.

- (7) *Les autorités de la concurrence sont généralement peu enclines à être impliquées dans les recours civils et, quoi qu'il en soit, les juristes sont divisés sur la question de savoir si ces interventions sont utiles.*

Les délégués de certaines autorités de la concurrence ont déclaré qu'elles n'avaient ni les moyens, ni l'obligation de quantifier l'atteinte à la concurrence, *a fortiori* dans les affaires civiles. À l'aide parfois de méthodes empiriques, la plupart des autorités s'efforcent tout de même de quantifier globalement l'atteinte portée à la concurrence par la pratique contre laquelle elles ont décidé d'intervenir. Cependant, bon nombre d'entre elles estiment également qu'elles ne disposent pas des ressources nécessaires pour quantifier le préjudice de manière systématique dans les recours civils. Mesurer le préjudice causé à un client direct ou indirect d'une entente, par exemple, avec suffisamment de précision et de fiabilité pour que cette estimation soit recevable devant les tribunaux, requiert un grand nombre de données. Il faudrait notamment disposer d'estimations des élasticités-prix tout au long de la chaîne d'approvisionnement et d'une connaissance approfondie du secteur concerné.

Dans quelques rares pays toutefois, les tribunaux peuvent demander aux autorités de la concurrence de fournir des estimations (le cas échéant non contraignantes) du préjudice subi par les victimes de pratiques anticoncurrentielles. Cette approche est motivée notamment par le fait que ces victimes pourraient dans le cas contraire hésiter à tenter des actions. En effet, faute

d'avoir les moyens de quantifier elles-mêmes précisément les dommages qu'elles ont subis, elles pourraient être rebutées par la perspective d'un procès long et coûteux, à l'issue incertaine. C'est pour cette raison que, jusqu'au début de l'année 2010, les tribunaux civils japonais étaient tenus de demander l'avis de l'autorité de la concurrence sur les préjudices. Cette consultation est désormais facultative mais elle reste courante. En Hongrie, l'autorité de la concurrence peut intervenir dans les affaires où elle a déjà constaté une infraction et lorsque le préjudice concerne un grand nombre de consommateurs. Les autorités de la concurrence sont davantage susceptibles d'être priées ou tenues d'intervenir dans les procédures privées dans les pays où ces procédures sont peu courantes.

Selon un juge du panel, il serait à la fois difficile et peu souhaitable qu'une autorité de la concurrence intervienne dans les affaires civiles. L'autorité peut ne pas disposer des ressources nécessaires pour quantifier le préjudice et elle peut ne pas être une source d'informations totalement neutre, ce qui exclut son intervention en qualité d'*amicus curiae*. Dans certains pays, l'autorité de la concurrence est sous la tutelle d'un ministère, ce qui peut poser des problèmes d'ordre politique. Un autre juge estime toutefois que le rôle d'*amicus curiae* a fait ses preuves depuis longtemps déjà en Allemagne. Il a ajouté que, dans des affaires où l'infraction lèse un grand nombre de consommateurs dans des proportions très modestes pour chacun d'eux, l'autorité pouvait faire en sorte que le contrevenant verse des réparations en contrepartie de l'abandon des poursuites.

- (8) *Les opinions divergent sur le rapport entre la quantification de l'atteinte à la concurrence et la détermination de l'amende appropriée.*

La plupart des délégués estiment qu'il n'est ni nécessaire ni souhaitable que le montant des amendes soit directement aligné sur l'atteinte à la concurrence, convenant généralement qu'il doit aussi servir à sanctionner la pratique illicite mise en évidence et à décourager sa répétition à l'avenir. Pour autant, la quantification de l'atteinte à la concurrence réalisée par les autorités dans les affaires administratives peut avoir une valeur indicative.

À l'inverse, pour une minorité de participants, estimer quantitativement le préjudice subi par les victimes dans les procédures civiles serait bien plus difficile et nécessiterait de mobiliser bien plus de ressources, au risque de réduire le nombre d'actions intentées et l'effet dissuasif. Les actions des autorités publiques ont pour but de sanctionner et de dissuader ; les procédures civiles devraient quant à elles avoir pour rôle principal de garantir les réparations. Aux États-Unis, toutefois, les procédures civiles qui aboutissent entraînent le versement de dommages et intérêts représentant le triple du préjudice estimé. Ce dispositif a pour but d'encourager les victimes à intenter des poursuites et à contrebalancer les cas dans lesquels les pratiques anticoncurrentielles n'ont été ni détectées, ni sanctionnées.

- (9) *Les accords transactionnels, alternative aux procédures judiciaires*

Un nombre croissant d'affaires de concurrence, notamment de procédures civiles, se soldent par un accord transactionnel. Les parties s'entendent sur les dommages causés et sur le montant approprié des réparations pour les victimes, sans qu'une décision de justice soit nécessaire. Pour les victimes, l'avantage est d'être indemnisé relativement rapidement, plutôt que d'avoir à patienter plusieurs années. On se demande souvent pourquoi les procédures transactionnelles sont relativement rapides. Pour certains, il est possible que les économistes des deux parties parviennent à s'accorder promptement sur les dommages et les réparations en l'absence des avocats car ils « parlent le même langage ». Il en va de même pour les avocats des deux parties réunis en l'absence des économistes. D'autres avancent que, devant les tribunaux, les avocats et

économistes de chaque partie sont payés pour livrer bataille, tandis que dans les négociations en vue d'un accord, ils sont payés pour trouver un règlement.

Une idée intéressante a été évoquée. Elle consisterait à conjuguer un accord conclu avec l'autorité sur l'atteinte à la concurrence – moyennant une réduction de l'amende – avec un accord portant sur l'indemnisation des victimes, ce qui éviterait les frais et les délais associés aux actions intentées après la constatation d'une infraction par les autorités de la concurrence. Cette approche fonctionnerait probablement mieux dans les cas où les victimes sont peu nombreuses et leur indemnisation individuelle élevée plutôt que dans les cas inverses.

Quoi qu'il en soit, pour que les procédures transactionnelles soient efficaces, il faut que les parties soient incitées à conclure un accord. Cette incitation peut par exemple prendre la forme de réductions d'amende. Il faut également un cadre procédural clair et, de préférence, la présence d'un intermédiaire qui ne soit pas un salarié de l'autorité de la concurrence.



## BACKGROUND NOTE

*By the Secretariat\**

### 1. Introduction

Competition agencies try to limit harm to competition caused by anti-competitive conduct. In some jurisdictions and for specific types of conduct they are required to quantify the potential or actual harm in order to prove the conduct, to calculate administrative fines, or for advocacy reasons. National courts – besides their role in administrative proceedings – are in charge, often with the help of external experts, of quantifying private damages due to anti-competitive conduct. Given that administrative proceedings and private damages actions are pursued in parallel both proceedings steer the incentive of firms not to behave anti-competitively, resulting in interrelations between the two types of proceedings – some of them wanted by the competition authority, others not.

The concept of harm to competition resulting from anti-competitive conduct is related but distinct from the concept of damages suffered by particular victims as a result of that conduct. Harm to competition captures the general harm done to the economy and takes a welfare perspective; it is at the centre of any assessment by a competition agency. On the opposite side, the concept of damages takes a strong individualised perspective which might or might not coincide with the damages to society; it is central in any private damages case brought in front of a national court.

While the two theoretical concepts differ to some extent the methods for quantification are more or less the same and face comparable challenges: When quantifying harm to competition or private damages analytical approaches vary due to industry and infringement characteristics and the information available on the infringement. Indeed, quantifying harm (or damages) caused by an infringement can be complex: reconstructing the situation that would have occurred “but for” the infringement often requires elaborate analysis – an analysis that requires economic experts to work within a legal context. That, in turn, presents a challenge in terms of preparing judges to understand complicated models and techniques. The *tragedy of information asymmetry*, i.e. that the defendant holds the information that the plaintiff needs to prove damages empirically and that the plaintiff holds the information that the defendant needs to prove pass-on, requires well-defined procedural rules to allow a robust empirical estimation.

This note explores the economic challenges in quantifying adverse effects to competition (comprising both harm to competition and private damages). In section two, we describe the likely (theoretical) economic effects of anti-competitive conduct. Section three describes empirical methods to quantify adverse effects and section four describes important trade-offs to be considered when applying those empirical methods in a legal setting.

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\* This paper was prepared for the OECD Secretariat by Hans W. Friederiszick and Elisabeth Fugger. It partially builds upon some joint earlier work with Lars-Hendrik Röller.

The main points of this note are:

- There are differences between harm to competition and individual damages, which needs to be taken into account when measuring the effects of anti-competitive behaviour and limits the exchangeability of quantification results between administrative and private litigation proceedings. In cartel cases, for instance, the focus in private damages cases is on the overcharge effect (and potentially on the pass-on defence) while in an administrative proceeding the output effects – which measure the negative welfare implications of a cartel- must play a prominent role.
- While for cartel cases (as an example of exploitative abuses) the theoretical effects are relatively well defined, in exclusionary conduct cases – in particular if they comprise a vertical dimension – they are not. The most important complicating factors for exclusionary conduct cases are that competitors, beside the consumers, are directly affected; potential effects vary with the particular exclusionary strategy chosen (e.g. tying or bundling strategies, conditional rebates, or refusal to supply strategies); conduct specific efficiencies are common; the market structure is affected by exclusionary practices; and that the effects vary across the different phases of conduct (and/or across different customer groups) and may not be limited to the market or region where the price effects are felt.
- The pros and cons of empirical methods vary according to the underlying assumptions and data requirements; simple, “automatised” routines are, hence, not applicable. The most often used methods, the indicator variable approach and the forecasting approach, typically require relatively large data sets, but work with only a few structural assumptions.
- The trade-off between practicality and applicability is central for a proper judgement on the appropriate methodology to be applied in the court room. Well defined procedural steps, legal standards and disclosure rules are required to make econometric testimony effective in legal proceedings.

## **2. Economic effects of anti-competitive behaviour**

Anti-competitive behaviour can come in many forms. In general one can distinguish anti-competitive conduct along two main dimensions: horizontal vs. vertical and exploitative vs. exclusionary conduct. Horizontal conduct comprises anti-competitive agreements or unilateral behaviour between direct (i.e. horizontal) competitors like in cartel cases or foreclosure strategies targeted to direct competitors (like predation strategies). Vertical conduct explores the strategic opportunities available in an upstream/downstream constellation, where misbehaviour upstream may lower competitive pressure downstream, and vice versa.

Exploitative conduct describes behaviour where the anti-competitive conduct focuses on earning a supernormal profit from customers or customer groups as is the case in cartel or discrimination infringements, while exclusionary conduct focuses on the foreclosure or marginalisation of a competitor (which in turn may allow higher profits after successful foreclosure). One example of exclusionary conduct is predatory strategies, where once the prey is excluded the predator can earn supernormal profits. Bundling or tying strategies may also be misused to foreclose competitors (but they can also form part of exploitative conduct to extract supernormal profits from particular customer groups through price discrimination).

The richness of the underlying conduct, the fact that various types of conduct often come in parallel or have multiple effects, translates into a rather complex investigation if one wants to measure the empirical effects of a particular behaviour. This complexity rules out any simple, “automatized” estimation approach but requires a careful investigation of the economic parameters of the industry (such as, type of product, number of firms, cost and demand factors and forms of rivalry), the particular theory of harm and the availability of data. It is a combined assessment of all three elements that will define the best set of empirical methods to be applied for measuring the effect of an anti-competitive behaviour.

In the following section we describe the potential harm to competition and likely damages and how to measure it from a theoretical perspective. We begin with cartels as an example of an anti-competitive horizontal agreement. Here the theoretical effects can be relatively robustly defined. Thereafter we discuss exploitative/ vertical abuses, where – even from a theoretical perspective – the effects of anti-competitive behaviour on the different stakeholders are often ambiguous.

## 2.1 *Cartels*

### 2.1.1 *The economic concept of collusion*

From an economic point of view, collusion describes a situation where a group of competitors raises, or attempts to raise, through direct or indirect communication with each other, the prices in a specific antitrust market (or markets) above a level that would have emerged without communication. Note that the economic definition of collusive behaviour comprises both explicit collusion (based on direct communication and often referred to as a cartel), and implicit (or tacit) collusion. The legal consequences of whether a particular behaviour falls into one or the other category are significantly different. The underlying economic analysis does not differ very much – partially due to the shortcomings of economic theory, partially because of similarity in the effects of both infringements.<sup>1</sup>

The motivation of forming a cartel is that market participants can raise collective and consequently individual profit relative to the profit achieved in a competitive market. The challenge of managing a cartel is that once prices are raised, cartel participants have a motivation to individually lower prices and raise their individual profit even higher while harming the other cartel participants.

Most prominently, explicit and implicit collusion rests on the dynamic interaction between firms.<sup>2</sup> Firms condition their future behaviour in the market on the current behaviour of competitors. For instance, firms may threaten to revert to “cut-throat competition” for some period in the future in reaction to a competitor’s deviation from collusive price levels. This type of dynamic interaction allows firms – if

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<sup>1</sup> In fact economists tend to define collusion as related to an outcome (higher prices) more than to a particular behaviour, like explicit communication of prices or market shares. For instance, Motta (2004, p.138) defines collusion as follows: “In economics, collusion is a situation where firms’ prices are higher than some competitive benchmark. A slightly different definition would label collusion as a situation where firms set prices which are close enough to monopoly prices. In any case, in economics collusion coincides with an outcome (high-enough price), and not with the specific form through which that outcome is attained.” See also Harrington (2008, p.216).

<sup>2</sup> Ivaldi et al. (2006). Equally, (repeated) interaction across markets or products might allow collusive outcomes to emerge. See Bernheim and Whinston (1990) for an analysis of multi-market contact games and Milgrom and Roberts (1982) for a seminal work on entry deterrence in markets with interaction across regional markets.

implemented effectively – to maintain prices at levels close to monopoly prices and significantly above what unilateral conduct alone would allow.<sup>3</sup>

Dynamic price stabilisation can be reached either through direct communication – which is the legal prerequisite for a cartel infringement – or through coordination via observing and following other firms' behaviour in the market.<sup>4</sup> The latter is referred to as tacit coordination or coordinated effects, and is assessed within dominance assessments or merger proceedings, but is not considered a cartel agreement.

Cartels can break down, or not emerge, due to several factors. Most importantly, cartels need to avoid internal and external destabilisation. Internal destabilisation describes a situation in which one of the cartel members deviates from the price agreement. External destabilisation can happen when a non-cartel member (a foreign firm or a firm active in a neighbouring product market) competes with the cartel members or enters the affected market. A cartel can also be externally destabilised by customers with buyer power.<sup>5</sup> Finally, the incentives for firms to engage in cartel activity are affected by competition policy law and its anticipated enforcement.

### 2.1.2 *Potential effects of collusive conduct*

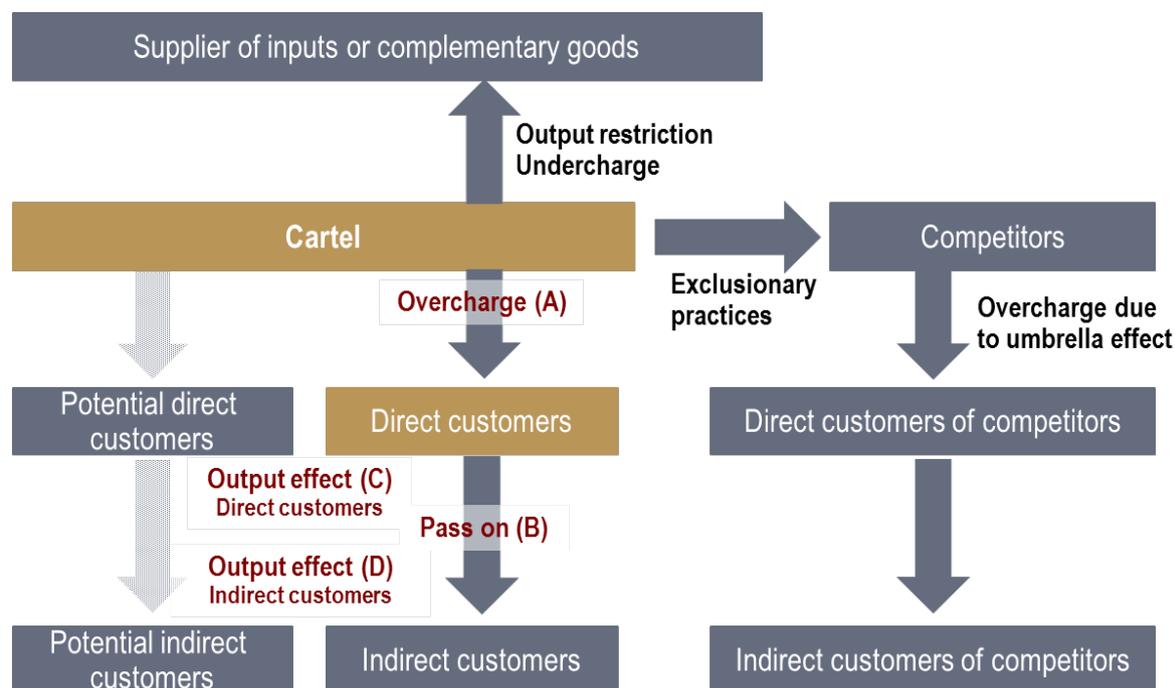
From the perspective of a direct customer there are three main effects: First, higher prices on observed sales (so called overcharge or in legal terms actual loss or *damnum emergens*; in Figure 1 labelled “A”). Second, an opposing pass-on effect that is the fraction of the overcharge which is passed on through higher prices to indirect customers (labelled “B” in Figure 1) and the output effect, which is the forgone profit margin of the direct purchaser that he would have realised from additional sales at the counterfactual price level (labelled “C” in Figure 1 and called loss of profit or *lucrum cessans* in legal terms). The latter effect can affect both actual customers who have purchased some products during the infringement period, but less than what they would have purchased at a lower price and potential customers who did not purchase at all at the collusive price level but would have purchased some products at the competitive price level.

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<sup>3</sup> A simple test to distinguish price increases due to unilateral conduct from price increases due to collusive behaviour is whether a single firm has an incentive to lower prices given the prices of its competitors. If the firm has an incentive to lower prices collusive behaviour is the cause. It is not possible however to distinguish between explicit collusion (i.e. a cartel) and implicit or tacit collusion based on economic effects only. For an overview of the economics of collusion, see Motta (2004), Ivaldi et al. (2006) or Davis and Garcés (2010).

<sup>4</sup> There is a rather fine line between direct communication of market shares or prices sufficient to prove a cartel and indirect communication (via the marketplace). Motta (2004, p.189), for instance, considers communication between firms that is based on unilateral behaviour of the firms not sufficient to form part of a hardcore violation. A careful discussion of different forms of collusion and their grading from a competition policy perspective is given in Kühn (2001). See also Davis and Garcés (2010, p.315).

<sup>5</sup> Harrington and Chen (2006).

**Figure 1: Potential damages caused by a cartel**

Source: Based on Friederiszick and Röller (2010)

As illustrated in Figure 1, besides the direct customers there are several other parties affected by a collusive agreement. First, there are indirect customers who are negatively affected by the pass-on effect (B). Indirect customers also forgo the benefit of additional consumption at the collusive price level in the form of lost consumer utility (labelled D in Figure 1).

Second, an equivalent effect occurs for upstream suppliers.<sup>6</sup> By exercising buyer power a cartel may enforce lower input prices upstream. Depending on the specific market conditions, input price reduction may be enforced by the cartel through output contraction affecting both existing and potential suppliers.<sup>7</sup>

<sup>6</sup> Suppliers of complementary products can be considered input suppliers in some instances (and hence have been depicted jointly in Figure 1). Yet some differences might exist. For instance, suppliers of complementary products who have direct access to end customers and where customers do not consume the complementary products in fixed proportions might be less affected by collusion in the neighbouring markets (or might even benefit).

<sup>7</sup> Buyer power can be exercised in a number of ways. In markets with an institutionalised, liquid market place, like a commodity exchange, the cartel can enforce lower prices simply by output contraction: a reduction of overall demand results in oversupply, which requires price reductions for market clearance. In contrast, in a bilateral bargaining situation an overall output reduction is not needed to enforce lower prices. In these situations the supplier and the buyer negotiate prices individually. The increased bargaining power of the cartel is given by a reduction (or a less profitable) alternative for suppliers in case negotiations with the cartel breakdown, see Blair and Harrison (1993), Dobson et al. (1998), Inderst and Mazzarotto (2008) and OECD (2008).

Moreover, upstream suppliers may (partially) pass-on the worsened sales conditions to their own upstream suppliers.<sup>8</sup>

Finally, exclusionary practices may affect (potential) competitors outside the cartel and their (potential) customers. Competitors in the same relevant market that are not participating in the cartel agreement, or potential competitors in related product or neighbouring regional markets, are potentially affected by exclusionary practices. The opposite can also happen: competitors outside the cartel could benefit by softened competition, enjoying higher prices due to the cartel (the so-called umbrella effect).

### 2.1.3 *Relationship between harm to competition and private damages*

The different adverse effects of a collusive agreement affect various parties differently. Figure 2 shows the example of an upstream cartel and the distribution of the adverse effects between the direct purchasers and the indirect purchasers. Assume a (partially) competitive market in which upstream firms sell goods to retailers at a wholesale price ( $w_{comp}$ ). From the perspective of retailers the wholesale price represents input costs. The retailers process the product and re-sell it to end consumers. For simplicity we assume that the wholesale price is the only cost the retailer faces. In the competitive counterfactual retailers can sell the product at a retail price ( $r_{comp}$ ) which includes a normal profit margin ( $r_{comp}-w_{comp}$ ).

In a second scene the upstream firms agree to raise the price of their input good to a higher price level ( $w_{cartel}$ ) in order to maximise profits. Rectangle A represents the overcharge earned by the upstream cartel. Consequently, the costs of the retailers rise and they will try to increase prices as well to minimise their loss suffered from the cost increase (pass-on effect). Rectangle B shows the fraction of the overcharge that is passed on to the indirect purchaser (that is, the end-consumers in our example).

Whether retailers can or cannot pass-on a significant fraction depends on various factors. The most important factors are the degree of competition in the downstream industry, whether or not all downstream firms are equally affected by the cost increase due to cartelisation and the demand elasticity of the end consumer. A more competitive industry will – in a standard setting – pass-on a higher fraction than a non-competitive industry. In a perfectly competitive industry the market price equals marginal costs. Hence, any change of the marginal cost will be passed on 1:1. A cartel, however, will pass on only a fraction and partially absorb the cost increase. This intuition of pass-on reverses however if outside competition exists, i.e. if some retailers (for instance foreign importers) are not affected by the cost shock. In this setting outside competition will – in a perfectly competitive industry – not allow a pass on of the overcharge to end consumers. Finally, when consumers are more price sensitive the pass on will be – all else equal – smaller.

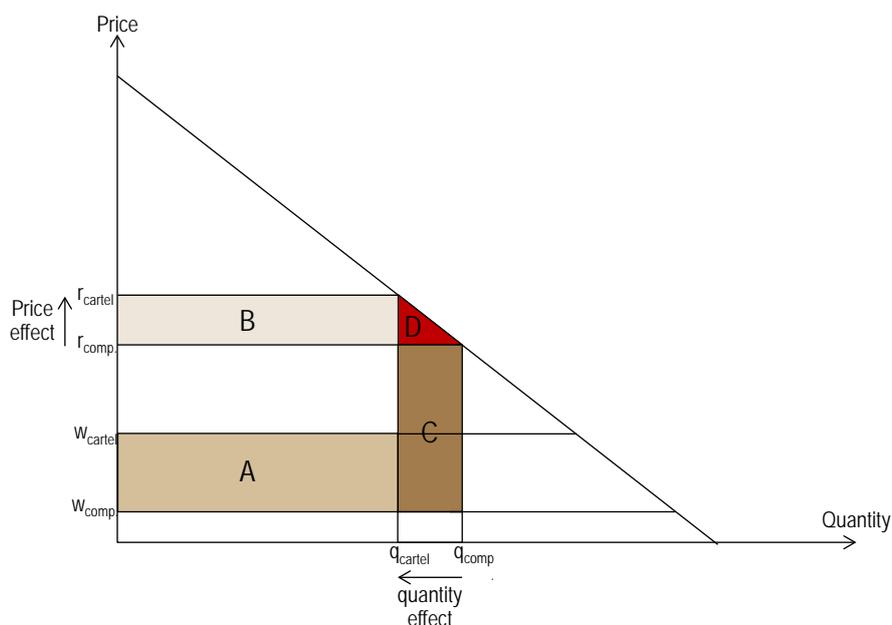
Increased end consumer prices will result in decreased demand (quantity effect).<sup>9</sup> The quantity effect follows from the presumption that not all customers value the good equally high. Customers that value the product higher than reflected in the competitive price but lower than reflected in the collusive price will refrain from purchasing it, if the price of a product increases to the collusive price level. This output effect damages both retailers and end customers. The retailers lose the additional profit they would have earned selling additional quantity. Rectangle C describes the output effect felt by the direct purchaser (lost sales), that is, the additional profit he could have made if he could have bought the input at the competitive

<sup>8</sup> For a detailed discussion on how cartel damages propagate across the supply chain, see Han, Schinkel, and Tuinstra (2008).

<sup>9</sup> Note that we will not distinguish between quantity foregone by the active or potential retailers or end consumer. Economically the effect is the same for both groups. A difference might lie in the burden of proof as it often may be easier to document that one would have purchased more quantity at a lower price than that one would have initiated a new supply channel at the lower price level.

wholesale price level ( $w_{comp}$ ). Triangle D describes the output effect of the end-consumer (lost utility). It represents the additional end-consumer welfare achieved without a collusive agreement at the upstream level and without subsequent pass-on thereof to the end-consumer; it accounts for the value of the extra utility he would have realised at the higher consumption level.

**Figure 2: Damages with two layers of downstream purchasers**



Source: Based on van Dijk and Verboven (2010)

Table 1 allows us to derive the adverse effects for the two purchaser groups (direct and indirect) and shows the total harm to competition from a consumer welfare perspective (total consumer harm) and from a total welfare perspective (total welfare harm). We will briefly discuss the various sub-segments focussing on the different objectives of an assessment by a competition authority and a court.

**Table 1: Adverse effects of a cartel on various parties**

|                                  | Overcharge | Pass-on | Lost sales | Lost utility |
|----------------------------------|------------|---------|------------|--------------|
| Direct purchaser                 | A          | -B      | C          |              |
| Indirect purchaser/ end-consumer |            | B       |            | D            |
| Total consumer harm              | A          |         | C          | D            |
| Total welfare harm               |            |         | C          | D            |

Source: Based on van Dijk and Verboven (2010)

In a private damages case the focus typically stays on the damages felt by the direct purchaser. His damages are the sum of overcharge A minus the pass-on effect B plus the output effect C (lost sales). In

contrast to that, the damage of the indirect purchaser (in our example the end-consumer) is the sum of the pass-on effect B plus the output effect D (lost utility).

From a competition policy perspective either the total consumer harm or total welfare harm is of relevance (depending on the welfare standard applied; in most jurisdictions this is the consumer welfare standard). The total consumer harm is the sum of the overcharge effect A and the two components of the output effect, C (lost sales of the direct purchaser) and D (lost utility of the end-consumer).

The pass-on effect washes out under such an assessment, highlighting the different focus of the assessment of effect in an administrative proceeding and such an assessment in a damages case (i.e. no assessment of the pass-on effect). It also highlights the similarities of the two different foci under a consumer welfare standard, namely the central focus on the overcharge effect A and the output effects.

Interestingly under a total welfare standard only the output effects should stay in the focus of the assessment by a competition authority.

## **2.2 Exclusionary conduct**

### *2.2.1 The economic concept of exclusionary abuses*

Exclusionary conduct can come in various forms ranging from price related practices like predatory pricing, conditional rebates and margin squeeze strategies to non-price related abuses, like tying, refusal to deal or exclusive dealing. Exclusionary practices may target direct horizontal competitors (like under predation strategies or through conditional rebates) or focus on firms active downstream or upstream. The two most common vertical abuses are customer foreclosure or input foreclosure.

What all exclusionary strategies have in common is that they aim to weaken rivals. Typically, a firm sacrifices short-term profits to force its competitors out of the market or to limit their capabilities to compete (i.e. to marginalise them). Due to (re-)entry barriers, the foreclosed competitor may not re-enter, allowing the incumbent to recoup his losses in the long run.

Consider the example of a predation strategy. Here the predator reduces – in the aggressive form of predation - his price below average avoidable cost. In its less aggressive variant the incumbent decreases prices below average total costs but remains with its prices above average variable costs. In a homogeneous product industry this forces its competitor to follow this price move. Depending on the particularities of the industry the prey may depend to a larger extent on (limited) external finances, forcing it to exit the market or to accept being a niche supplier. Predatory strategies may also allow the incumbent to pre-empt entry in neighbouring markets by building up a reputation of entry deterrence. Predation strategies are particularly profitable for incumbents if the low pricing policy can be targeted to specific regions or customer segments, thereby limiting the negative effects on the incumbent's profits.

A complicating feature of these kinds of conduct is that they often come together with (or are hidden behind) efficiencies. Low price strategies are common for promoting new products, in particular in industries with strong network effects; bundling or tying strategies are often implemented in response to consumer preferences for a unified product environment.

### *2.2.2 Potential effects of exclusionary conduct*

The identification of the adverse effects of an exclusionary conduct is – in comparison to exploitative abuses previously discussed – complicated by four main differences:

First, the group of affected parties, the potential effects, and the welfare implications thereof are much more diverse and case related: competitors are, beside the consumers, directly affected; potential effects vary with the particular exclusionary strategy chosen; and positive welfare effects, i.e. efficiencies, must be expected. Overall, this results in a much more case-specific empirical approach for estimating the damages.<sup>10</sup>

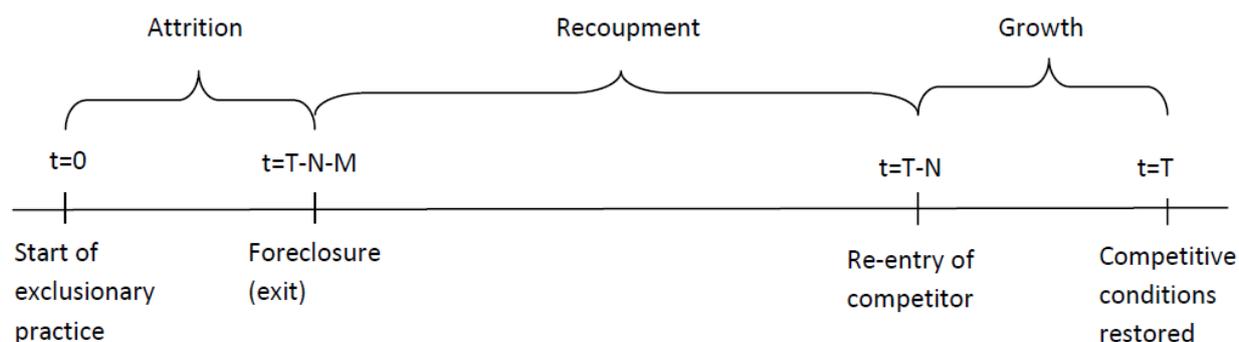
Second, the market structure, which in cartel cases is often assumed to be unaffected by the conduct, is by definition affected by exclusionary practices. This results in additional challenges for the empirical methodology.

Third, the effects on customers may vary across the different phases of conduct (and/or across different customer groups). For example, in predation, prices are low initially and then high during the recoupment phase.

Fourth, the effects of the anti-competitive behaviour may not be limited to the market or region where the price effects are felt. Exclusionary strategies can be used to try to deter entry into neighbouring markets or can be pursued by an incumbent in order to build a reputation of aggressive response to entry. For instance, a predation strategy in a local bus market may prevent entry in this particular submarket, but it also potentially deters entry at a national scale.

Figure 3 describes the typical timeline of exclusionary conduct. In the first step the firm with market power implements its exclusionary strategy, either forcing a competitor to exit the market or to prevent entry of a potential competitor. In the recoupment phase prices will go up, allowing the incumbent to recover potential losses he might have felt during the attrition phase. Finally – and potentially in response to the intervention by the competition authority – re-entry may occur, which typically involves some entry costs and a phase of gradual recovery.

**Figure 3: Phases of exclusionary conduct**



Source: Fumagalli/ Padilla/ Polo 2010

Table 2 summarises the main theoretical effects over the different time periods and for the excluded or marginalised competitor and the end consumer. If the exclusionary strategy takes place in an upstream industry pass-on effects may be relevant as discussed before for exploitative abuses.

While it seems a relatively robust conjecture to presume increase in prices during the recoupment phase (that is after foreclosure and relative to a competitive price level), effects during the attrition phase –

<sup>10</sup> See, for instance, the EC Guidance and staff discussion paper on Art. 82 (EC 2005 and 2009).

and eventually also during the growth phase – strongly depend on industry characteristics and the anticompetitive strategy chosen.

In predatory pricing cases, for example, prices will be set below the costs of both the predator and its competitor (in its most radical form, below average avoidable cost of an as-efficient competitor) until the competitor exits the market. Applying those strategies will often mean short term social welfare gains for all affected customers during this period. Positive side effects of a predation strategy can, however, be focused on few customers or offset by negative effects in neighbouring markets. For instance in transport cost intensive industries foreclosure strategies can be limited to one, specific region. The positive effects might be also limited due to some waterbed effects, i.e. predation strategies vis-à-vis foreign firms may be cross-financed through collusion in the home market.

Furthermore, some strategies can come with no or very limited positive price effects. Margin squeeze constellations can arise for instance through an anticompetitive increase in the wholesale price (and not - like under a predation strategy – through an anticompetitive reduction of the end consumer price) thereby effectively undermining the potential to earn a normal margin at the retail level without driving end consumer prices down. Equally, conditional rebate systems may effectively keep small competitors out of the market through the so called suction effect without reducing average market price substantially. Thus the effect of exclusionary strategies during the attrition phase on consumer welfare is ambiguous.

The following table summarises the likely effects of exclusionary conduct (assuming effective foreclosure of competition).

**Table 2: Adverse effects of effective exclusionary conduct**

|                            | <b>Attrition</b>                                            | <b>Recoupment</b>                                      | <b>Growth</b>                                      | <b>Overall effect</b>                          |
|----------------------------|-------------------------------------------------------------|--------------------------------------------------------|----------------------------------------------------|------------------------------------------------|
| <b>Excluded Competitor</b> | Reduced operating profit and/ or factual losses; exit costs | Foregone operating profit                              | Reduced profit and re-entry costs                  | Harmed                                         |
| <b>End consumer</b>        | Ambiguous, Potential gains due to price cuts                | Losses due to higher prices (price and output effects) | Gains or losses depending on entry strategy chosen | Harmed (if no significant efficiencies exists) |
| <b>Total consumer harm</b> | Negative                                                    | Positive (if no significant efficiency exists)         | Depends on entry strategy and efficiencies         | Harmed (if no significant efficiencies exists) |
| <b>Total welfare harm</b>  | Ambiguous                                                   | Positive (if no significant efficiency exists)         | Ambiguous                                          | Harmed (if no significant efficiencies exists) |

### 3. Empirical methods for quantification

The quantification of harm to competition is typically a backward-looking exercise that applies sophisticated econometric techniques.

As outlined in the theoretical sections, the following main effects need to be measured: (1) but-for price during the infringement period (and potentially some spillover effects after the end of the

infringement) in order to measure the overcharge; (2) the degree of cost pass-on (3) the reaction of demand to price changes to measure the quantity effect (price elasticity of industry demand).

In exclusionary effects cases – in particular if they include a vertical dimension – in addition to the above-mentioned effects one may be required to measure/put more emphasis on: (1) the changes in price during the various phases of the infringement as the infringement affects market outcomes differently over time (e.g. predatory pricing leads to prices being lower than the competitive prices in the attrition phase and higher during the recoupment phase. Applying a model that measures an average price effect over both periods is not adequate, averaging out the two effects. Furthermore, quantity of the affected competitor will strongly fluctuate across the different phases, necessitating accurate price measures over the time horizon); (2) the loss in sales of an affected competitor (cross-firm price elasticity) (3) direct profit measures, cost assessments (both to measure exit and re-entry costs and efficiencies).

Once the period-specific effects are calculated they need to be discounted to come to a current money value of damages incurred over a long period. Whether or not (and from which point in time) interest rates are taken into account strongly depends on the legal environment and on the purpose of the quantification exercise. Some jurisdictions (like the US) do not consider any interest rates (or only from the point of the legal action and not from the point of the infringement on); some jurisdictions apply simple interest rates, others compound interest rates. In some jurisdictions simple shortcuts are available to derive the appropriate discount factor, e.g. an interbank interest rate like the EURIBO plus some fixed add-ons. From an economic, compensation perspective a compound interest rate based on the opportunity cost of capital of the victim and applied to the damages in the period of occurrence seems to be the most appropriate one.

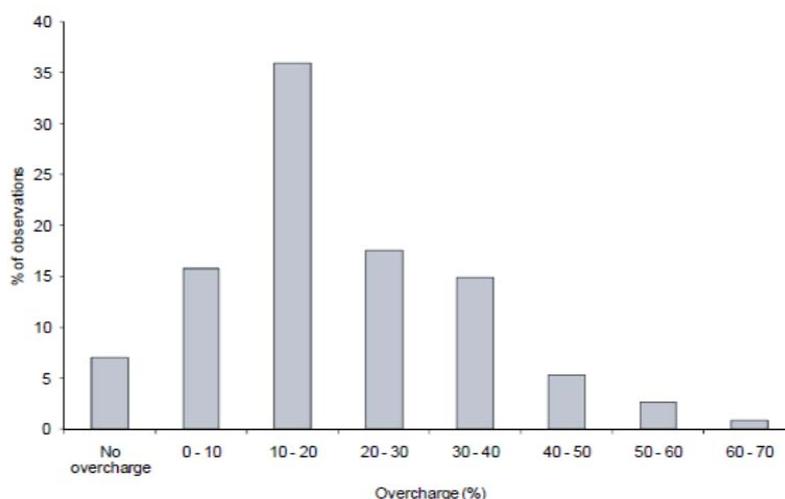
There are a large number of empirical approaches to quantify damages caused by a cartel.<sup>11</sup> In the following we discuss the various methods, focussing on the price effects of a cartel.

### **3.1 *Simple presumptions***

A starting point for calculating harm to competition is some simple presumptions about the average price effects of a particular infringement on the revenue figures of the affected parties. For instance, in cartel cases an increasing number of overcharge estimations of cartels exists, allowing us to derive average overcharges. Figure 4 shows the average overcharge (relative to the competitive price level) as calculated by Connor and Lande, 2008, and re-assessed by Oxera and Komninos, 2009, and based on 114 individual overcharge estimations.

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<sup>11</sup> An overview of the various methods can be found in Ashurst (2004), van Dijk and Verboven (2007) and most recently in Oxera and Komninos (2009) and Davis et al. (2010, pp.351). See also Baker and Rubinfeld (1999) for a discussion within the US legal context.

**Figure 4: Historical overcharge estimations**

Source: Connor and Lande (2008) as reported in Oxera and Komninos (2009)

One can see from Figure 4 that for most of the (detected) cartels an overcharge of between 10% and 20% was calculated and that less than 10% of the cartels reached overcharges of 40% or more. Segmentation between international and national cartels indicates higher overcharges for international cartel cases than for national ones.

This kind of average overcharge estimates might justify legal, rebuttable presumptions. Indeed, the European Commission guidelines apply a 30% presumption for cartel cases (with various aggravating and attenuating factors applied thereafter); the Hungarian law foresees a 10% presumption in cartel cases.

This approach, however, has severe shortcomings: the strong fluctuation of overcharges indicates important industry, country and cartel-specific factors influencing the level of overcharges, rendering an average approach inaccurate. Appropriate databases that allow a cartel candidate market to be benchmarked with some comparable historical cartel cases do not exist so far.

One interesting alternative to an across-the-board presumption for overcharges is bilateral negotiated fines. On some markets, where prices are set in standardised, formalistic tender procedures – in economic terms labelled bidding markets – parties agree in the tendering documents (or the final contract in the event of success) to a, say, 15% overcharge presumption in the case of proven cartel conduct. Such an approach allows the presumption to be situation and industry specific. It requires sufficient buyer power ex ante to establish such a practice, though (because an effective cartel might fight off any attempts to introduce contractual fines).

In addition, simple presumptions are helpful for cross-checking the results of estimates based on more complex methods or for a first risk/opportunities assessment for plaintiff or defendant.

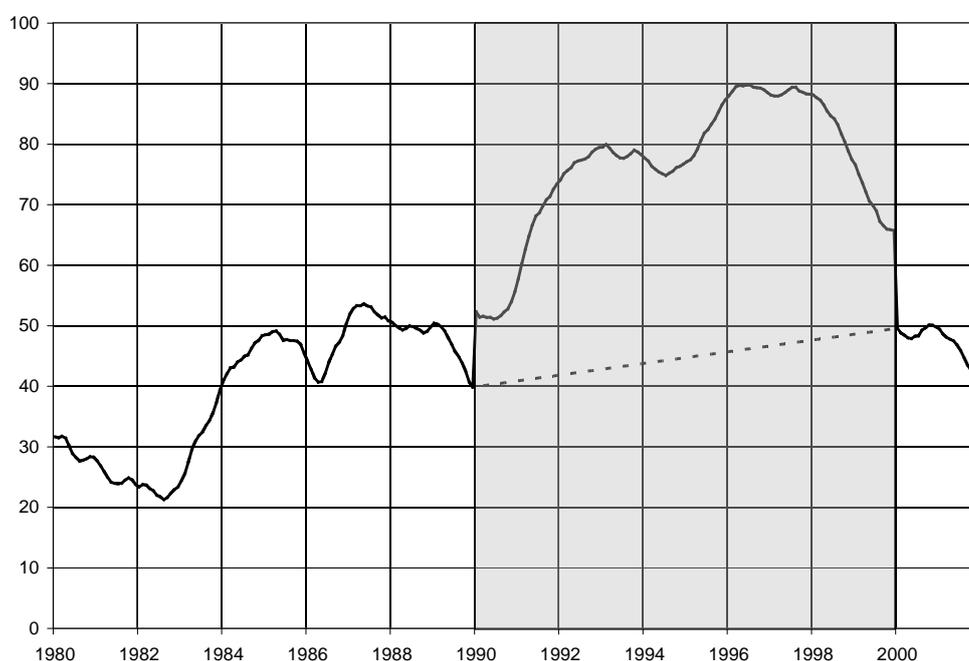
### **3.2. Before, during and after approaches**

Before, during and after approaches compare prices during the alleged anti-competitive period with prices before and/or after. Before, during and after approaches can be carried out by a simple comparison of average prices between the periods or by more sophisticated econometric tests in order to control for changes in other market conditions.

The straight-line method assumes that the prices absent the anti-competitive conduct would have grown or declined on a constant rate (Figure 5; the shaded area represents the conduct period). A line is drawn from the price before the anti-competitive period to the price after the anti-competitive period to estimate the but-for price. The difference between the actual price and the estimated but-for price is considered to be the price effect due to anti-competitive behaviour. This method requires knowledge of the prices before and after the conduct.

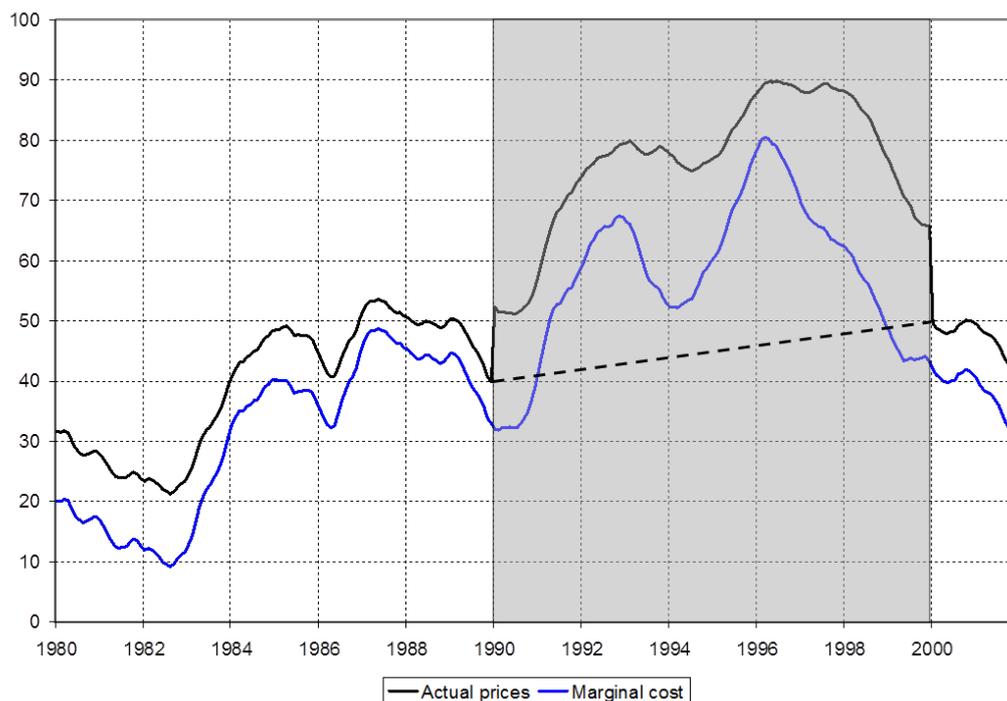
Unfortunately, data on prices before the conduct are often unavailable. This situation occurs especially in Europe, where many markets have only recently been liberalised. In these cases an alternative and even more simplistic approach can be applied assuming that prices have been constant and that the price within the anti-competitive period equals prices after the conduct.

**Figure 5: Straight-line approach**



One major shortcoming of these simple approaches is that price changes due to other external factors (e.g. increased demand or costs, or structural changes in the competitive environment, like increased import penetration) are disregarded. Consequently if, for instance, costs increased significantly during the anti-competitive period, and thus prices as well, the price effect of the cartel will be overestimated. In the same manner, the cartel effect might be underestimated if cost were higher outside the cartel period.

Figure 6 shows a hypothetical time series of marginal costs (blue line) together with the price line (black line). The simple straight-line approach would have resulted in a counterfactual price between 40 to 50 index points. Compared to the average cartel price of around 80 index points this would hint to a significant overcharge of around 60% to 100%. However, the marginal cost line reveals a severe increase in costs over the cartel period, which would have pushed prices up also during the cartel period. As this is not taken into account, the straight-line-approach results in this example in a drastic overestimation of the price effect of the infringement.

**Figure 6: Straight line method – overestimating the price effect**

To address those concerns, statistical, econometric methods allow multiple changes of those factors to be controlled for, thereby deriving an overcharge estimate which is unaffected by such concerns (so-called multivariate regression analysis). Carrying out such an analysis requires expert know-how and can typically only be carried out by specialised units within competition authorities (like the Chief Economist Team in the EU) or external experts.

While the range of alternative approaches is broad (depending on the specificities of the case and data availability) two main methods are commonly used: the indicator variable model and the forecasting approach.

The indicator variable approach introduces an indicator variable for the anti-competitive period. Depending on the specification of the model, the estimator for the indicator reflects the absolute or relative increase of prices due to anti-competitive behaviour.<sup>12</sup> The estimation sample includes both a period unaffected by the cartel and the period affected by it and thereby assumes that the relationship between the cost/demand factors and prices is the same in periods of anti-competitive conduct and effective competition. The main advantages of this model are its relatively simple application (and thereby higher verifiability) and the more limited data requirements. In particular, for cases for which data outside the infringement period is limited, the indicator variable approach is superior to the forecasting approach. The introduction of different indicator variables for different infringement phases allows the calculation of different price effects for different periods of the infringement (as required for exclusionary conduct cases).

<sup>12</sup>

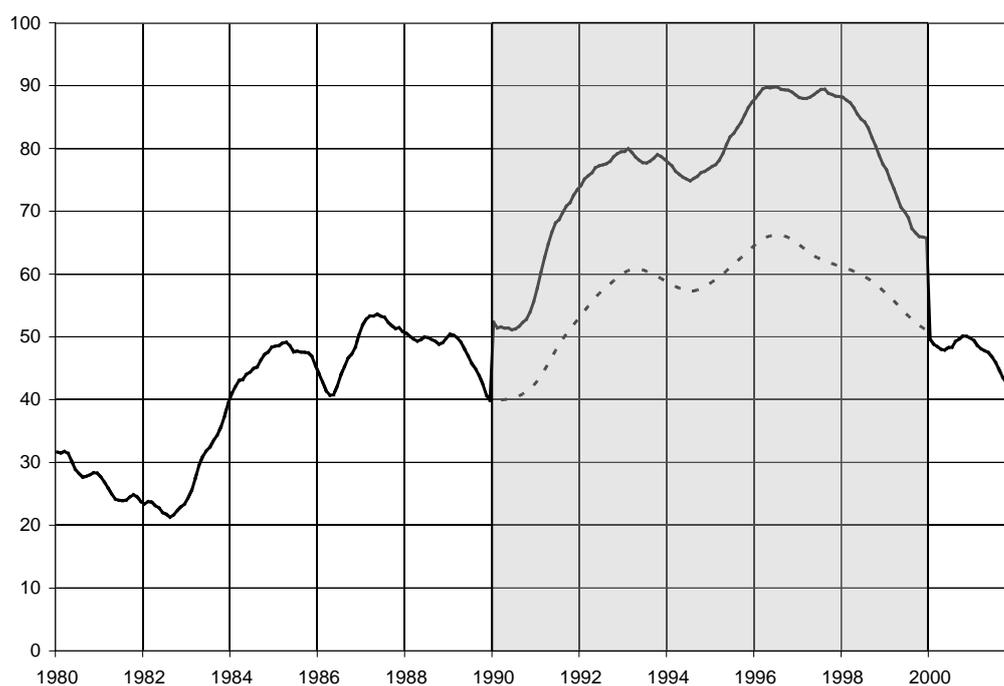
There is some ambiguity as to whether the estimate coefficient of the indicator variable is the right measure of the cartel effect or the difference between the factual price and the predicted price under the presumption of no infringement (i.e. setting the indicator variable to zero). In the latter case the overcharge varies to some extent over the infringement period, assigning effects which cannot be explained by the model to the infringement. The differences, in most cases, should be limited though.

The forecasting approach uses estimates from the regression analysis only in the periods free of anti-competitive behaviour. The estimated cost-price and demand-price relationships are applied to the cost and demand data during the infringement period allowing the but-for price during the infringement period to be forecast. It thereby results in overcharge estimations that vary over time (Figure 7).

In comparison to the indicator model, the forecasting model puts fewer assumptions on the data – it only assumes that the relationship between cost/demand factors and prices *would have been* the same during the entire sample period if a cartel had not existed, but allows for different cost/demand/price relationship in a competitive environment vs. a collusive one. Accordingly, the forecasting approach is superior to the indicator model in an environment with rich data outside the infringement period and indications that the infringement affected the cost/demand/price relationship.

For both models the indicator variable approach and the forecasting approach can be implemented in a so-called dynamic framework. Here, price changes of period  $t-1$  influence price in period  $t$ , allowing some form of price rigidity. Such a dynamic approach might allow superior predictions if it can be estimated robustly. Indeed, within such an approach predictors are selected “based on their ability to improve the forecast accuracy of the econometric model during the benchmark period” (White et al. 2006), that is, the choice of the included variables is driven predominantly by their statistical properties. In a low-quality data environment this may not be feasible; it also comes with the disadvantage that the influence and economic plausibility of the cost/demand factors cannot be easily assessed.

**Figure 7: Forecasting approach**



The main difficulty for the before and after approaches is to establish the exact cartel period. Decisions from the administrative proceedings often leave open the starting point of the collusive conduct. In a rich data environment one may want to exclude ambiguous time periods for the estimation and “let the data decide” whether a positive overcharge is identified or not over this period. It is then mostly a legal question of whether the overcharges of these periods can be taken into account or not.

The post cartel/infringement period is in most cases more clearly identified through the date of the dawn raid by the competition authority or the leniency application. However, problems may also arise here if the cartel has lasting effects into the post-cartel period. Reasons for this can be long-term contracts or a price war situation post-cartel breakdown that lasts until an industry moves back to a long-term competitive equilibrium. Another concern – mostly plausible in a US environment where private damages are much more relevant than administrative fines and have for a long time been based on empirical approaches – is that cartel participants may act strategically by holding the prices higher than the competitive level to forgo higher damage claims.<sup>13</sup>

### **3.3 *Regional or product price comparisons***

An alternative approach to the before, during and after price analysis is based on regional or product comparisons (also sometimes labelled yardstick approaches). Here the price in the region affected by anti-competitive behaviour is compared to prices in other geographic regions or product markets that are not affected by the conduct. Just as with the before, during and after approach, empirical applications can cover the spectrum from simple average price comparisons to complex econometric estimations comparable to the empirical methods described above.

The main challenge for such comparisons across different regions and/or products is to find a sound benchmark. A sound benchmark is one that is affected by changes in demand, costs or market structure to the same extent as the affected market but for the conduct under assessment. Indeed, structural factors vary between markets (e.g. number of firms or regulatory rules) or products and have to be “controlled” for if a comparison is to be valid. If, however, the structural parameters of a particular region or a specific product are highly comparable then this region is also prone to collusion (and accordingly an invalid competitive benchmark). Along the same lines, the cartel can have effects on related markets, e.g. the umbrella effect, if close markets are used as benchmarks. Thus, estimators of the price effects may be biased.

Note that both before and after methods and regional and product comparisons can be considered in a unified empirical framework. For instance, one might have relevant data on various regions (some affected by the anti-competitive conduct, others not) over a long time period (longer than the anti-competitive conduct lasted). In this case, these data can be explored in a single empirical approach, called difference-in-difference method or – when more sophisticated statistical methods are applied - panel data analysis. The benefit of such an approach is that if a proper comparator market does exist, that is a market which is affected by the same cost and demand factors but not affected by collusion, the difference-in-difference approach offers an easily applicable but robust methodology. If the comparator market does exhibit some differences, statistical methods allow us “to make the markets comparable”. Here it is the usage of all available information which makes the methodology superior to more simple before and after approaches – requiring however more data and depending on the assumption that the price/ cost/ demand relationship in the comparator markets is the same as in the affected market. See, for instance, Simpson and Taylor (2008) for the application of a difference-in-difference method to a merger in the US gasoline market.

### **3.4 *Cost-based, profit-oriented or simulation approaches***

A cost-based approach constructs the but-for price “bottom up” by measuring the relevant costs of the affected product and adding a reasonable profit margin (which would emerge under normal market conditions). One major difficulty of this approach is in finding robust cost estimates, since accounting costs do not generally reflect economic costs. Furthermore, the assignment of fixed costs to various product categories offered by a firm is not trivial in most instances. Finally, competition authorities, courts and customers often lack a proper understanding or simply do not have access to such robust cost measures.

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<sup>13</sup> Harrington (2004).

A further difficulty is the assessment of a reasonable profit margin, which requires a proper understanding of competition absent the cartel and may require the empirical assessment of firm- or product-specific margins. Some industries might have a structure that allows positive margins exceeding a reasonable margin even when competition is active (e.g. low number of firms, high barriers to entry, product differentiation and capacity constraints). Another reason for higher than reasonable margins can be an outcome of the dynamics of a market. Companies investing in innovation must have a perspective on being able to amortise the investments through higher prices.<sup>14</sup> These specific structural characteristics are to some extent accounted for in simulation models.

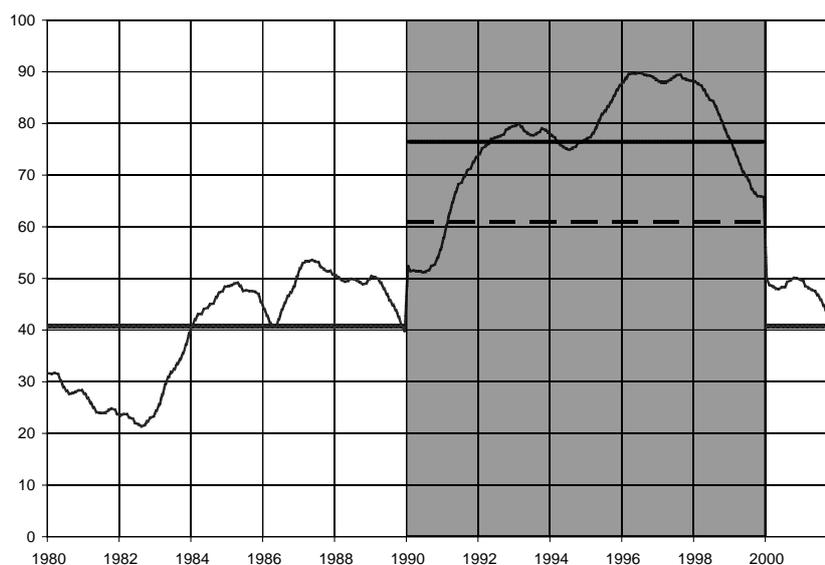
The simulation approach (theoretical modelling) is closely related to cost-based approaches as it often requires some cost information. However, this methodology uses an explicit model of competition, which is used to “simulate” the profit margins. In addition to data on costs, simulations thus require information on market structure (like HHIs) and demand (such as demand elasticities).

Several crucial decisions have to be made that can drastically influence the results. Depending on the type of rivalry, an industry-specific theoretical model must be chosen (or even tailor-made). Do firms compete on prices or quantities? Do capacity constraints matter? Are prices bilaterally negotiated? etc. Another crucial assumption is the choice of the particular demand system and the cost function. This includes, for example, deciding whether prices are likely to rise proportionally or not when demand or cost is increasing.

Once a model environment is chosen the model parameters need to be set according to the facts of the industry (so-called “calibration”). Parameter values might be available from earlier studies of this or a comparable industry. Crucial parameters may also be set according to own estimates for this particular industry or market intelligence. In any case, a sensitivity analysis should support the robustness of the results over plausible ranges of the core parameters of the model.

Once the parameters are set a simulation approach allows one to derive a theoretical price at the competitive level and under collusion (see Figure 8). Comparing the simulated collusive price with the factual price during the infringement period allows the verification of the plausibility of the model (and/ or the effectiveness of the cartel).

**Figure 8: Simulation models**



<sup>14</sup>

Van Dijk and Verboven (2005)

The advantage of such simulation models is the relatively limited data requirements; its main shortcoming is the high sensitivity to changes in the model setting and the parameter values. Estimated damages often vary strongly within plausible parameter ranges. Simulation models can however play an important role in estimating margins across various regional markets, and calculating the implications of market exit and entry on prices. Hence, in particular for exclusionary conduct cases, simulation techniques may provide complementary estimates of price effects.

Alternatively, the theoretical framework may translate into an empirically testable hypothesis, an approach typically referred to as structural empirical modelling. According to Reiss et al. (2007) “economists refer to models that combine explicit economic theories with statistical models as structural econometric models”. All types of intermediate types exist through blending some form of economic theory with statistical models. Reiss et al. (2007) also provide a careful discussion on the pros and cons of structural empirical models and how and when to apply them. The opposite extreme to structural empirical estimation is the dynamic forecasting approach previously discussed that focuses predominantly on the predictive power of the estimated benchmark model.

Table 3 summarises the main methods, their key assumptions and data requirements.

**Table 3: Estimation methods and data requirements**

| <b>Estimation method</b>                                 | <b>Requires understanding of the form of rivalry prevalent in the market (economic model)</b> | <b>Required data quality</b> | <b>Data needed</b>                                                                                                      |
|----------------------------------------------------------|-----------------------------------------------------------------------------------------------|------------------------------|-------------------------------------------------------------------------------------------------------------------------|
| <b>Presumptions</b>                                      | No                                                                                            | Low                          | Volume data                                                                                                             |
| <b>Straight-line Method</b>                              | No                                                                                            | Low                          | Prices in cartel period and to some extent data from after (and or before) cartel period                                |
| <b>Regional or product price comparisons</b>             | (Yes)                                                                                         | Low to moderate              | Prices of comparable products in a different product or regional market without anti-competitive conduct                |
| <b>Simulation methods</b>                                | No                                                                                            | Moderate                     | Average prices, demand elasticity and marginal costs within anti- or competitive period                                 |
| <b>Regression: (Dynamic) indicator variable approach</b> | No                                                                                            | High                         | Prices, costs and demand factors from anti-competitive and before or after periods                                      |
| <b>Regression: (Dynamic) forecasting approach</b>        | No                                                                                            | High                         | Prices, costs and demand factors from anticompetitive and before or after periods                                       |
| <b>Regression: Structural estimation</b>                 | Yes                                                                                           | High                         | Depends on specific model, typically prices, costs and demand factors from anti-competitive and before or after periods |

From a practical perspective an empirical assessment typically comprises six steps. First, interviews will be carried out to understand the economics of the industry, the alleged conduct and the available information. Second, a methodology (or several in parallel) will be chosen. The empirical strategy depends not only on the economics and data availability, but also on the objective and legal environment of the empirical assessment (see the discussion of trade-offs in the following section). Third, an information request will be filed. The broadness thereof will again strongly depend on the legal disclosure rules in private damages cases or the power of the competition authority to file information requests within the

administrative proceeding. Fourth, a data cleaning process is initiated. Here data is made consistent between various data sources, outliers are identified and open data questions resolved. This phase is often the most intensive and long lasting phase of an empirical investigation. Fifth, the analysis is carried out and a preferred (that is the most robust and economically convincing) model is chosen. Sixth, robustness checks and sensitivity analysis are carried out around the preferred model. This step often is carried out in dialogue with the various stakeholders of a case, e.g. economic and industry experts of the opposing side. All these steps are influenced both from economic and legal aspects of the case – the main trade-offs will be identified in the following section.

#### 4. Important trade-offs exist between legal concepts and empirical methods

In this section some important trade-offs that arise when applying empirical economic analysis in a legal environment are discussed. Those trade-offs have to be well understood, made transparent, and decisions on how to proceed in light of those trade-offs have to be taken upfront by the court.

Below, we structure our discussion of the trade-offs into general trade-offs, followed by trade-offs of an economic nature and finally trade-offs of a legal nature. While some of the trade-offs can be linked more to economic methodology and others to legal aspects, it is important to keep in mind that it is the legal constraints (burden and standard of proof, etc.) that define the economic approach (scope of data collection, methodology, level of sophistication, etc.).

##### 4.1 General trade-offs

A central theme when discussing the relative benefits of different empirical methods is the trade-off between accuracy and practicality. This trade-off becomes clear when it is taken into account that quantifying the effect of a practice requires the creation of a scene (the counterfactual). The more realistic the scene that is created, the more complex is the creation. At the same time increases in complexity lead to decreases in practicality. For clarity we define the two notions of accuracy and practicality:

There are two dimensions to being accurate in a probabilistic world. The first is to be correct *on average*, which in statistics is referred to as unbiased.<sup>15</sup> In other words, the methodology is unbiased if it delivers, on average, the correct estimate. Note that being right on average does not necessarily imply that your estimate is close to the truth: you could be over or underestimating the correct damages by a great deal, while still being on average correct. This second dimension of accuracy – being close to the truth – is called **precision** in statistics (or efficiency of the estimator).<sup>16</sup>

*Definition of accuracy: accuracy describes the potential of a methodology (an estimator) to deliver unbiased and precise estimates of ‘true’ damages.*

Note that in the above definition, we abstract away from the trade-off between bias and precision. In principle an estimator with a small bias but high precision might be superior to an estimator which is

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<sup>15</sup> In econometrics an unbiased estimator describes an estimator with an expectation value, or mean, which is the true population parameter one is trying to estimate. In other words, if the empirical experiment is repeated sufficiently often, on average, the unbiased estimator yields the true population mean. Griffiths et al. (1993, p.81).

<sup>16</sup> Precision of an estimator tells us, in a probabilistic sense, how much the estimates from that estimator can vary from sample to sample. The lower the variance of an estimator, the greater the (sampling) precision of that estimator. Griffiths et al. (1993, p.213).

unbiased but very imprecise.<sup>17</sup> This is related to the debate surrounding structural economic models. The more economic assumptions from economic theory are imposed on the estimation, the more precise the estimates obtained. Albeit, the result will be biased if the assumptions are incorrect.<sup>18</sup>

Let us also state that this definition assumes a state-of-the-art execution of the methodology under discussion. Hence, we abstract from questions related to the quality of the expert and his capabilities to execute the methodology.<sup>19</sup>

*Definition of practicality: a methodology is practical when it yields a verifiable and transparent estimate within a reasonable timeframe and with proportional resources.*

In empirical work, the properties of verifiability and transparency depend a great deal on data submission and presentational style. The provision of raw data, documentation of any adjustments made to the data, and the statistical routine used to derive the results allow a direct replication of the results by a second expert and enable sensitivity checks and the estimation of alternative empirical models. Even complex methods can be communicated so that the underlying empirical test idea and assumptions become verifiable for non-experts; best-practice rules exist on how to present empirical results in such a way that they can be verified by an expert.<sup>20</sup>

Regarding timeframe and proportionality of resources it has to be noted that huge differences exist, the key determinants of which are data collection and data cleaning. We will come back to that point.

As mentioned, we argue that there is a fundamental trade-off between accuracy and practicality that may emerge in empirical work. The following graph depicts this trade-off. With an appropriate methodology and sophistication, many empirical methods do gain accuracy. The shaded area indicates the minimum standard of proof to be met by a specific methodology.<sup>21</sup>

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<sup>17</sup> Statistical measures do exist which provide guidance for empirical economists on how to resolve this trade-off. For instance, the mean square error is the sum of the (squared) bias and the variance of the estimator. An estimator that minimises the mean square error may achieve that by allowing some bias to the benefit of precision. Griffiths et al. (1993, p.312). This trade-off is most visible in the debate between so-called parametric versus semi- or non-parametric estimations methods. Semi- or non-parametric estimations do not — in contrast to parametric approaches — presume (or at least to a lesser extent) the functional relationship between the variables of interest. The higher flexibility comes at a price though. First, estimation precision decreases rapidly as the number of explanatory variables increases. As a result, impracticably large data sets are required. Second, non-parametric estimations do not permit extrapolation thereby excluding predictions from the cartel-free into the cartel-affected period. Finally, it is difficult to impose restrictions on the estimates. While partial solutions to these shortcomings do exist, these also come with more assumptions imposed on the statistical methodology. See Horowitz (2009) for an introduction on this topic.

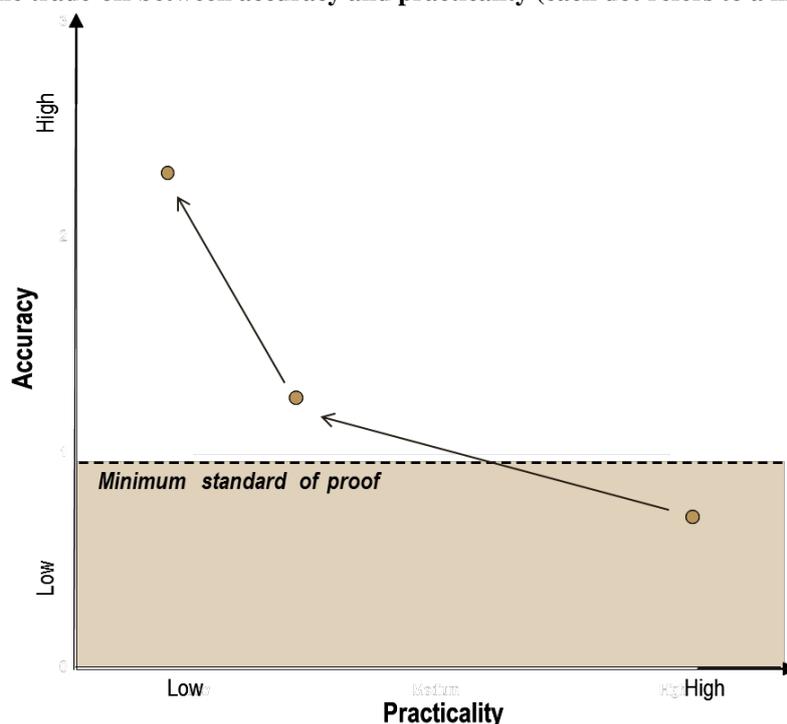
<sup>18</sup> This is the debate on structural vs. non-structural empirical estimations. See section on different empirical methods.

<sup>19</sup> In the US - based on a judgment in the case *Daubert v. Merrell Dow Pharmaceuticals, Inc* - detailed rules are derived for admissibility of an econometric expert testimony. These rules address issues like the qualification of the expert, and reliability and relevance of the methods applied. See ABA (2005, Chapter II).

<sup>20</sup> European Commission (2010), Davis and Garcés (2010, p.13) or Reiss et al. (2007).

<sup>21</sup> The level of the standard of proof depicted in this graph and in the following graphs is for descriptive purposes only. It does not intend to reflect the factual standard or ranking of standards in a particular case or country.

Figure 9: The trade-off between accuracy and practicality (each dot refers to a methodology)



In other words, the above trade-off exists as a matter of fact in many situations. This may also imply that judges and lawyers may find it difficult to fully comprehend the proposed methods. This is not uncommon in other areas – a testimony assessing, say, the causes and damages caused by a car accident (typically carried out by a specialised engineer) also contains elements that are not understandable without profound expert knowledge. The key is that the expert must be in a position to explain the logic and plausibility of the approach taken. Nevertheless, there is a conflict between the objective of practicality (in particular, verifiability) and accuracy. In our view, this implies that judges should demand significant accuracy, while making sure that the procedural aspects of empirical economic analysis are strengthened.

It may also be that there are cases where no accurate empirical estimate is possible within a reasonable timeframe or with proportional resources. The legal system needs a careful discussion of how to proceed in such cases.

On the other hand, there are situations where a specific method is both practicable and results in highly accurate results. The so-called difference-in-difference method used in the context of a sound benchmark might be one example of such a methodology.<sup>22</sup>

More generally, both accuracy and practicality depend on the specificities of the case and on data availability. For instance, the difference-in-difference approach will not meet any plausible legal standard if no sound benchmark is available. Nevertheless, economists should provide some *prima facie* guidance on the pros and cons of different methods. For instance, price-based approaches are in our view usually more robust than cost-based approaches: cost measures are often less transparent than measures of prices, and are therefore more difficult to verify.

<sup>22</sup>

For an application of the difference-in-difference approach in the field of merger control, see for example Simpson and Taylor (2008). Indeed, this is related to a broader empirical principle that changes in variables (i.e. differences) can often measure effects more accurately than absolute values.

Plausible niche applications do exist for some methods, however. For example, simulations may play an important role for a first risk assessment (from the perspective of a defendant) or a first damages model (from the perspective of a plaintiff). In addition, simulation might play a particular role for local markets with different market structures<sup>23</sup> or in exclusionary conduct cases, where market structure is affected by the conduct.

#### **4.2 Trade-offs from an economist's perspective**

The general trade-off between accuracy and practicality translates into several specific but important trade-offs on how to tailor the empirical economic analysis. These trade-offs can be structured in data choice, number of variables included and methods applied and the choice of the counterfactual.

Often, the most cumbersome work in empirical economics is data collection and cleaning. Hence, an important decision is whether one can work with publicly available data or with data provided by the parties. Working with data provide by the parties often allows for the collection of much more disaggregated data (transaction data vs. annual data; price data on specific products vs. average prices across all product categories; regional data vs. national data). More disaggregated data result in a higher accuracy of the estimates.

On the other hand, beyond easy accessibility, publicly available information does have some advantages over data provided by the parties. First, public data offer a consistent data source that allows cross-firm comparisons and includes information on firms not participating in the proceedings. Second, they are not prone to ex post strategic data manipulation. Third, the period of data collection is significantly shortened.

A further important design issue is the number of variables included and – related to this – the number of methods applied in parallel. Consider the question of the number of variables, which is subject to several trade-offs. Prices are determined by many factors, including cost and demand shifters as well as market structure. Collecting information on all of these factors would result in significant data collection. Moreover, the introduction of many variables relative to the number of data observations will reduce the accuracy of the estimates.

In some instances, several explanatory factors follow a simple linear time trend or are highly correlated. If the individual impact of those variables is not of interest for the assessment, the inclusion of representative variables controlling for the combined effect is sufficient and may allow to pursue the assessment with a relatively small data set based on publicly available data. On the other hand, the omission of important variables could result in biased estimates (less accuracy). Hence, a careful selection is important as included variables need to be based on an assessment of the economics of the industry and tailored to the specific needs of the methodology.

Questions of time and effort (i.e. practicality) versus accuracy will determine whether several different methods in parallel are applied. From an accuracy perspective, applying as many parallel methods as possible is desirable. From a practicality viewpoint, this is not so.

Consider, for instance, a situation depicted in the graph on the left in Figure 10, where two methods are available, both of which are sufficient to meet the minimum required legal standard at a significant

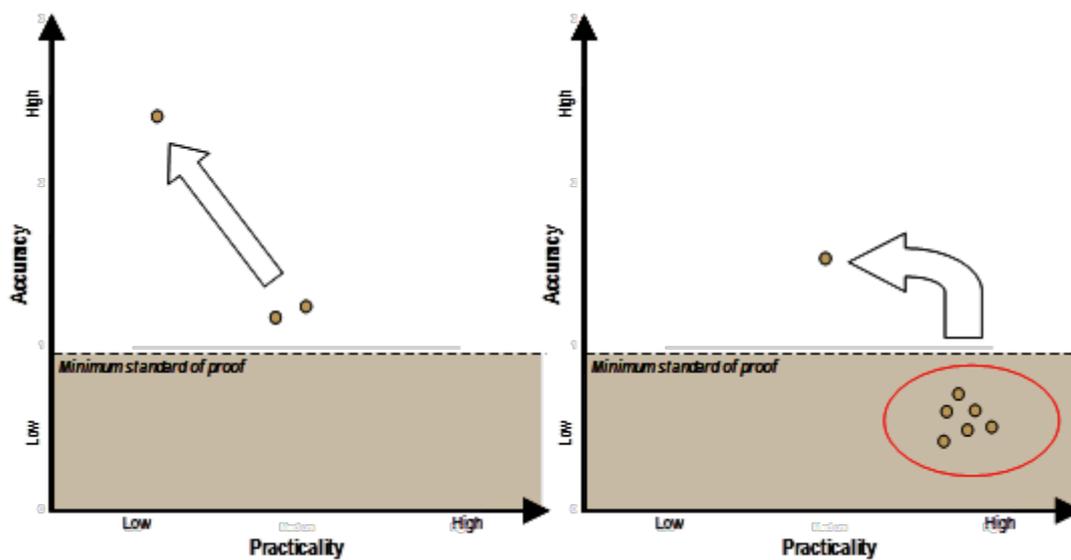
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<sup>23</sup>

The reason for this is that cartel simulations allow the calculation of firm-specific margins depending on local market structure. In industries where markets are regional and local concentration varies, cartel simulation might provide helpful guidance on average margins. This relates to the earlier point that working with “changes” may be better than absolute levels.

tolerance. By executing both methods one can still achieve a higher level of accuracy but at the cost of lower practicality, as indicated in the graph by the arrow. In this situation a sequential approach seems plausible: starting with the most promising method and only if this method does not result in an outcome which is sufficiently accurate to meet legal standards an alternative method is carried out. Such a sequential approach seems to us superior to a “try all” approach, at least in those instances where each method requires a significant effort when executed.

**Figure 10: Potential effects of parallel application of methods (each dot represents a method)**



Source: Friederiszick and Röllner (2010)

Consider another situation where several simple (high practicality) methods are available. In this case, it makes sense to pursue several methods in parallel, jointly reaching the required legal standard at a sufficient margin as indicated in the right-hand side graph of Figure 10. A word of caution is in order as to whether various “weak” methods are so much more informative than each method separately. In general, this depends on the amount of independent information on the underlying facts of the case. However, torturing the same low-quality data with various alternative methods may not result in a more informed assessment of the damages.

In sum, whether a sequential or parallel approach is taken depends on the particular circumstances of the case. It is important though to decide early in the process which approach to follow, otherwise a dispute over the method may arise. A veil of uncertainty on the outcome of each methodology allows a consensus between parties with conflicting interests on what is considered the superior methodology.<sup>24</sup>

A third important design element is the right counterfactual; that is, what would have been the price during the alleged period absent the infringement. There are three variations of this issue, which we address in turn.

<sup>24</sup>

A further argument in favour of the application of multiple methods is that the application of a single predictable methodology may result in an attempt by firms to influence the outcome of estimated overcharges, see Harrington (2004). However, this argument supports the position to not always use the same method across all cases. It does not support the view that it is always appropriate to use multiple methods in each individual case.

An initial legal question is whether to take market concentration into account when assessing the counterfactual price. While this seems obvious from an economic perspective, it has significant implications for the empirical analysis. While unilateral price effects would have to be accounted for, it may also be an issue as to whether coordinated effects apply when assessing illicit gains: from a welfare perspective coordinated effects can be as damaging as explicit coordination. A further issue in this context is whether an alternative market structure would have emerged in the counterfactual without infringement. Cartel cases sometimes are an attempt of the industry to avoid industrial restructuring; in exclusionary conduct cases by definition the changes of market structure have to be taken into account,

One further variation of the right counterfactual is related to the inter-temporal (as well as cross-sectional) relationship between prices during and after the infringement period. For instance, Harrington<sup>25</sup> has argued that prices post-cartel are set higher than a scenario without the cartel, since firms know that damages will be calculated based on the price difference before and after cartel breakdown. This argument may be more prone to the US environment since in Europe fines are not based on a before and after methodology,<sup>26</sup> nor does private enforcement currently apply such an approach consistently.

A final variation on the right counterfactual design is whether other market distortions have to be taken into account. In some cases it was argued that prices would have been below the normal competitive price level, for instance, due to dumping from foreign regions or in response to abusive buyer power. The parties argued that the abusive behaviour (here collusion) only pushed back the prices to normal price levels and hence – despite having a positive impact on prices – did not result in positive overcharges. Equally, predatory pricing strategies might be initiated in response to such events. These kinds of arguments are typically rejected by courts.

#### **4.3      *Legal aspects and trade-offs***

Leaving the question of the right counterfactual behind, another important trade-off arises with respect to infringement-affected comparator markets. For long-lasting infringements it is often difficult to find clean comparable prices. Neighbouring countries or comparable products are often either prone to the infringement or are too different.

Focussing on accuracy, markets where there is an indication of similar infringements are likely to be excluded as comparator markets. However, markets with proven effective cartel periods or monopolies are still informative, as they can be used to benchmark the observed price against a (proven) monopoly price. A significant difference – that is the price in the region with a proven monopoly is significantly higher than the price in the affected period – would indicate a less effective infringement in the affected market.<sup>27</sup> If alternative methods are not available it might be appropriate to use this information. More generally, the trade-off is whether the potential bias that is introduced by wrongly including an affected market into the group of infringement-free comparators or an infringement-free market into a group of infringement-affected markets is too large, offsetting the advantage of additional observations.

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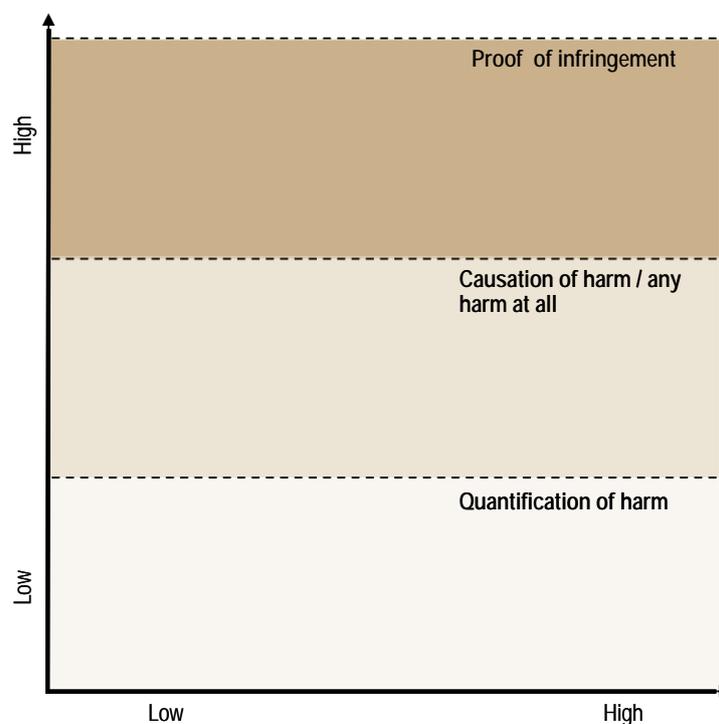
<sup>25</sup> Harrington (2004).

<sup>26</sup> In Europe the effects of a cartel are taken into account only indirectly when assessing the level of fines. For instance, the gravity of the infringement (which determines the basic amount of fines) is decided by factors like the nature of infringement, market shares, regional scope or implementation. See the guidelines on the method of setting fines, European Commission (2006).

<sup>27</sup> If the reverse is true, i.e. a higher price in the affected region than in the proven monopoly region – this indicates the inappropriateness of the region for comparison due to significant differences in demand or cost factors.

While the question of whether to include infringement-affected comparator markets in the analysis is more a detailed methodological question, the legal standard of proof as well as the distribution of the burden of proof are core issues that determine the legal environment in which an overcharge estimate is to be used.

**Figure 11: Different standards of proof**



Source: Friederiszick and Röller (2010)

As depicted in Figure 11, significant differences exist in legal standards across different aspects of a case (which in turn may differ between countries and across exclusionary practices). In cartel cases for instance the widespread belief in economics prevails that empirical findings are not sufficient to prove cartels.<sup>28</sup> Indeed evidence of explicit communication is required to meet the legal standard to prove collusive conduct in administrative proceedings of most jurisdictions.<sup>29</sup> If such an approach is pursued, the role of economics is limited to the steps following the finding of a cartel (which may still have been ineffective). Similarly, in private actions for damages, high standards of proof exist for an infringement and whether any harm was inflicted at all, while the standard of proof for quantifying the harm is lower. Once harm has been shown, judges can estimate the quantity of harm at a lower standard.<sup>30</sup> Other forms of

<sup>28</sup> Motta (2004, p.189) or Kühn (2001). It remains to be seen whether under the more effects-based approach under Art.82 and competition policy in general this wide-shared belief in economics is overruled. See Davis and Garcés (2010, p.316) for a discussion leaning – it seems – towards a more interventionist approach and Röller (2008) for a more skeptical view on exploitative abuses.

<sup>29</sup> Economics may play a much more important role for guiding the competition authorities' priorities in carrying out dawn raids. While broad "fishing expeditions" are considered extensive, the legal standard to be met to justify dawn raids is relatively low. See Friederiszick and Maier-Rigaud (2008).

<sup>30</sup> E.g. § 287 of the German Code of Civil Procedure.

exclusionary conduct like predatory pricing often rely much more on economic evidence and do not require “smoking gun” type of evidence to proof the infringement.

The legal standard has important implications for the economic analysis and its trade-offs: a higher legal standard may require more accurate economic analysis, for example by collecting transaction level data and, eventually, pursuing several methods in parallel. This results in significant additional effort and cost. To this end courts need to be upfront and transparent as to the objectives of economic assessment and the relevant legal standards.

Turning to the burden of proof, one element that is important for economic analysis is who has access to data. Here a particular issue is the “tragedy of information asymmetry” in private litigation cases. On the one hand the plaintiff, who has to make his case, does not have the information to show damages robustly. The defendant, on the other hand, who carries the burden to prove pass-on, does not hold the right information for this in his hands. Thus, a difficult trade-off arises with tight disclosure rules, which assure timely data disclosure but also might result in excessive transparency. Indeed, examples exist where an investigation by a competition authority increased the transparency to a degree allowing tacit collusion to arise. The intervention of the competition authority thus might even result in higher prices post-intervention. Tight disclosure rules can also be misused within a strategy of raising rivals costs where a complainant pushes its competitor into a costly litigation process.

Another aspect crucial for the proper functioning of economic analysis in court proceedings is the guidance that the economic expert gets from the court. For instance, in the cement cartel case the court decided – after a comprehensive debate with the expert and the parties – to pursue a during and after approach (i.e. to exclude cross-region and cross-product comparisons). Other important decisions were taken by the judge in light of the economic trade-offs discussed above, such as to exclude the price-war period, to collect regional data, etc. In this regard, the three-step procedure can be instrumental in maximising the effectiveness of the economic analysis.

Guidance by the court could also be provided with regard to the effectiveness of the infringement. Providing the economic experts with an assessment of the effectiveness of the alleged infringements across various regions would enable the experts to cross-check their empirical findings.

Finally, the possibility for courts to reduce the expert’s estimates derived by econometric techniques (through so called ‘safety discounts’) can be a helpful way to balance the trade-off between accuracy and practicability. For instance, predicted damages might be of lower accuracy for historical periods (due to missing data or empirical predictions over a long prediction horizon). However, application of such safety discounts needs to be justified well and applied carefully so that the estimate does not become superfluous.

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## NOTE DE RÉFÉRENCE

*Par le Secrétariat\**

### 1. Introduction

Les autorités de la concurrence s'efforcent de limiter les effets néfastes des comportements anticoncurrentiels sur la concurrence. Dans certains pays et pour certains types de comportements, elles sont tenues de quantifier les atteintes potentielles ou réelles afin d'établir l'existence du comportement et calculer les amendes administratives, ou pour des raisons de sensibilisation. Les juridictions nationales, en plus du rôle qu'elles jouent dans les procédures administratives, sont chargées – souvent avec l'aide d'experts extérieurs – de l'évaluation des préjudices personnels causés par un comportement anticoncurrentiel. Du fait que les procédures administratives et les actions privées en dommages et intérêts sont menées parallèlement, elles incitent toutes les deux les entreprises à ne pas adopter de comportement anticoncurrentiel, ce qui crée des interrelations entre les deux types de procédures, qui ne sont pas toujours souhaitées par l'autorité de la concurrence.

Si le concept d'atteinte à la concurrence résultant d'un comportement anticoncurrentiel est lié au concept de préjudice subi par des victimes déterminées en raison de ce comportement, il s'en distingue toutefois. L'atteinte à la concurrence renvoie au préjudice général causé à l'économie et a pour optique le bien-être ; elle est au centre de toute évaluation menée par une autorité de la concurrence. À l'opposé, le concept de préjudice est fortement individualisé et peut, ou non, coïncider avec le préjudice causé à la société ; il est au centre de toute action privée en dommages et intérêts intentée par un particulier devant une juridiction nationale.

S'il est vrai que ces deux concepts théoriques diffèrent dans une certaine mesure, les méthodes de quantification sont plus ou moins les mêmes et rencontrent des problèmes équivalents. Pour évaluer les atteintes à la concurrence ou les dommages et intérêts privés, les approches analytiques utilisées varient selon le secteur d'activités, les caractéristiques de l'infraction et les informations dont on dispose sur l'infraction. L'évaluation des effets néfastes (ou des dommages et intérêts) causés par une infraction peut en effet s'avérer compliquée : imaginer ce qu'aurait été la situation « en l'absence » d'infraction réclame souvent une analyse détaillée – analyse qui oblige les experts économiques à travailler dans un cadre juridique. Cela pose en retour le problème épineux de la compréhension par le juge de modèles et de techniques complexes. La *tragédie de l'asymétrie de l'information*, qui désigne le fait que le défendeur détient les informations nécessaires au demandeur pour prouver concrètement le préjudice et que le demandeur détient les informations nécessaires au défendeur pour prouver la répercussion, exige des règles de procédure bien définies pour permettre une juste évaluation empirique.

La présente note examine les défis économiques de la quantification des effets néfastes sur la concurrence (comprenant les atteintes à la concurrence et les préjudices personnels). La deuxième partie offre une description des possibles effets économiques (théoriques) des comportements anticoncurrentiels tandis que la troisième partie présente les méthodes empiriques utilisées pour évaluer les effets néfastes.

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Enfin, la quatrième partie détaille les importants arbitrages nécessaires à la mise en œuvre de ces méthodes empiriques dans un cadre juridique.

Le présent document porte essentiellement sur les éléments suivants :

- Il existe des différences entre les atteintes à la concurrence et les préjudices personnels, qui doivent être prises en considération lors de l'évaluation des effets d'un comportement anticoncurrentiel et qui limitent les possibilités de transposition des résultats de la quantification entre les procédures contentieuses administratives et privées. Dans les affaires d'ententes, par exemple, les actions privées en dommages et intérêts intentées par des particuliers mettent l'accent sur l'effet de surcoût (et éventuellement sur le moyen de défense tiré de la répercussion) tandis que dans une procédure administrative, priorité est donnée aux effets de production – qui mesurent les effets néfastes d'une entente sur le bien-être.
- Dans les affaires d'ententes (prises en tant qu'exemple de pratiques d'exploitation), les effets théoriques sont relativement bien définis, ce qui n'est pas le cas des comportements d'éviction, en particulier lorsqu'ils ont une dimension verticale. Les facteurs de complication les plus importants des comportements d'éviction tiennent au fait que les concurrents, en plus des consommateurs, sont directement affectés ; que les effets potentiels varient en fonction de la stratégie d'exclusion spécifique adoptée (comme les stratégies de ventes liées ou regroupées, les remises conditionnelles, ou les stratégies de refus de fourniture) ; que les gains d'efficacité spécifiques aux comportements sont fréquents ; que la structure du marché est affectée par les pratiques d'exclusion ; et que les effets varient selon les différentes étapes du comportement (et/ou selon différents groupes de clients) et peuvent ne pas se limiter au marché ou à la région où les effets prix se font sentir.
- Les avantages et les inconvénients des méthodes empiriques varient en fonction des hypothèses sur lesquelles elles reposent et des exigences en matière de données. De simples programmes « automatisés » ne sont donc pas applicables. Les méthodes les plus communément utilisées que sont l'approche de la variable indicateur et l'approche prévisionnelle nécessitent souvent des ensembles de données assez vastes, mais fonctionnent avec quelques hypothèses structurelles seulement.
- L'équilibre entre la facilité de mise en œuvre de la méthode et la possibilité de transposer les résultats à d'autres cas est fondamental pour décider de la méthode appropriée devant un tribunal. Pour améliorer l'efficacité des rapports économétriques utilisés dans les poursuites judiciaires, il est nécessaire de bien définir les étapes de la procédure, les normes juridiques et les règles en matière de communication d'informations.

## **2. Effets économiques du comportement anticoncurrentiel**

Le comportement anticoncurrentiel peut prendre de nombreuses formes. D'une manière générale, il se divise en deux composantes principales : les comportements horizontaux ou verticaux et les comportements d'exploitation ou d'éviction. Les comportements horizontaux comprennent les accords anticoncurrentiels ou les comportements unilatéraux entre concurrents directs (c'est-à-dire horizontaux) comme dans le cas des ententes ou des stratégies de verrouillage visant les concurrents directs (telles que les stratégies d'éviction). Les comportements verticaux recherchent les opportunités stratégiques existant dans une formation amont/aval dans laquelle les mauvais comportements en amont peuvent réduire la pression concurrentielle en aval, et inversement.

Les pratiques d'exploitation concernent les cas où les comportements anticoncurrentiels se polarisent sur les profits supranormaux tirés des clients ou des groupes de clients, comme en cas d'entente, de discrimination ou de violation de la loi, alors que les comportements d'éviction concernent pour l'essentiel le verrouillage ou la marginalisation d'un concurrent (ce qui peut par la suite permettre une hausse des bénéfices après un verrouillage réussi). Les stratégies de prédation consistent par exemple en des comportements d'éviction où, une fois que la proie est exclue du marché, le prédateur peut réaliser des profits supranormaux. Les stratégies de ventes liées ou regroupées peuvent être utilisées de manière abusive dans le but d'évincer les concurrents (mais elles peuvent aussi constituer une pratique d'exploitation pour soutirer des profits supranormaux à des groupes particuliers de clients par le jeu de la discrimination par les prix).

L'abondance des comportements sous-jacents, ajoutée au fait que plusieurs types de comportements se développent souvent en parallèle ou ont des effets multiples, rend l'enquête relativement compliquée si l'on veut mesurer les effets empiriques d'un comportement particulier. Cette complexité rend impossible toute méthode d'estimation « automatisée » simple, et exige au contraire un examen attentif des paramètres économiques du secteur d'activités (tels que le type de produit, le nombre d'entreprises, les facteurs de coût et de demande et les formes de rivalité), de la théorie des effets nuisibles et de l'accessibilité des données. C'est l'analyse cumulée de ces trois éléments qui déterminera le meilleur ensemble de moyens empiriques à même de mesurer les effets d'un comportement anticoncurrentiel.

Dans la partie suivante, nous décrivons les atteintes potentielles à la concurrence et les éventuels préjudices qui en découlent et explique comment les mesurer d'un point de vue théorique. Nous nous intéresserons tout d'abord à l'entente, qui constitue un exemple d'accord horizontal anticoncurrentiel. Les effets théoriques peuvent être ici assez sûrement définis. Nous examinerons ensuite les pratiques d'exploitation/verticales, dans le cadre desquelles, même d'un point de vue théorique, les effets d'un comportement anticoncurrentiel sur les différentes parties prenantes sont souvent ambigus.

## **2.1 Les ententes**

### **2.1.1 Le concept économique de collusion**

D'un point de vue économique, la collusion se définit comme la situation dans laquelle un ensemble de concurrents communiquent entre eux de manière directe ou indirecte pour augmenter ou chercher à augmenter les prix sur un ou plusieurs marchés antitrust particuliers, à un niveau supérieur à celui qu'ils auraient atteint sans communiquer. Il convient de souligner que la définition économique du comportement collusif comprend la collusion expresse (basée sur la communication directe et souvent connue sous le nom d'entente) et la collusion implicite (ou tacite). Les conséquences juridiques sont très différentes selon qu'un comportement particulier relève de l'une ou l'autre catégorie. L'analyse économique sous-jacente n'est pas très différente – en partie en raison des insuffisances de la théorie économique, et au motif que les deux infractions produisent des effets similaires.<sup>1</sup>

La formation d'une entente est motivée par le fait que les acteurs du marché peuvent augmenter leurs profits collectifs et donc individuels, par rapport aux profits réalisés sur un marché concurrentiel. La

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<sup>1</sup> En fait, les économistes ont tendance à considérer que la collusion est liée à un résultat (des prix plus élevés) plus qu'à un comportement particulier, comme la communication expresse des prix ou des parts de marché. À titre d'exemple, Motta (2004, p. 138) définit la collusion comme suit : « En économie, la collusion est la situation dans laquelle les prix des entreprises sont plus élevés que certains indices de référence concurrentiels. Une définition légèrement différente consiste à définir la collusion comme la situation dans laquelle les entreprises fixent des prix qui se rapprochent des prix de monopole. Quoi qu'il en soit, en économie, la collusion correspond à un résultat (des prix suffisamment élevés) et non à la façon particulière dont celui-ci est atteint ». Voir aussi Harrington (2008, p. 216).

difficulté de gestion d'une entente tient à ce que, une fois que les prix ont augmenté, les participants à l'entente sont incités à baisser les prix à titre individuel et à augmenter encore plus leurs profits personnels au détriment des autres participants à l'entente.

De manière très marquante, la collusion expresse et tacite s'appuie sur le dynamisme de l'interaction entre les entreprises.<sup>2</sup> Les entreprises déterminent leur futur comportement sur le marché en fonction du comportement adopté par les concurrents. Par exemple, les entreprises peuvent menacer de mener une « concurrence acharnée » pendant une période future en réaction à l'infléchissement d'un concurrent par rapport au niveau des prix de collusion. Ce type d'interaction dynamique permet aux entreprises – lorsqu'elle est effectivement mise en œuvre – de maintenir les prix à des niveaux proches des prix de monopole et nettement supérieurs à ce qu'un comportement unilatéral seul permettrait.<sup>3</sup>

La stabilisation dynamique des prix peut être obtenue grâce à la communication directe – ce qui constitue une condition préalable obligatoire à l'infraction d'entente – ou grâce à la coordination, en observant et en suivant le comportement sur le marché des autres entreprises.<sup>4</sup> Cette dernière approche est appelée tacite coordination ou effets coordonnés, et est prise en compte pour établir l'existence d'une position dominante ou dans le cadre des procédures de fusion, sans pour autant être considérée comme une entente.

Les ententes peuvent être démantelées, ou ne pas voir le jour, pour de multiples raisons. Par-dessus tout, les ententes doivent éviter toute déstabilisation interne et externe. La déstabilisation interne concerne le cas où l'un des membres de l'entente s'écarte de l'accord de prix, et il peut y avoir déstabilisation externe lorsqu'un non-membre de l'entente (une entreprise étrangère ou une entreprise opérant sur un marché de produits voisin) est en concurrence avec les membres de l'entente ou lorsqu'il entre sur le marché concerné. Une entente peut également se trouver déstabilisée de l'extérieur par le pouvoir d'achat des clients.<sup>5</sup> Enfin, les mesures incitant les entreprises à participer à une entente relèvent du droit de la concurrence et de son application attendue.

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<sup>2</sup> Ivaldi et al. (2006). De la même manière, l'interaction (répétée) sur les marchés ou dans les produits pourraient entraîner des effets de collusion. Voir Bernheim et Whinston (1990) pour une étude des jeux de contacts multi-marchés et Milgrom et Roberts (1982) pour leurs travaux précurseurs sur l'effet dissuasif à l'entrée sur les marchés qui a des interactions sur les marchés locaux.

<sup>3</sup> Un simple critère de distinction entre les hausses de prix résultant d'un comportement unilatéral et les hausses de prix résultant d'un comportement collusif consiste à vérifier si oui ou non une entreprise seule a intérêt à baisser les prix au regard des prix de ses concurrents. Dans l'affirmative, il s'agit d'un cas de comportement collusif. Il est toutefois impossible de différencier la collusion expresse (c'est-à-dire l'entente) de la collusion implicite ou tacite sur la seule base des effets économiques. Pour une vue d'ensemble des aspects économiques de la collusion, voir Motta (2004), Ivaldi *et al.* (2006) ou Davis et Garcés (2010).

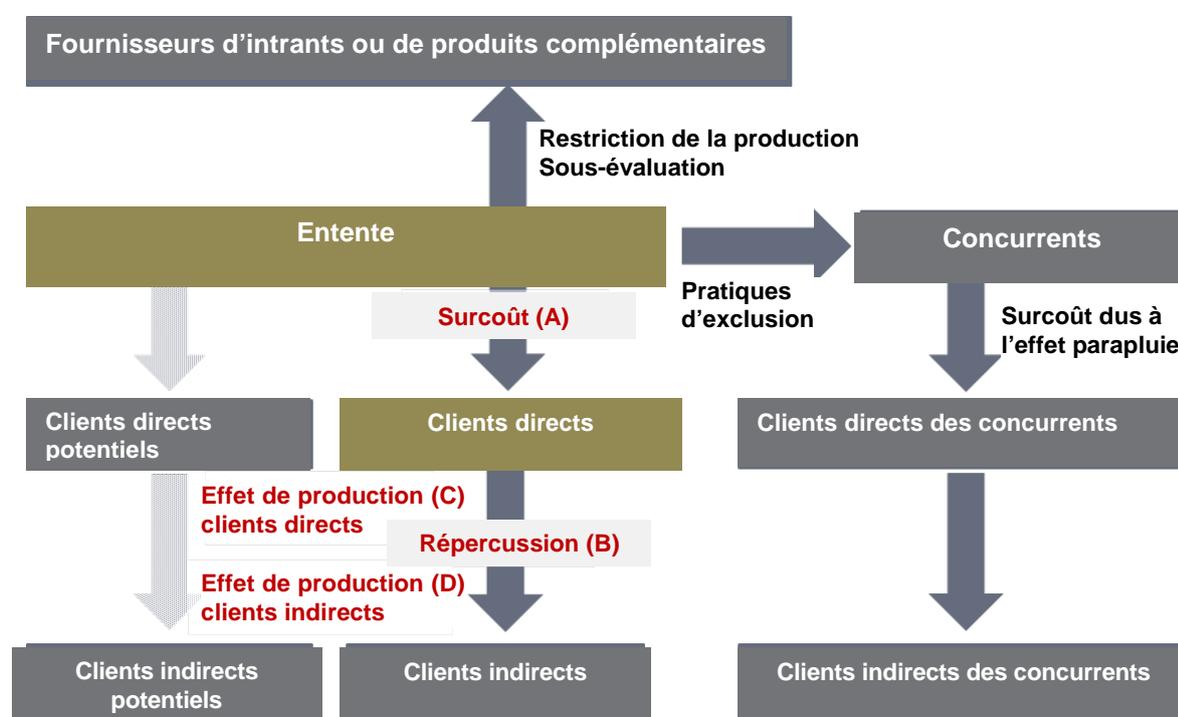
<sup>4</sup> La distinction entre la communication directe des parts de marché ou des prix, qui suffit à établir l'existence d'une entente, et la communication indirecte (par le biais du marché) est assez subtile. Motta (2004, p. 189) par exemple, estime que la communication entre entreprises qui repose sur un comportement unilatéral des entreprises ne suffit pas à constituer une infraction caractérisée. Kühn (2001) propose un examen détaillé des différentes formes de collusion et de leur classification du point de vue de la politique de la concurrence. Voir aussi Davis et Garcés (2010, p. 315).

<sup>5</sup> Harrington et Chen (2006).

### 2.1.2 Les effets potentiels des comportements collusifs

Du point de vue d'un client direct, les principaux effets sont au nombre de trois : d'abord, les prix plus élevés sur les ventes nettes (ce que l'on appelle surcoût ou, en termes juridiques, perte réelle ou *damnum emergens*; marqué « A » dans la Figure 1) ; ensuite, un effet adverse de répercussion qui correspond à la fraction du surcoût qui est répercutée grâce à une hausse des prix pour les clients indirects (marqué « B » dans la Figure 1) ; et enfin l'effet de production, qui représente la marge bénéficiaire que l'acheteur direct aurait tirée des ventes supplémentaires réalisées au prix fictif (marqué « C » dans la Figure 1 et appelé manque à gagner ou *lucrum cessans* en termes juridiques). Ce dernier effet peut affecter à la fois les clients réels, qui ont acheté des produits pendant la durée de l'infraction mais moins toutefois que s'ils les avaient achetés à un moindre prix, et les clients potentiels qui n'ont rien acheté au prix de collusion mais qui auraient acheté des produits au prix compétitif.

Figure 1: Préjudices possibles causés par une entente



Source : Travaux de Friederiszick et Röller (2010)

Comme l'illustre la Figure 1, un accord de collusion peut toucher plusieurs autres parties, en plus des clients directs. Premièrement, certains clients indirects souffrent de l'effet de répercussion (B). Les clients indirects renoncent également au bénéfice d'une surconsommation au prix de collusion, sous la forme de la perte d'utilité du consommateur (marquée « D » dans la Figure 1).

Deuxièmement, un effet équivalent se produit pour les fournisseurs en amont.<sup>6</sup> En exerçant son pouvoir d'achat, une entente peut faire baisser le prix des facteurs de production en amont. En fonction des

<sup>6</sup> Les fournisseurs de produits complémentaires peuvent dans certains cas être considérés comme des fournisseurs d'intrants (raison pour laquelle ils sont décrits conjointement dans la Figure 1). Des différences peuvent pourtant exister. Par exemple, les fournisseurs de produits complémentaires qui ont un accès direct aux consommateurs finals pourraient être moins touchés par la collusion sur les marchés

conditions particulières du marché, l'entente peut faire appliquer la réduction du prix des facteurs de production grâce à une contraction de la production, qui touche à la fois les fournisseurs actuels et potentiels.<sup>7</sup> Par ailleurs, les fournisseurs en amont peuvent (en partie) répercuter les conditions de vente rendues difficiles à leurs propres fournisseurs en amont.<sup>8</sup>

Enfin, les pratiques d'exclusion peuvent affecter les concurrents (potentiels) étrangers à l'entente ainsi que leurs clients (potentiels). Les concurrents opérant sur le même marché pertinent qui ne participent pas à l'entente, ou les concurrents potentiels sur les marchés de produits ou les marchés régionaux connexes voisins, pourraient subir les effets des pratiques d'exclusion. L'inverse peut aussi se produire : les concurrents étrangers à l'entente pourraient tirer profit d'une concurrence plus douce, bénéficiant ainsi de prix plus élevés grâce à l'entente (ce que l'on appelle l'effet parapluie).

### 2.1.3 La relation entre les atteintes à la concurrence et les préjudices personnels

Les effets néfastes d'un accord de collusion affectent différemment les parties. La Figure 2 donne l'exemple d'une entente en amont et indique comment sont répartis les effets néfastes entre les acheteurs directs et les acheteurs indirects. Imaginons un marché (partiellement) concurrentiel sur lequel des entreprises en amont vendent aux détaillants des produits au prix de gros ( $W_{comp}$ ). Pour les détaillants, le prix de gros constitue le coût des intrants. Ils transforment ensuite le produit et le revendent aux consommateurs finals. Par souci de simplicité, supposons que le détaillant ne supporte pas d'autres coûts que le prix de gros. Dans l'hypothèse de concurrence, les détaillants peuvent vendre le produit au prix de détail ( $r_{comp}$ ), qui comprend une marge bénéficiaire normale ( $r_{comp} - W_{comp}$ ).

Dans un deuxième scénario, les entreprises en amont conviennent d'augmenter le prix de leurs produits ( $w_{cartel}$ ) de manière à maximiser les bénéfices. Le rectangle A représente la hausse des prix portée au crédit de l'entente en amont. Par conséquent, les coûts du détaillant augmentent, et celui-ci voudra à son tour augmenter les prix pour limiter les pertes dues à la hausse des prix (effet de répercussion). Le rectangle B montre la part du surcoût répercutée à l'acheteur indirect (c'est-à-dire le consommateur final dans notre exemple).

La faculté pour les détaillants de répercuter ou non une part importante du prix dépend de plusieurs facteurs. Les plus importants sont le degré de concurrence dans le secteur d'activités en aval, que toutes les entreprises en aval soient ou non également frappées par la hausse des prix due à la constitution d'ententes, et l'élasticité de la demande du consommateur final. La répercussion d'un secteur plus compétitif – dans un cadre normatif – sera plus grande que celle d'un secteur non compétitif. Dans un secteur parfaitement concurrentiel, le prix du marché est égal au coût marginal ; aussi, toute modification du coût marginal sera répercutée à 1:1. Une entente, cependant, ne répercutera qu'une fraction de la hausse des prix et

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voisins (ou pourraient même en tirer des profits) lorsque les clients ne consomment pas de produits complémentaires dans une proportion fixe.

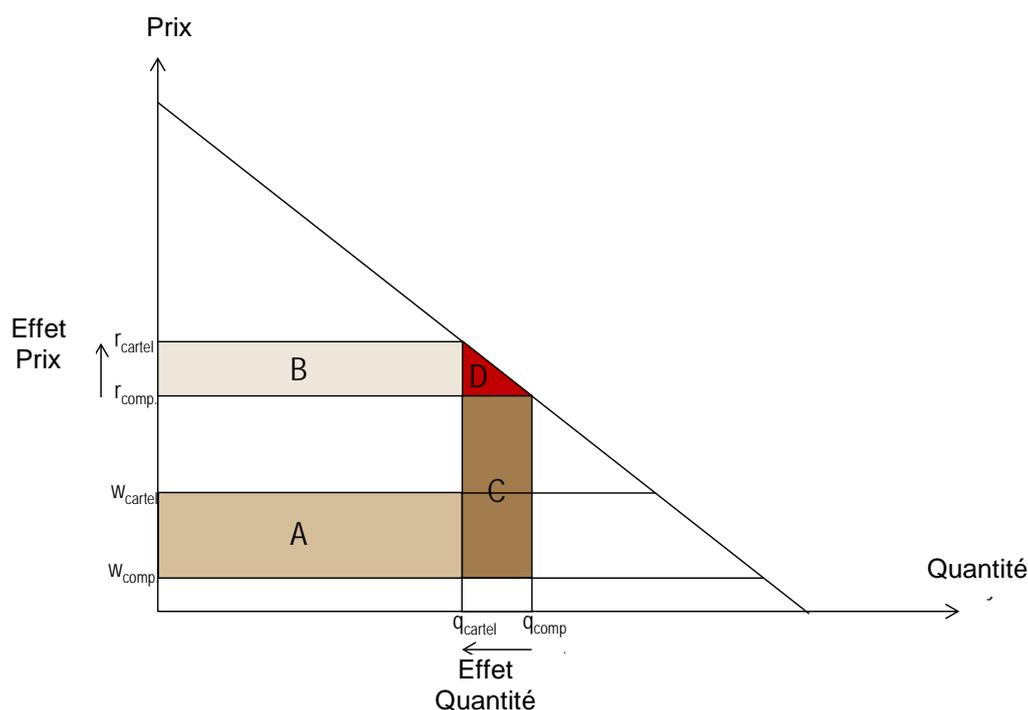
<sup>7</sup> Le pouvoir de l'acheteur peut s'exercer de différentes manières. Sur les marchés institutionnalisés et liquides, comme une bourse de commerce, l'entente peut faire baisser les prix par simple contraction de la production : une réduction de la demande globale entraîne un excédent de production qui rend nécessaires des réductions de prix pour équilibrer le marché. En revanche, dans une situation de négociation bilatérale, une réduction générale de la production n'est pas nécessaire pour faire baisser les prix. Dans ce cas, le fournisseur et l'acheteur négocient les prix séparément. Le pouvoir de négociation accru de l'entente provient d'une réduction (ou d'une alternative moins avantageuse) accordée aux fournisseurs lorsque les négociations avec l'entente n'aboutissent pas, voir Blair et Harrison (1993), Dobson *et al.* (1998), Inderst et Mazzarotto (2008) et l'OCDE (2008).

<sup>8</sup> Pour un examen détaillé de la façon dont les préjudices causés par les ententes se propagent tout le long de la chaîne d'approvisionnement, voir Han, Schinkel, et Tuinstra (2008).

l'absorbera en partie. Cet effet de répercussion s'infléchit toutefois en cas de concurrence extérieure, c'est-à-dire si certains détaillants (par exemple des importateurs étrangers) ne sont pas affectés par la brusque augmentation des coûts. Dans ce cadre, la concurrence extérieure – dans un secteur parfaitement concurrentiel – ne permettra pas la répercussion du surcoût sur les consommateurs finals. Enfin, lorsque les consommateurs sont plus sensibles aux prix, la répercussion est moindre, toutes choses étant par ailleurs égales.

L'augmentation des prix pour le consommateur final entraîne une réduction de la demande (effet quantité).<sup>9</sup> L'effet quantité découle de la présomption selon laquelle tous les clients n'accordent pas la même valeur au produit. Les clients qui accordent au produit une valeur plus élevée que celle exprimée dans le prix compétitif mais inférieure à celle qui ressort du prix de collusion s'abstiendront de l'acheter si le prix du produit atteint le niveau du prix de collusion. Cet effet de production est autant préjudiciable aux détaillants qu'aux consommateurs finals. Les détaillants perdent les bénéfices supplémentaires qu'ils auraient tirés de la vente d'une quantité supplémentaire. Le rectangle C illustre l'effet de production ressenti par l'acheteur direct (perte de ventes), c'est-à-dire les bénéfices supplémentaires qu'il aurait réalisés s'il avait pu acheter le facteur de production au niveau du prix de gros compétitif ( $w_{comp}$ ). Le triangle D symbolise l'effet de production du consommateur final (perte d'utilité). Il représente le bien-être supplémentaire du consommateur final obtenu en l'absence d'accord de collusion en amont et sans répercussion ultérieure au consommateur final. Il illustre la valeur de l'utilité supplémentaire qu'il aurait obtenu au niveau de consommation supérieur.

**Figure 2: Préjudices en cas de double niveau d'acheteurs en aval**



Source : Travaux de van Dijk et Verboven (2010)

<sup>9</sup>

Il convient de noter que nous n'opérons aucune distinction entre la quantité à laquelle les détaillants réels ou potentiels ont renoncé et la quantité à laquelle le consommateur final a renoncé. Du point de vue économique, les effets sont les mêmes pour les deux groupes. Une différence pourrait résider dans la charge de la preuve, dans la mesure où il est souvent plus facile d'établir qu'on a acheté une plus grande quantité à un moindre prix que d'établir qu'on a lancé un nouvelle chaîne d'approvisionnement à moindre prix.

Le Tableau 1 nous permet de calculer les effets néfastes pour les deux groupes d'acheteurs (directs et indirects) et indique le total des atteintes à la concurrence du point de vue du bien-être des consommateurs (total des atteintes au consommateur) et du bien-être total (total des atteintes au bien-être). Nous examinerons brièvement les différents sous-groupes en mettant l'accent sur les différents objectifs d'une évaluation menée par une autorité de la concurrence ou un tribunal.

**Tableau 1: Effets néfastes d'une entente sur différentes parties**

|                                        | Surcoût | Répercussion | Perte de ventes | Perte d'utilité |
|----------------------------------------|---------|--------------|-----------------|-----------------|
| Acheteur direct                        | A       | -B           | C               |                 |
| Acheteur indirect / consommateur final |         | B            |                 | D               |
| Total des atteintes au consommateur    | A       |              | C               | D               |
| Total des atteintes au bien-être       |         |              | C               | D               |

Source : Travaux de van Dijk et Verboven (2010)

Dans une action privée en dommages et intérêts intentée par un particulier, priorité est généralement donnée au préjudice subi par l'acheteur direct. Son préjudice est la somme du surcoût A moins l'effet de répercussion B plus l'effet de production C (perte de ventes). À l'inverse, le préjudice de l'acheteur indirect (dans notre exemple le consommateur final) est la somme de l'effet de répercussion B plus l'effet de production D (perte d'utilité).

Du point de vue de la politique de la concurrence, ni le total des atteintes au consommateur ni le total des atteintes au bien-être ne sont déterminants (selon les normes de bien-être appliquées – dans la plupart des systèmes juridiques, il s'agit de normes en matière de bien-être des consommateurs). Le total des atteintes au consommateur est la somme de l'effet du surcoût A et de deux éléments de l'effet de production C (perte de ventes de l'acheteur direct) et D (perte d'utilité du consommateur final).

Une telle évaluation estompe l'effet de répercussion, mettant en évidence que l'objectif de l'évaluation des effets dans une procédure administrative n'est pas le même que dans une action en dommages et intérêts (à savoir qu'il n'y a pas d'évaluation de l'effet de répercussion). L'effet de répercussion souligne en outre les similitudes des deux différents axes d'une évaluation menée dans le cadre d'une norme relative au bien-être des consommateurs, à savoir l'effet du surcoût A et les effets de production.

Chose intéressante, dans le cadre d'une norme de bien-être total, seuls les effets de production devraient rester le point central de l'évaluation d'une autorité de la concurrence.

## 2.2 *Les comportements d'éviction*

### 2.2.1 *Le concept économique de pratique d'éviction*

Le comportement d'éviction peut prendre diverses formes, allant des pratiques liées aux prix, comme le prix d'éviction, les remises conditionnelles et les stratégies de ciseau tarifaire, aux pratiques non liées aux prix, comme les ventes liées, le refus de vente ou la vente exclusive. Les pratiques d'exclusion peuvent viser les concurrents horizontaux directs (comme dans le cadre des stratégies d'éviction ou des remises conditionnelles) ou concerner plus particulièrement les entreprises opérant en aval ou en amont. Les deux

pratiques verticales les plus communes sont le verrouillage de la clientèle et le verrouillage du marché des intrants.

Les stratégies d'exclusion ont toutes pour but d'affaiblir les entreprises rivales. Généralement, une entreprise renonce à ses bénéfices à court terme pour forcer ses concurrents à sortir du marché ou pour limiter leur pouvoir compétitif (c'est-à-dire pour les marginaliser). En raison des barrières appliquées à l'entrée ou à la ré-entrée, le concurrent évincé peut ne pas ré-entrer, permettant ainsi à l'entreprise en place de couvrir ses pertes à long terme.

Prenons un exemple de stratégie d'éviction. Dans la forme agressive de l'éviction, le prédateur réduit son prix en deçà du coût évitable moyen. Dans sa variante moins agressive, l'entreprise en place réduit les prix en deçà du coût total moyen mais les maintient au-dessus des coûts variables moyens. Dans un secteur de production homogène, cela oblige les concurrents à suivre les variations de prix. En fonction des particularités du secteur d'activités, la proie peut être davantage tributaire de finances extérieures (limitées), l'obligeant à quitter le marché ou à accepter de n'être présent que sur une niche de marché. Les stratégies de prédation peuvent également permettre à l'entreprise en place de faire barrage à l'entrée sur des marchés voisins en faisant courir le bruit d'un effet dissuasif à l'entrée. Les stratégies d'éviction profitent particulièrement aux entreprises en place si les politiques de bas prix peuvent cibler des régions ou des segments de clientèle spécifiques, limitant de cette façon tout impact préjudiciable sur les bénéfices de l'entreprise en place.

Un aspect complexe de ce type de comportement tient à ce qu'il se manifeste souvent en même temps que des gains d'efficacité (ou se cachent derrière). Les stratégies de bas prix sont courantes en matière de promotion de nouveaux produits, en particulier dans les secteurs d'activités connaissant de puissants effets de réseau ; les stratégies de ventes liées ou regroupées sont souvent mises en œuvre en réponse aux préférences des consommateurs pour un environnement du produit unifié.

### 2.2.2 *Les effets potentiels des comportements d'éviction*

La détermination des effets néfastes d'un comportement d'éviction est – par rapport aux pratiques d'exploitation examinées précédemment – compliquée par quatre différences principales :

Premièrement, le groupe des parties affectées, les effets potentiels, et leurs répercussions sur le bien-être sont beaucoup plus diversifiés et diffèrent selon les cas : les concurrents sont, en plus des consommateurs, directement affectés ; les effets potentiels varient en fonction de la stratégie d'exclusion choisie ; et des effets positifs sur le bien-être, c'est-à-dire des gains d'efficacité, sont possibles. Globalement, cela donne lieu à une approche empirique d'évaluation des préjudices davantage basée sur le cas par cas.<sup>10</sup>

Deuxièmement, la structure du marché, dont on considère souvent dans une entente qu'elle n'est pas affectée par le comportement, est par définition affectée par les pratiques d'exclusion. Elle constitue pour la méthode empirique un défi supplémentaire à relever.

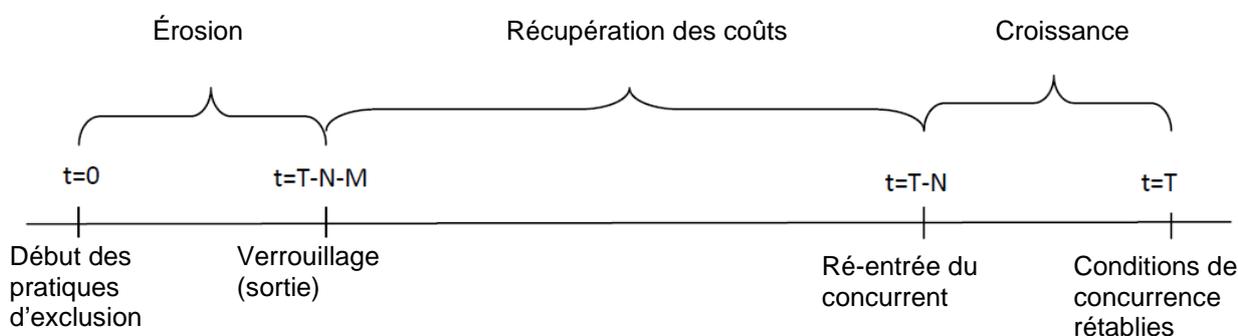
Troisièmement, les effets sur les clients peuvent varier au cours des différentes étapes du comportement (et/ou au sein des différents groupes de clients). Par exemple, dans le cas de l'éviction, les prix sont tout d'abord bas puis augmentent pendant la phase de récupération des coûts.

<sup>10</sup> Voir, par exemple, les lignes directrices de la CE et le document de réflexion sur l'article 82 (CE 2005 et 2009).

Quatrièmement, les effets des comportements anticoncurrentiels peuvent ne pas se limiter au marché ou à la région où les effets sur les prix se font sentir. Les stratégies d'exclusion peuvent être utilisées pour tenter de décourager l'entrée sur les marchés voisins ou elles peuvent être mises en œuvre par une entreprise en place pour répandre le bruit d'une réaction agressive à l'entrée. Par exemple, une stratégie d'éviction sur un marché local de transport par autobus peut empêcher l'entrée sur ce sous-marché particulier mais elle pourrait aussi empêcher l'entrée sur le marché national.

La Figure 3 décrit les phases habituelles du comportement d'éviction. Dans un premier temps, l'entreprise dotée d'une puissance commerciale met en œuvre sa stratégie d'exclusion, en obligeant un concurrent à quitter le marché ou en empêchant l'entrée d'un concurrent potentiel. Dans la phase de récupération des coûts, les prix augmentent, ce qui permet à l'entreprise en place de recouvrer les pertes éventuellement subies pendant la phase d'érosion. Enfin – et potentiellement en réponse à l'intervention de l'autorité de la concurrence – une ré-entrée sur le marché est possible, laquelle implique souvent des coûts d'entrée et une phase de reprise progressive.

**Figure 3: Phases du comportement d'éviction**



Source : Fumagalli/ Padilla/ Polo 2010

Le Tableau 2 résume les principaux effets théoriques au cours des différentes phases, pour le concurrent exclu ou marginalisé et pour le consommateur final. Si la stratégie d'exclusion est appliquée dans un secteur en amont, les effets de répercussion peuvent être significatifs, comme nous l'avons examiné précédemment pour les pratiques d'exploitation.

S'il est vrai que l'hypothèse d'une augmentation des prix pendant la phase de récupération des coûts peut être tenue pour sûre (après verrouillage et par rapport à un prix compétitif), les effets pendant la phase d'érosion – et à terme également pendant la phase de croissance – dépendent fortement des caractéristiques du secteur et de la stratégie anticoncurrentielle adoptée.

Dans les cas de prix d'éviction, par exemple, les prix seront fixés en deçà des coûts du prédateur et de son concurrent (et dans sa forme la plus radicale, en deçà du coût évitable moyen d'un concurrent aussi efficace) jusqu'à ce que le concurrent quitte le marché. L'application de ces stratégies se traduira souvent par des gains de bien-être social à court terme pour tous les clients affectés au cours de cette période. Les effets secondaires positifs d'une stratégie d'éviction peuvent cependant ne concerner que quelques clients ou être atténués par l'impact préjudiciable des marchés voisins. Par exemple, dans les industries soumises à d'importants coûts de transport, les stratégies de verrouillage peuvent se limiter à une région spécifique. Les effets positifs pourraient aussi être limités du fait de certains effets liés au principe de vases communicants, c'est-à-dire que des stratégies d'éviction visant des entreprises étrangères peuvent faire l'objet d'un financement croisé par le biais de la collusion sur le marché national.

De plus, certaines stratégies peuvent avoir peu ou pas d'effets positifs sur les prix. Des effets de ciseaux tarifaires peuvent naître par exemple d'une augmentation anticoncurrentielle du prix de gros (et non, comme dans une stratégie d'éviction, d'une réduction anticoncurrentielle du prix au consommateur final), rendant ainsi impossible en pratique de dégager une marge normale au détail sans baisser les prix au consommateur final. De la même manière, les systèmes de remises conditionnelles peuvent effectivement maintenir les petits concurrents hors du marché grâce à ce que l'on appelle l'effet d'aspiration, sans réduire considérablement le prix moyen du marché. Dès lors, l'effet des stratégies d'exclusion pendant la phase d'érosion sur le bien-être des consommateurs est incertain.

Le tableau suivant offre une synthèse des effets éventuels des comportements d'éviction (en tenant pour acquis la fermeture effective du marché aux concurrents potentiels).

**Tableau 2: Les effets néfastes d'un comportement d'éviction effectif**

|                                            | <b>Érosion</b>                                                                                    | <b>Récupération des coûts</b>                                                   | <b>Croissance</b>                                            | <b>Effet global</b>                                     |
|--------------------------------------------|---------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------|--------------------------------------------------------------|---------------------------------------------------------|
| <b>Concurrent exclu</b>                    | Bénéfices d'exploitation limités et/ou pertes réelles ; coûts inhérents à la cessation d'activité | Bénéfices d'exploitation réduits                                                | Bénéfices limités et coûts d'entrée sur le marché            | Lésé                                                    |
| <b>Consommateur final</b>                  | Gains potentiels incertains en raison des réductions de prix                                      | Pertes dues à une hausse des prix (effets de production et effets sur les prix) | Gains ou pertes en fonction de la stratégie d'entrée adoptée | Lésé (en l'absence de gains d'efficacité significatifs) |
| <b>Total des atteintes au consommateur</b> | Négatif                                                                                           | Positif (en l'absence de gains d'efficacité significatifs)                      | Dépend de la stratégie d'entrée et des gains d'efficacité    | Lésé (en l'absence de gains d'efficacité significatifs) |
| <b>Total des atteintes au bien-être</b>    | Incertain                                                                                         | Positif (en l'absence de gains d'efficacité significatifs)                      | Incertain                                                    | Lésé (en l'absence de gains d'efficacité significatifs) |

### 3. Méthodes empiriques de quantification

La quantification des atteintes à la concurrence constitue généralement un exercice rétrospectif, qui utilise des techniques économétriques pointues.

Comme nous l'avons indiqué dans les sections consacrées à la théorie, il convient d'évaluer les principaux effets suivants : 1) le prix concurrentiel de référence pendant la période d'infraction (et éventuellement quelques effets cumulatifs après la fin de l'infraction) de manière à évaluer le surcoût ; 2) le degré de répercussion des coûts ; 3) la réaction de la demande aux modifications de prix pour mesurer l'effet quantité (élasticité prix de la demande du secteur).

Dans les cas d'effets d'exclusion – en particulier lorsqu'ils ont une dimension verticale – outre les effets mentionnés ci-dessus, il peut s'avérer nécessaire de mesurer/insister davantage sur : 1) les variations de prix au cours des différentes phases de l'infraction, dans la mesure où l'infraction affecte différemment la situation du marché au fil du temps (par exemple, les prix d'éviction ont pour effet de baisser les prix en-deçà des prix compétitifs pendant la phase d'érosion et de les élever à un niveau supérieur pendant la phase de récupération des coûts. Il n'est pas satisfaisant d'appliquer un modèle qui mesure un effet prix moyen sur les deux périodes, ce qui revient à faire la moyenne des deux effets. De plus, le nombre de concurrents affectés variera fortement au cours des différentes phases, rendant nécessaire d'adopter des mesures tarifaires rigoureuses dans la durée) ; 2) les pertes de ventes d'un concurrent affecté (élasticité prix entre

entreprises) ; 3) les mesures relatives aux bénéfices directs, l'évaluation des coûts (à la fois pour mesurer les coûts de sortie et de ré-entrée et les gains d'efficience).

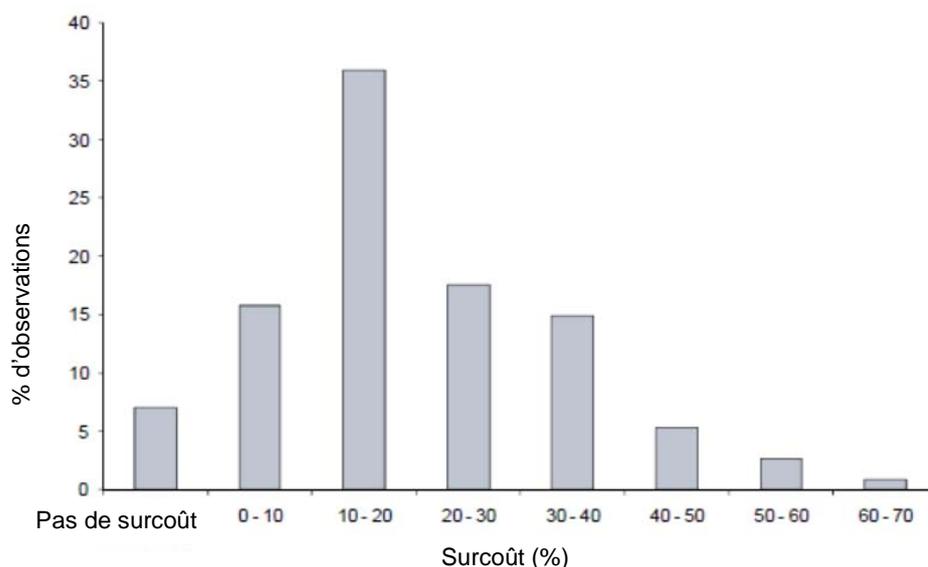
Une fois calculés, les effets liés à chaque période doivent être déduits pour obtenir une valeur numéraire des préjudices subis sur une longue période. La prise en compte ou non des taux d'intérêt (quelle que soit la période concernée) dépend fortement du cadre juridique et de l'objectif de la quantification. Certains États (comme les États-Unis) ne tiennent pas compte des taux d'intérêt (ou alors uniquement à partir du moment où une action en justice est intentée et non à compter de l'infraction) ; certains autres appliquent des taux d'intérêt simples, d'autres encore des taux d'intérêt composés. Certains disposent d'outils simplifiés pour calculer le facteur d'escompte approprié, par exemple le taux d'intérêt interbancaire EURIBOR et quelques majorations fixes. Du point de vue de la rentabilité et de la compensation, un taux d'intérêt composé, basé sur le coût d'opportunité du capital de la victime et appliqué aux préjudices subis pendant la période de survenance, semble être le plus approprié.

Il existe de nombreuses approches empiriques pour quantifier les dommages et intérêts dus à une entente.<sup>11</sup> Nous examinerons ci-dessous différentes méthodes, en mettant l'accent sur les effets d'une entente sur les prix.

### 3.1 *Présomptions simples*

Certaines présomptions simples relatives aux effets-prix moyens d'une infraction particulière sur le chiffre des recettes des parties affectées peuvent servir de base au calcul des atteintes à la concurrence. Par exemple, dans le cas des ententes, l'accroissement du nombre d'estimations de surcoût permet de calculer un surcoût moyen. La Figure 4 fait apparaître le surcoût moyen (par rapport au prix compétitif) tel qu'il a été calculé par Connor et Lande en 2008, et réévalué par Oxera et Komninos en 2009, sur la base de 114 estimations de surcoût individuelles.

**Figure 4 : Historique de l'estimation des surcoûts**



Source : Travaux de Connor et Lande (2008), tel que mentionnés dans Oxera et Komninos (2009)

<sup>11</sup> Une vue d'ensemble des différentes méthodes peut être consultée dans les travaux de Ashurst (2004), van Dijk et Verboven (2007) et plus récemment dans les articles de Oxera et Komninos (2009) et Davis *et al.* (2010, pp. 351 ss). Voir aussi Baker et Rubinfeld (1999) pour un examen du contexte juridique américain.

Il ressort de la Figure 4 que pour la plupart des ententes (constatées), un surcoût de 10 % à 20 % a été calculé et que les ententes ayant entraîné un surcoût de 40 % ou plus représentent moins de 10 %. La segmentation entre les ententes internationales et nationales révèle que les surcoûts sont plus élevés pour les ententes internationales que pour les ententes nationales.

Ce genre d'estimations du surcoût moyen pourrait justifier l'existence de présomptions juridiques simples. En effet, les lignes directrices de la Commission européenne appliquent une présomption de 30 % aux ententes (conjuguée à diverses circonstances aggravantes et atténuantes ultérieures) et la loi hongroise une présomption de 10 %.

Cette approche comporte cependant de sérieuses insuffisances : la forte fluctuation des surcoûts donne à croire que d'importants facteurs liés aux industries, aux pays et aux ententes influencent le niveau des surcoûts, rendant imprécise toute approche fondée sur une moyenne. Il n'existe à ce jour aucune base de données adaptée permettant à un marché cible d'être comparé à des ententes équivalentes antérieures.

Les amendes négociées bilatéralement offrent une alternative intéressante à la présomption systématique des surcoûts. Sur certains marchés où les prix sont fixés selon des procédures d'offre normalisées et formelles, que l'on nomme en termes économiques des marchés d'enchères, les parties se mettent d'accord dans les documents d'adjudication (ou dans le contrat définitif en cas de succès) sur, par exemple, une présomption de surcoût de 15 % en cas de comportement avéré d'entente. Avec une telle approche, la présomption peut être spécifique à chaque situation et à chaque secteur. Une telle pratique demande pourtant de disposer de suffisamment de pouvoir d'achat ex ante (du fait qu'une entente effective pourrait résister à toute tentative d'instaurer des amendes contractuelles).

Par ailleurs, les présomptions simples sont utiles pour vérifier les résultats des estimations sur la base de méthodes plus complexes ou pour réaliser une première analyse des risques et des opportunités pour le compte du demandeur ou du défendeur.

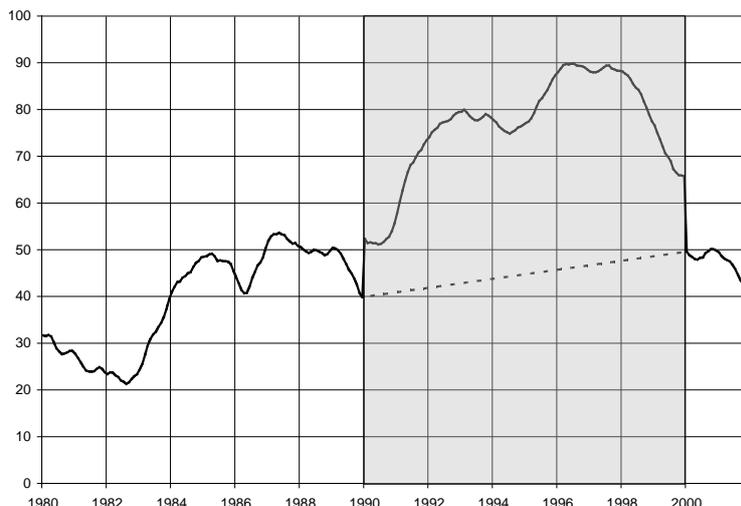
### **3.2. *Les approches avant, pendant et après***

Les approches avant, pendant et après comparent les prix appliqués pendant la période présumée de non-concurrence avec les prix appliqués avant et/ou après. Les approches avant, pendant et après peuvent consister en une simple comparaison des prix moyens entre les différentes périodes ou en tests économétriques plus élaborés, de manière à tenir compte de l'évolution des conditions prévalant sur les autres marchés.

La méthode linéaire part du principe qu'en l'absence de comportement anticoncurrentiel, les prix auraient augmenté ou baissé à un taux constant (Figure 5 : la zone en gris représente la période du comportement). Une ligne est tracée du prix applicable avant la période de non-concurrence au prix applicable après, de manière à évaluer le prix concurrentiel de référence. On considère que la différence entre le prix réel et le prix concurrentiel de référence estimé s'explique par l'effet-prix résultant du comportement anticoncurrentiel. Cette méthode exige de connaître les prix applicables avant et après l'apparition du comportement.

Malheureusement, on ne dispose pas souvent de données relatives aux prix antérieurs au comportement. Cela est particulièrement le cas en Europe, où de nombreux marchés n'ont été libéralisés que récemment. Une autre approche encore plus simpliste peut alors être appliquée, consistant à retenir que les prix ont été constants et que le prix applicable au cours de la période de non-concurrence est égal au prix applicable après le comportement.

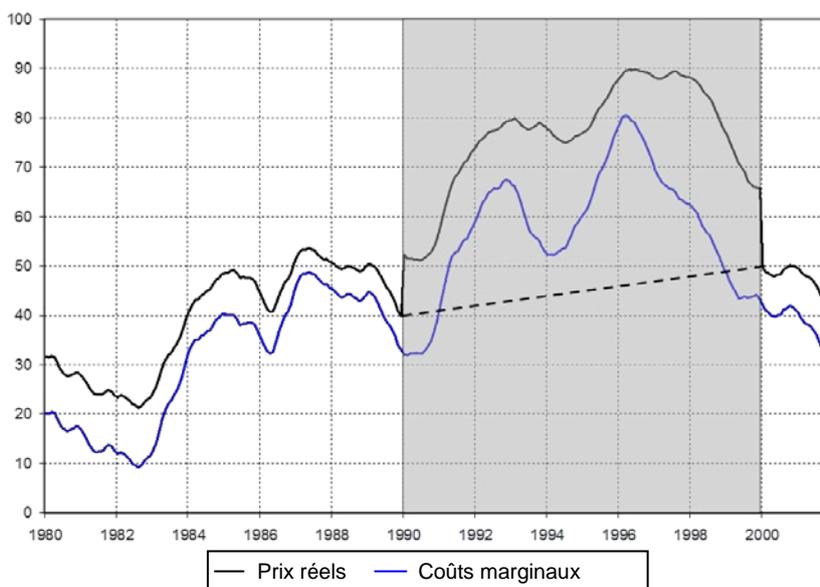
**Figure 5 : Approche linéaire**



Le grand défaut de ces approches simples est qu’elles ne tiennent pas compte des modifications de prix dues à d’autres facteurs extérieurs (par exemple la hausse de la demande ou des coûts, ou les changements structurels de l’environnement concurrentiel, comme une plus grande pénétration des importations). En conséquence, si par exemple les coûts ont augmenté de manière significative pendant la période de non-concurrence, entraînant par là même une hausse des prix, l’effet-prix de l’entente sera surestimé. De la même manière, l’effet de l’entente pourrait être sous-estimé si les coûts étaient plus élevés en dehors de la période d’entente.

La Figure 6 illustre une série temporelle hypothétique de coûts marginaux (ligne bleue) et une ligne de prix (ligne noire). Une approche linéaire simple aurait donné un prix fictif de 40 à 50 points d’indice. Par rapport au prix moyen de l’entente qui atteint près de 80 points d’indice, cela représenterait un surcoût considérable d’environ 60 % à 100 %. Or, la ligne des coûts marginaux met en évidence une augmentation marquée des coûts au cours de la période d’entente, qui aurait également fait grimper les prix pendant cette même période. Comme l’approche linéaire n’en tient pas compte, elle aboutit dans cet exemple à une surestimation extrême de l’effet-prix de l’infraction.

**Figure 6 : Méthode linéaire – surestimation de l’effet-prix**



Pour remédier à ce problème, les méthodes statistiques et économétriques tiennent compte des multiples changements de ces facteurs, et permettent ainsi de calculer une estimation du surcoût plus juste (c'est ce que l'on appelle l'analyse de régression multivariée). Une telle analyse exige un savoir-faire d'expert et ne peut généralement être menée que par des unités spécialisées au sein des autorités de la concurrence (comme l'équipe de l'économiste en chef de l'UE) ou par des experts extérieurs.

Bien que l'éventail des approches alternatives soit large (en fonction des spécificités de chaque cas et de la disponibilité des données), deux méthodes sont surtout employées : l'approche de la variable indicateur et l'approche prévisionnelle.

L'approche de la variable indicateur introduit une variable indicateur pour la période de non-concurrence. En fonction de la spécification du modèle, l'estimateur de l'indicateur rend compte de la hausse absolue ou relative des prix due au comportement anticoncurrentiel.<sup>12</sup> L'échantillon d'estimation comprend à la fois une période non affectée par l'entente et la période affectée, ce qui suppose dès lors que la relation entre les facteurs coût/demande et les prix soit la même pendant les périodes de comportements anticoncurrentiels et de concurrence effective. Ce modèle a principalement pour avantage d'être relativement simple d'application (et donc d'être plus facilement vérifiable) et d'être peu exigeant en matière de données. En particulier, dans les cas pour lesquels les données qui ne concernent pas la période d'infraction sont limitées, l'approche de la variable indicateur est préférable à l'approche prévisionnelle. L'introduction de différentes variables indicateurs pour chaque phase de l'infraction permet de calculer différents effets-prix pour les différentes périodes de l'infraction (comme cela est requis pour les comportements d'éviction).

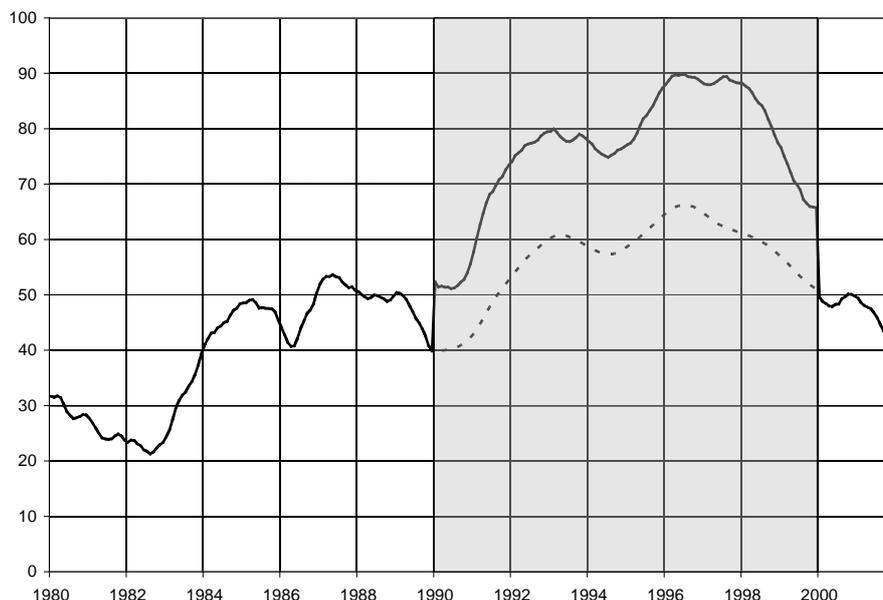
L'approche prévisionnelle utilise les estimations tirées de l'analyse de régression pour les seules périodes exemptes de tout comportement anticoncurrentiel. Les relations coût estimé-prix et demande-prix sont appliquées aux données relatives au coût et à la demande pendant la période d'infraction, ce qui permet d'établir une prévision du prix concurrentiel de référence pendant la période d'infraction. Cela a ainsi pour effet de faire varier les estimations du surcoût avec le temps (Figure 7).

Comparé au modèle d'indicateur, le modèle prévisionnel forme moins de conjectures sur les données – il suppose seulement que la relation entre les facteurs coût/demande et les prix *aurait été* la même pendant toute la période test s'il n'y avait pas eu d'entente mais n'exclut pas que la relation coût/demande/prix soit différente dans un environnement concurrentiel par rapport à un environnement de collusion. En conséquence, l'approche prévisionnelle est préférable au modèle d'indicateur dans un environnement où les données qui ne concernent pas la période d'infraction sont nombreuses et lorsque certains indices donnent à penser que l'infraction a affecté la relation coût/demande/prix.

L'approche de la variable-indicateur et l'approche prévisionnelle peuvent être appliquées, pour les deux modèles, dans ce qu'il est convenu d'appeler un cadre dynamique. Les modifications de prix de la période t-1 influencent ici les prix de la période t, ce qui permet une certaine forme de rigidité des prix. Cette approche dynamique, si elle peut être évaluée de manière sûre, pourrait permettre d'améliorer les prévisions. En effet, dans cette approche, les indicateurs sont sélectionnés « sur la base de leur capacité à améliorer l'exactitude de la prévision du modèle économétrique pendant la période de référence » (White *et al.* 2006), c'est-à-dire que le choix des variables retenues est déterminé avant tout par leurs qualités statistiques. Dans un environnement où les données sont de faible qualité, cela peut ne pas s'avérer matériellement possible, et un autre inconvénient tient au fait que l'influence et la plausibilité économique des facteurs coût/demande ne sont pas faciles à évaluer.

<sup>12</sup>

On ne sait pas très bien si la mesure exacte de l'effet de l'entente est le coefficient d'estimation de la variable indicateur ou la différence entre le prix réel et le prix prévu dans le cadre de la présomption d'absence d'infraction (c'est-à-dire en fixant la variable indicateur à zéro). Dans ce dernier cas, le surcoût varie dans une certaine mesure au cours de la période d'infraction, donnant à l'infraction des effets que le modèle ne peut pas expliquer. Dans la plupart des cas, les différences devraient pourtant être limitées.

**Figure 7 : Approche prévisionnelle**

La principale difficulté pour les approches avant et après est d'établir la période exacte de l'entente. Les décisions rendues dans le cadre des procédures administratives laissent souvent à discrétion le point de départ du comportement collusif. Dans un environnement où les données sont abondantes, on peut envisager d'exclure de l'estimation les périodes incertaines et « laisser les données déterminer » s'il y a ou non un réel surcoût pendant cette période. Il s'agit alors essentiellement de savoir si juridiquement les surcoûts de ces périodes peuvent être pris en compte ou non.

Dans la plupart des cas, la période post entente/infraction est identifiée plus clairement par la date des inspections de l'autorité de la concurrence ou de la demande de clémence. Cependant, des problèmes peuvent également se poser si l'entente a des effets durables qui se font sentir pendant la période postérieure à l'entente. Les raisons peuvent tenir à l'existence de contrats à long terme ou d'une situation de guerre des prix après le démantèlement d'une entente qui perdure jusqu'à ce que le secteur retrouve un équilibre concurrentiel sur le long terme. Une autre inquiétude – surtout plausible dans le contexte américain où les préjudices personnels sont beaucoup plus significatifs que les amendes administratives et sont depuis longtemps fondés sur des approches empiriques – réside dans le fait que les participants à l'entente peuvent maintenir les prix au-dessus du niveau concurrentiel de manière stratégique dans le but d'éviter des demandes d'indemnisation plus élevées.<sup>13</sup>

### 3.3 Comparaison des prix par région ou par produit

Une approche alternative à l'analyse des prix avant, pendant et après repose sur la comparaison des régions ou des produits (ce que l'on appelle parfois les approches comparatives). Le prix pratiqué dans la région affectée par le comportement anticoncurrentiel est ici comparé aux prix appliqués dans d'autres régions géographiques ou sur d'autres marchés de produits qui ne sont pas touchés par ce comportement. Tout comme pour l'approche avant, pendant et après, les applications empiriques peuvent couvrir tout un éventail allant de simples comparaisons de prix moyens à des estimations économétriques complexes, comparables aux méthodes empiriques décrites ci-dessus.

<sup>13</sup>

Harrington (2004).

La principale difficulté pour ces comparaisons sur plusieurs régions et/ou produits est de trouver un bon critère de comparaison. Pour être bon, un critère de comparaison doit être affecté par les modifications de la demande, les coûts ou la structure du marché dans la même mesure que le marché affecté, à l'exception du comportement évalué. En effet, les facteurs structurels varient selon les marchés (par exemple le nombre d'entreprises ou de réglementations) ou les produits, et ils doivent être « pris en compte » pour que la comparaison soit valable. Toutefois, si les paramètres structurels d'une région déterminée ou d'un produit particulier sont parfaitement comparables, cela signifie que cette région est également encline à la collusion (et qu'elle offre dès lors un critère de comparaison de la concurrence invalide). Dans le même ordre d'idées, il se peut que l'entente ait des effets sur des marchés connexes, comme l'effet parapluie, si les marchés voisins sont utilisés comme critères de comparaison. Par conséquent, les estimateurs des effets prix peuvent être biaisés.

Il convient de noter que les méthodes avant et après et les comparaisons par région et par produit peuvent être envisagées dans un cadre empirique unifié. Par exemple, il est possible d'obtenir des données pertinentes relatives à plusieurs régions (certaines affectées par le comportement anticoncurrentiel et d'autres pas) sur une longue période (supérieure à la durée du comportement anticoncurrentiel). Dans ce cas, ces données peuvent être étudiées dans le cadre d'une seule approche empirique, appelée méthode de la double différence (« *difference-in-difference* ») ou, si des méthodes statistiques plus élaborées sont appliquées, dans le cadre d'une analyse sur données de panel. L'avantage de cette approche tient à ce que si un marché de comparaison approprié existe, c'est-à-dire un marché affecté par les mêmes facteurs de coût et de demande mais qui ne connaît pas de collusion, l'approche de la double différence offre une méthode facilement applicable et sûre. Si le marché de comparaison présente quelques différences, les méthodes statistiques permettent « de rendre les marchés comparables ». La supériorité de cette méthode, par rapport aux approches avant et après plus simples, réside ici dans l'utilisation de l'ensemble des données disponibles – ce qui nécessite toutefois davantage de données et repose sur l'hypothèse que la relation prix/coût/demande sur les marchés de comparaison est la même que sur le marché affecté. Voir, par exemple, Simpson et Taylor (2008) pour l'application d'une méthode de la double différence à une fusion sur le marché américain de l'essence.

### **3.4 Approche fondée sur les coûts, approche axée sur les bénéfiques ou approche de simulation**

Une approche fondée sur les coûts construit la « base » du prix concurrentiel de référence en évaluant les coûts pertinents attachés au produit affecté et en y ajoutant une marge bénéficiaire raisonnable (qui se présenterait dans les conditions normales du marché). Une des difficultés majeures de cette approche est de trouver des estimations sûres des coûts, sachant que les coûts comptables ne reflètent généralement pas les coûts économiques. Par ailleurs, l'affectation de coûts fixes aux diverses catégories de produits offerts par une entreprise a des conséquences dans la plupart des cas. Enfin, les autorités de la concurrence, les tribunaux et les clients connaissent souvent mal ces indicateurs de coût ou simplement n'ont pas accès à des indicateurs aussi sûrs.

L'évaluation de ce qu'est une marge bénéficiaire raisonnable constitue une difficulté supplémentaire, en ce qu'elle requiert une bonne compréhension des conditions de concurrence en l'absence d'entente et peut nécessiter l'évaluation pratique des marges spécifiques par entreprise ou par produit. La structure de certains secteurs d'activités peut permettre des marges réelles supérieures à la marge raisonnable même en situation de concurrence (par exemple si le nombre d'entreprises est faible, si les barrières à l'entrée sont élevées, ou en cas de différenciation des produits et de contraintes de capacité). Les marges supérieures à la marge raisonnable peuvent aussi être un effet des forces qui animent le marché. Les entreprises qui investissent dans l'innovation doivent avoir pour optique d'amortir leurs investissements en pratiquant des

prix plus élevés.<sup>14</sup> Ces caractéristiques structurelles particulières sont dans une certaine mesure prises en compte dans les modèles de simulation.

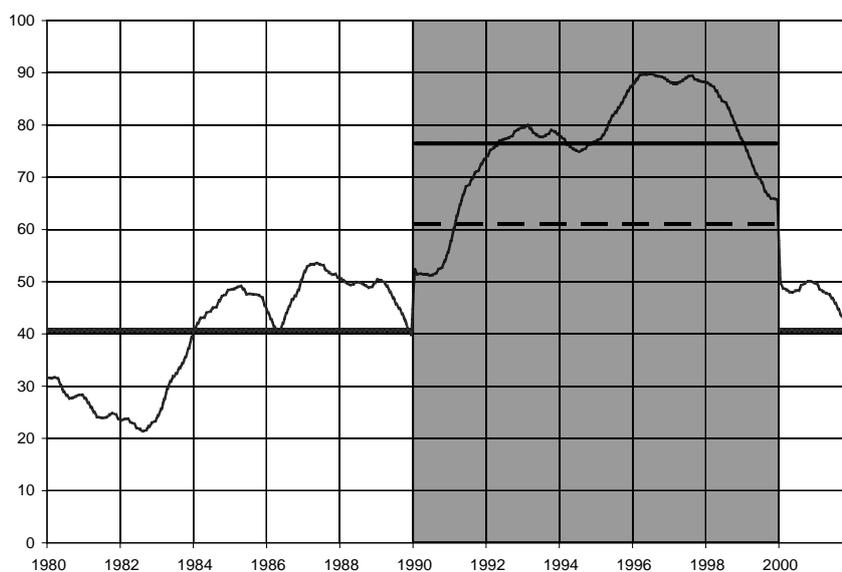
L'approche de simulation (modélisation théorique) est étroitement liée aux approches fondées sur les coûts, du fait qu'elle requiert souvent quelques données relatives aux coûts. Cela étant, cette méthode utilise un modèle explicite de concurrence, qui sert à « simuler » les marges bénéficiaires. Outre les données sur les coûts, ces simulations exigent donc des données sur la structure du marché (comme les indices HHI) et sur la demande (par exemple sur les élasticités de la demande).

Des décisions importantes doivent être prises, qui peuvent influencer les résultats de manière significative : en fonction du type de rivalité, un modèle théorique spécifique à un secteur devra être adopté (voire même spécialement adapté). Les entreprises sont-elles en concurrence sur les prix ou sur les quantités ? Les contraintes de capacité comptent-elles ? Les prix sont-ils négociés dans un cadre bilatéral ? etc. Une autre hypothèse cruciale tient au choix du système particulier de la demande et de la fonction du coût. Cela implique, par exemple, de déterminer si les prix sont susceptibles d'augmenter proportionnellement ou non à l'augmentation de la demande ou des coûts.

Une fois que l'environnement est choisi, les paramètres du modèle doivent être fixés en fonction des données du secteur (c'est ce que l'on appelle « l'étalonnage »). Les valeurs paramétriques peuvent provenir d'études antérieures concernant ce secteur ou un secteur comparable. Des paramètres essentiels peuvent aussi être fixés en fonction d'estimations propres concernant ce secteur particulier ou en fonction d'informations collectées sur les marchés. Quoi qu'il en soit, il convient qu'une analyse de sensibilité corrobore l'homogénéité des résultats par rapport à l'éventail possible des paramètres essentiels du modèle.

Une fois que les paramètres sont fixés, l'approche de simulation permet de calculer un prix théorique au niveau concurrentiel et dans le cadre d'une collusion (voir la Figure 8). La comparaison du prix de collusion simulé avec le prix réel pendant la période d'infraction permet de vérifier le caractère plausible du modèle (et/ou l'efficacité de l'entente).

**Figure 8 : Modèles de simulation**



<sup>14</sup>

Van Dijk et Verboven (2005)

Ces modèles de simulation ont pour avantage leur relativement faible niveau d'exigence en matière de données, leur défaut principal étant leur haute sensibilité aux changements dans la définition du modèle et des valeurs paramétriques. L'estimation des préjudices varie souvent énormément selon les différents éventails possibles de paramètres. Les modèles de simulation peuvent cependant jouer un grand rôle dans l'estimation des marges sur plusieurs marchés régionaux et dans le calcul des effets-prix de l'entrée et de la sortie du marché. Ainsi, s'agissant en particulier des comportements d'éviction, les techniques de simulation peuvent permettre des estimations complémentaires d'effets-prix.

À l'inverse, le cadre théorique peut déboucher sur une hypothèse vérifiable de manière concrète, ce que l'on a coutume d'appeler la modélisation structurelle empirique. D'après Reiss *et al.* (2007), « les économistes font appel à des modèles qui associent des théories économiques explicites à des modèles statistiques comme les modèles économétriques structurels ». Différents types intermédiaires sont possibles en mélangeant certaines formes de théorie économique aux modèles statistiques. Reiss *et al.* (2007) procèdent également à un examen détaillé des avantages et des inconvénients des modèles structurels empiriques, ainsi que de la façon de les appliquer et à quel moment. À l'extrême opposé de l'estimation structurelle empirique se trouve l'approche prévisionnelle dynamique, examinée précédemment, qui met avant tout l'accent sur le pouvoir prédictif du modèle de référence soumis à estimation.

Le Tableau 3 offre un résumé des principales méthodes, de leurs principaux postulats et de leurs exigences en matière de données.

**Tableau 3 : Méthodes d'estimation et exigences en matière de données**

| Méthode d'estimation                                               | Exige une connaissance de la forme de rivalité prévalant sur le marché (modèle économique) | Qualité des données requises | Données nécessaires                                                                                                                   |
|--------------------------------------------------------------------|--------------------------------------------------------------------------------------------|------------------------------|---------------------------------------------------------------------------------------------------------------------------------------|
| <b>Présomptions</b>                                                | Non                                                                                        | Faible                       | Données sur les volumes                                                                                                               |
| <b>Méthode linéaire</b>                                            | Non                                                                                        | Faible                       | Prix de la période d'entente et dans une certaine mesure, données postérieures (et/ou antérieures) à la période d'entente             |
| <b>Comparaison des prix par région ou par produit</b>              | (Oui)                                                                                      | De faible à modérée          | Prix des produits comparables sur un marché distinct de produit ou régional non affecté par un comportement anticoncurrentiel         |
| <b>Méthodes de simulation</b>                                      | Non                                                                                        | Modérée                      | Prix moyens, élasticité de la demande et coûts marginaux pendant la période de concurrence ou de non-concurrence                      |
| <b>Régression : Approche (dynamique) de la variable-indicateur</b> | Non                                                                                        | Élevée                       | Facteurs de prix, coûts et demande avant, pendant et après les périodes de non-concurrence                                            |
| <b>Régression : Approche (dynamique) prévisionnelle</b>            | Non                                                                                        | Élevée                       | Facteurs de prix, coûts et demande avant, pendant et après les périodes de non-concurrence                                            |
| <b>Régression : Estimation structurelle</b>                        | Oui                                                                                        | Élevée                       | Dépend du modèle spécifique ; généralement facteurs de prix, coûts et demande avant, pendant et après les périodes de non-concurrence |

Une évaluation empirique comprend généralement six étapes pratiques. Premièrement, les entretiens sont menés de manière à appréhender les aspects économiques du secteur, le comportement présumé et les données disponibles. Deuxièmement, une méthode (ou plusieurs en parallèle) est adoptée. La stratégie empirique dépend non seulement des aspects économiques et de la disponibilité des données, mais aussi du cadre objectif et juridique de l'évaluation empirique (voir les commentaires sur les arbitrages dans la section ci-dessous). Troisièmement, une demande de données est déposée. L'étendue de cette demande dépendra à nouveau fortement des règles juridiques en matière de communication d'informations dans les actions privées en dommages et intérêts ou du pouvoir de l'autorité de la concurrence de faire enregistrer les demandes de données dans le cadre de la procédure administrative. Quatrièmement, un processus de nettoyage des données est engagé. Il s'agit ici de mettre les données en conformité avec les diverses sources, d'identifier les valeurs erratiques et de lever les interrogations ouvertes concernant les données. Cette étape est souvent la plus intensive et la plus longue d'une enquête empirique. Cinquièmement, l'étude est réalisée et un modèle privilégié est choisi (c'est-à-dire le plus sérieux et le plus convaincant économiquement). Sixièmement, des vérifications d'homogénéité et une analyse de sensibilité sont réalisées autour du modèle privilégié. Cette étape est souvent menée en concertation avec les différentes parties à une affaire, par exemple avec les experts de l'économie et de l'industrie de la partie adverse. Toutes ces étapes sont influencées à la fois par les aspects économiques et juridiques de l'affaire – les principaux arbitrages seront identifiés dans la section ci-dessous.

#### **4. Importance des arbitrages entre les concepts juridiques et les méthodes empiriques**

Cette section examine quelques-uns des grands arbitrages qui s'imposent lors de la mise en œuvre d'une analyse économique empirique dans un cadre juridique. Ces arbitrages doivent être bien compris, transparents, et les décisions sur la façon de procéder au regard de ces équilibres à respecter doivent être adoptées préalablement par le tribunal.

Notre examen portera sur les arbitrages d'ordre général, puis sur les arbitrages d'ordre économique et enfin sur les arbitrages d'ordre juridique. S'il est vrai que certains arbitrages sont davantage associés à la méthode économique et d'autres aux aspects juridiques, il est important de garder présent à l'esprit que ce sont les contraintes juridiques (charge et critère de la preuve, etc.) qui définissent l'approche économique (étendue de la collecte des données, méthodologie, niveau de technicité, etc.)

##### **4.1 Arbitrages d'ordre général**

La question de l'équilibre entre exactitude et facilité de mise en œuvre est au centre des discussions sur les avantages respectifs des différentes méthodes empiriques. Cet équilibre devient évident lorsque l'on tient compte du fait que l'évaluation des effets d'une pratique nécessite de créer un environnement (l'hypothèse). Plus l'environnement est réaliste, plus il est compliqué à créer. Parallèlement, augmenter la complexité a pour effet de limiter la facilité de mise en œuvre. Dans un souci de clarté, il convient de définir les deux notions d'exactitude et de facilité de mise en œuvre:

Dans un monde probabiliste, l'exactitude comprend deux dimensions. Le premier est l'exactitude *en moyenne*, ce que l'on nomme en statistique l'exactitude sans biais.<sup>15</sup> En d'autres termes, la méthode est sans biais si elle donne, en moyenne, l'estimation correcte. Il convient de noter qu'une estimation juste en moyenne n'est pas forcément proche de la vérité: Les préjugés pourraient être sur ou sous-estimés en

<sup>15</sup>

En économétrie, un estimateur sans biais est défini comme un estimateur ayant une valeur ou une moyenne d'expectative, qui constitue le paramètre démographique réel que l'on cherche à évaluer. En d'autres termes, si l'expérience concrète est répétée suffisamment souvent, en moyenne, l'estimateur sans biais donne la moyenne démographique réelle. Griffiths *et al.* (1993, p. 81).

grande partie, tout en étant encore corrects en moyenne. Ce deuxième élément de l'exactitude – être proche de la vérité – s'appelle la précision en statistique (ou l'efficacité de l'estimateur).<sup>16</sup>

*Définition de l'exactitude : l'exactitude désigne la capacité d'une méthode (estimateur) à réaliser une estimation sans biais et précise des préjudices « réels ».*

Il est à noter que la définition ci-dessus ne tient pas compte de l'équilibre à respecter entre le biais et la précision. En principe, un estimateur légèrement biaisé mais ayant un degré élevé de précision pourrait s'avérer préférable à un estimateur sans biais mais très imprécis.<sup>17</sup> Cette question est au cœur du débat qui entoure les modèles économiques structurels. Plus les estimations se voient imposer de postulats économiques provenant des théories économiques, plus elles sont précises, encore que, le résultat sera biaisé si les postulats sont erronés.<sup>18</sup>

Précisons également que cette définition suppose une application moderne de la méthode examinée. Aussi, nous ne tenons pas compte des interrogations liées à la qualité de l'expert et à sa capacité à mettre la méthode en œuvre.<sup>19</sup>

*Définition de la facilité de mise en œuvre : une méthode est facile à mettre en œuvre lorsqu'elle donne une estimation vérifiable et transparente dans un délai raisonnable et à l'aide de ressources proportionnelles.*

Dans les travaux empiriques, les qualités de vérifiabilité et de transparence dépendent beaucoup de la communication des données et de leur présentation. Grâce aux données brutes, à la documentation sur les ajustements et aux statistiques courantes fournies pour calculer les résultats, la reproduction directe des résultats par un deuxième expert est possible, et des vérifications de sensibilité ainsi que l'estimation de différents modèles empiriques peuvent être réalisées. Même des méthodes sophistiquées peuvent être

<sup>16</sup> Le degré de précision d'un estimateur nous informe, dans un sens probabiliste, sur la mesure dans laquelle l'estimation de cet estimateur peut varier d'un test à l'autre. Moins un estimateur a de variance, plus grande est sa précision (de test). Griffiths *et al.* (1993, p. 213).

<sup>17</sup> Certaines mesures statistiques donnent des indications aux économistes empiriques sur la façon de réaliser cet équilibre. Par exemple, l'erreur quadratique moyenne est la somme du biais (quadratique) et de la variance de l'estimateur. Un estimateur peut limiter l'erreur quadratique moyenne en tolérant quelques biais au profit de la précision. Griffiths *et al.* (1993, p. 312). Cet équilibre est plus apparent dans le débat entre ce que l'on appelle les méthodes d'estimation paramétriques et les méthodes semi- ou non-paramétriques. Les estimations semi- ou non-paramétriques – contrairement aux approches paramétriques – ne présument pas (ou alors dans une moindre mesure) de la relation fonctionnelle qui existe entre les variables considérées. Mais, une plus grande flexibilité a un coût. Tout d'abord, le degré de précision de l'estimation diminue rapidement à mesure que le nombre de variables explicatives augmente. Des ensembles vastes de données, irréalisables, sont donc nécessaires. Ensuite, les estimations non paramétriques ne permettent pas les extrapolations, et excluent ainsi d'appliquer les prévisions relatives aux périodes sans entente aux périodes d'entente. Enfin, il est difficile de faire peser des restrictions sur les estimations. Des solutions pallient partiellement ces insuffisances, mais elles font peser davantage de postulats sur les méthodes statistiques. Voir Horowitz (2009) pour un exposé sur le sujet.

<sup>18</sup> C'est tout le débat sur le choix entre les estimations empiriques structurelles ou non structurelles. Voir la section sur les différentes méthodes empiriques.

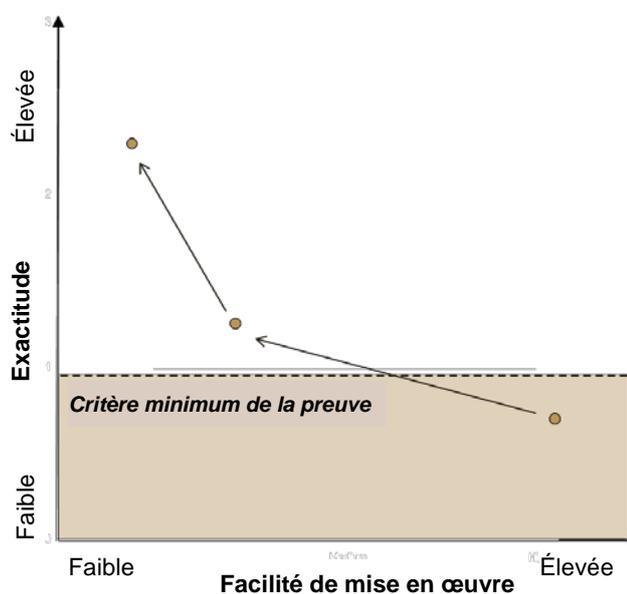
<sup>19</sup> Aux États-Unis – selon un arrêt rendu dans l'affaire Daubert c. Merrell Dow Pharmaceuticals, Inc – des modalités sont fixées pour la recevabilité du rapport de l'expert économétrique. Ces modalités portent sur des points tels que la qualification de l'expert, et la fiabilité et la pertinence des méthodes appliquées. Voir ABA (2005, chapitre II).

communiquées de manière à permettre à des non experts de vérifier les critères empiriques et les postulats sur lesquels elles reposent. Des règles relatives aux pratiques d'excellence décrivent la façon de présenter les résultats de manière à ce qu'ils puissent être vérifiés par un expert.<sup>20</sup>

S'agissant du délai et de la proportionnalité des ressources, il convient de relever qu'il existe de grandes différences, liées principalement à la collecte des données et au nettoyage des données. Nous reviendrons sur ce point.

Comme nous l'avons indiqué, nous défendons la thèse selon laquelle un équilibre fondamental entre l'exactitude et la facilité de mise en œuvre peut émerger des travaux empiriques. Le graphique ci-dessous illustre cet équilibre. Avec une méthode appropriée et un certain degré de technicité, de nombreuses méthodes empiriques gagnent en exactitude. La zone en gris indique le critère minimum de la preuve qu'une méthode doit remplir.<sup>21</sup>

**Figure 9 : L'arbitrage entre exactitude et facilité de mise en œuvre (chaque point désigne une méthode)**



En d'autres termes, les arbitrages existent de fait dans bon nombre de situations. Cela peut aussi impliquer qu'il peut être difficile aux juges et aux avocats de comprendre entièrement les méthodes proposées. Cela est courant dans d'autres domaines – le témoignage cherchant à déterminer, par exemple, les causes d'un accident de voiture et les dommages afférents (généralement présenté par un ingénieur spécialisé) contient aussi des éléments incompréhensibles sans de profondes connaissances d'expert. Il est essentiel que l'expert puisse expliquer la logique et la plausibilité de l'approche adoptée. Il existe néanmoins une contradiction entre l'objectif de facilité de mise en œuvre (et notamment de vérifiabilité) et celui d'exactitude. Selon nous, cela laisse penser que les juges devraient exiger une grande exactitude, tout en s'assurant que les aspects procéduraux de l'analyse économique empirique sont renforcés.

<sup>20</sup> Commission européenne (2010), Davis et Garcés (2010, p. 13) ou Reiss *et al.* (2007).

<sup>21</sup> Le niveau du critère de la preuve décrit dans ce graphique et dans les graphiques suivants n'est donné qu'à titre indicatif. Il n'est pas le reflet du critère réel ou du classement des critères dans une affaire ou dans un pays en particulier.

Il peut aussi exister des cas dans lesquels il n'est pas possible d'obtenir une estimation empirique exacte dans un délai raisonnable ou en ayant recours à des ressources proportionnelles. En pareil cas, le système juridique doit réfléchir de manière approfondie à la façon de procéder.

D'un autre côté, il existe des situations dans lesquelles une méthode spécifique est à la fois facile à mettre en œuvre et aboutit à des résultats d'une grande exactitude. La méthode dite de la double différence utilisée avec un critère de comparaison précis pourrait donner un bon exemple de cette méthode.<sup>22</sup>

De manière plus générale, l'exactitude et la facilité de mise en œuvre dépendent des spécificités de l'affaire et de la disponibilité des données. Par exemple, l'approche de la double différence ne satisfera à aucune norme juridique plausible en l'absence de critère de comparaison précis. Néanmoins, les économistes devraient fournir quelques grandes orientations sur les avantages et les inconvénients des différentes méthodes. Par exemple, les approches fondées sur les prix sont de notre point de vue souvent plus solides que les approches fondées sur les coûts : les indicateurs de coût sont souvent moins transparents que les indicateurs de prix, et sont donc plus difficiles à vérifier.

Cela étant, des applications de niche sont possibles pour certaines méthodes. Par exemple, les simulations peuvent jouer un rôle important pour une première évaluation des risques (du point de vue du défendeur) ou pour un premier type d'indemnités (du point de vue du requérant). Par ailleurs, la simulation pourrait jouer un rôle particulier sur les marchés locaux connaissant des structures différentes<sup>23</sup> ou dans les cas de comportement d'éviction, lorsque la structure du marché est affectée par le comportement.

#### 4.2 *Les arbitrages d'ordre économique*

L'arbitrage d'ordre général entre exactitude et facilité de mise en œuvre donne lieu à plusieurs arbitrages spécifiques mais importants sur la façon de modéliser l'analyse économique empirique. Ces arbitrages peuvent être organisés selon le choix des données, le nombre de variables retenues et de méthodes appliquées et le choix de l'hypothèse de simulation.

Les travaux les plus complexes de l'économie empirique sont souvent la collecte et le nettoyage des données, raison pour laquelle il est important de déterminer s'il l'on peut travailler avec les données publiques ou avec les données fournies par les parties. Travailler avec les données fournies par les parties permet souvent de collecter beaucoup plus de données désagrégées (données de transaction par opposition aux données annuelles ; données sur les prix de produits spécifiques par opposition aux prix moyens sur l'ensemble des catégories de produits ; données locales par opposition aux données nationales). Plus les données sont désagrégées, plus l'exactitude des estimations est grande.

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<sup>22</sup> Pour une application de l'approche de la double différence dans le domaine du contrôle des fusions, voir par exemple Simpson et Taylor (2008). En effet, selon un principe empirique plus large, les changements de variables (c'est-à-dire les différences) peuvent souvent mesurer les effets avec plus de précision que les valeurs absolues.

<sup>23</sup> La raison en est que les simulations d'ententes permettent le calcul de marges spécifiques aux entreprises en fonction de la structure du marché local. Dans les secteurs d'activités dans lesquels les marchés sont locaux et où la concentration locale est variable, une simulation d'entente peut offrir des indications utiles sur ce que pourraient être les marges moyennes. Cela rejoint le point précédent selon lequel travailler sur la base de « changements » peut s'avérer plus efficace que de travailler sur des niveaux absolus.

D'un autre côté, en plus d'une meilleure accessibilité, les données publiques présentent certains avantages par rapport aux données fournies par les parties. Premièrement, les données publiques offrent une source de données constante qui permet les comparaisons entre entreprises et comprend des informations sur les entreprises qui ne participent pas à la procédure. Deuxièmement, elles ne sont pas susceptibles de faire l'objet d'une manipulation stratégique a posteriori. Troisièmement, la période de collecte des données est considérablement écourtée.

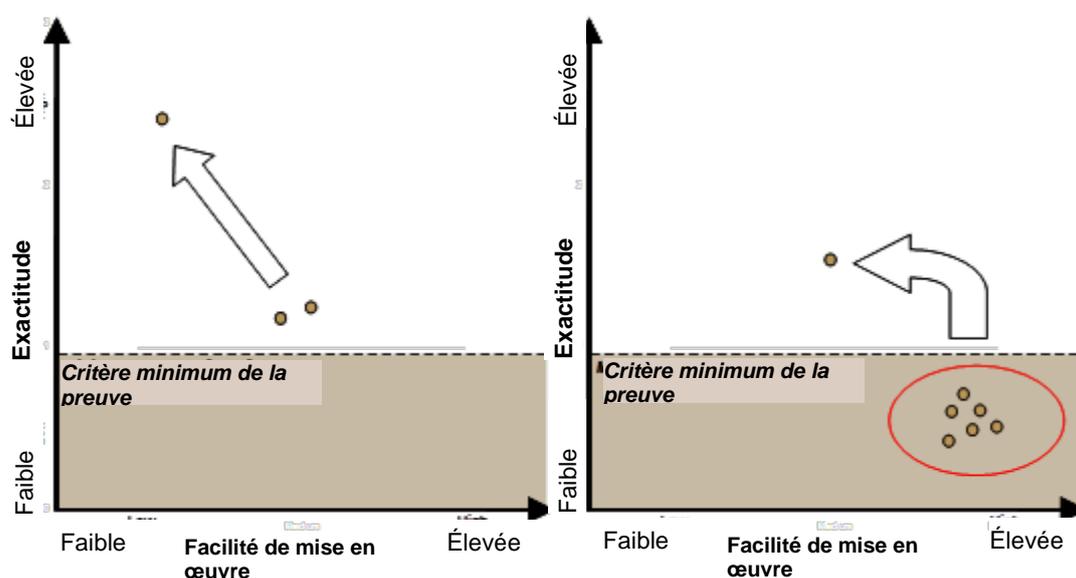
Un autre problème important lié à l'étude tient au nombre de variables retenues et – en relation à cela – au nombre de méthodes appliquées en parallèle. Considérons la question du nombre de variables, qui fait l'objet de plusieurs arbitrages. Les prix sont déterminés par de nombreux facteurs, parmi lesquels les leviers du coût et de la demande ainsi que la structure du marché. La collecte des données sur l'ensemble de ces facteurs serait considérable. De plus, l'introduction de nombreuses variables relatives au nombre d'observations des données réduirait l'exactitude des estimations.

Dans certains cas, plusieurs facteurs explicatifs suivent une simple évolution linéaire dans le temps ou sont dans une large mesure liés entre eux. Si l'impact particulier de ces variables n'est pas intéressant pour l'évaluation, inclure des variables représentatives qui tiennent compte de l'effet combiné peut suffire et permettre de poursuivre l'évaluation avec un ensemble relativement restreint de données publiques. D'un autre côté, l'omission de variables importantes pourrait se solder par des estimations biaisées (moins exactes). Aussi, il est important de sélectionner soigneusement les variables dans la mesure où les variables retenues doivent être basées sur une évaluation des aspects économiques du secteur et adaptées aux besoins particuliers de la méthode.

La mise en balance des délais et des efforts nécessaires (c'est-à-dire la facilité de mise en œuvre) par rapport à l'exactitude déterminera si plusieurs méthodes sont appliquées parallèlement. Il est souhaitable de mettre en œuvre autant de méthodes parallèles que possible du point de vue de l'exactitude, mais pas du point de vue de la facilité de mise en œuvre.

Considérons, par exemple, la situation décrite dans le graphique de gauche de la Figure 10, où deux méthodes sont appliquées, qui suffisent toutes deux à satisfaire à la norme juridique minimale requise à un haut degré de tolérance. En appliquant les deux méthodes, on peut encore atteindre un degré plus élevé d'exactitude mais au prix d'une moins grande facilité de mise en œuvre, comme l'indique la flèche dans le graphique ci-dessous. Dans cette situation, une approche progressive semble possible : on commence par la méthode la plus prometteuse et seulement dans les cas où cette méthode ne donne pas de résultats suffisamment précis pour satisfaire aux normes juridiques, on applique une autre méthode. Cette approche progressive nous semble préférable à une approche « multiple », au moins dans les cas où chaque méthode réclame un effort important d'application.

**Figure 10 : Effets possibles d'une application parallèle de plusieurs méthodes  
(chaque point représente une méthode)**



Source : Friederiszick et Röller (2010)

Considérons une autre situation où plusieurs méthodes simples (ayant une grande facilité de mise en œuvre) sont appliquées. Dans ce cas, il paraît sensé de mettre en œuvre plusieurs méthodes en parallèle, qui vont ensemble satisfaire à la norme juridique requise avec une marge suffisante, comme l'indique le graphique de droite de la Figure 10. Il convient de déterminer avec prudence si plusieurs méthodes « peu probantes » sont ou non plus riches en informations que chaque méthode prise séparément. D'une manière générale, cela dépend de la quantité d'informations indépendantes concernant les faits sur lesquels repose l'affaire. Cela étant, il n'est pas certain que le traitement des mêmes données de faible qualité avec des méthodes différentes permette une évaluation plus informée du préjudice.

En somme, le choix de l'approche progressive ou parallèle dépend des circonstances particulières de l'affaire. Il est pourtant primordial de prendre une décision sur l'approche à adopter dès les premiers stades du processus, pour éviter tout litige ultérieur sur la méthode. Toute incertitude sur le résultat d'une méthode permet aux parties qui ne sont pas d'accord sur la meilleure méthode à adopter de parvenir à un consensus.<sup>24</sup>

Un troisième élément important de l'étude tient à la juste hypothèse; c'est-à-dire, à ce qu'aurait été le prix pendant la période invoquée en l'absence d'infraction. Ce point donne lieu à trois variations, que nous aborderons successivement.

La première question juridique qui se pose est de savoir s'il convient de prendre en compte la concentration du marché lors de l'évaluation du prix fictif. Si cela semble évident du point de vue économique, les répercussions sur l'analyse empirique sont importantes. S'il est vrai que les effets-prix

<sup>24</sup>

Un autre argument en faveur de l'application de multiples méthodes consiste à dire que l'application d'une seule méthode prévisible peut avoir pour effet d'inciter les entreprises à tenter d'influencer l'estimation des surcoûts, voir Harrington (2004). Selon cet argument, il est possible de ne pas toujours utiliser la même méthode dans tous les cas, mais le recours à des méthodes multiples dans chaque cas particulier n'est pas toujours approprié.

unilatéraux devraient être pris en compte, la question peut aussi se poser de savoir si les effets coordonnés devraient l'être pour évaluer les gains illicites : du point de vue du bien-être, les effets coordonnés peuvent s'avérer aussi dommageables qu'une coordination explicite. Une autre question dans ce contexte est celle de savoir si une structure du marché différente serait apparue dans l'hypothèse d'une absence d'infraction. Les affaires d'entente ne sont parfois que des tentatives d'entreprises pour éviter la restructuration industrielle ; dans les affaires de comportement d'éviction, les changements dans la structure du marché doivent par définition être pris en compte.

Une autre variation de la juste hypothèse est liée à la relation intertemporelle (et transversale) entre les prix pendant et après la période d'infraction. Par exemple, Harrington<sup>25</sup> a fait valoir que les prix pratiqués après une période d'entente étaient plus élevés que dans un scénario sans entente, dans la mesure où les entreprises savent que les dommages et intérêts seront calculés sur la base de la différence de prix pratiqués avant et après le démantèlement de l'entente. Cet argument concerne peut-être davantage le contexte américain puisqu'en Europe, les amendes ne sont pas basées sur une méthode avant et après,<sup>26</sup> et les actions privées ne font actuellement pas régulièrement appel à cette approche.

Une dernière variation dans l'élaboration de la juste hypothèse consiste à déterminer si d'autres distorsions du marché doivent être prises en compte. Dans certains cas, il a été suggéré que les prix auraient été inférieurs au prix compétitif normal, par exemple, à cause du dumping de pays étrangers ou en réponse au pouvoir abusif de l'acheteur. Les parties font valoir que le comportement abusif (la collusion dans le cas présent) ne fait que réduire les prix au niveau des prix normaux et partant – malgré un impact positif sur les prix – n'entraîne pas de surcoûts réels. De la même manière, les stratégies de prix d'éviction pourraient être lancées en réponse à de tels événements. Ce type d'argument est souvent rejeté par les tribunaux.

#### 4.3 *Arbitrages d'ordre juridique*

Si on laisse de côté la question de la juste hypothèse, un autre arbitrage important concerne les marchés de comparaison affectés par l'infraction. S'agissant des infractions de longue durée, il est souvent difficile de trouver des prix nets comparables. Les pays voisins ou les produits équivalents sont souvent susceptibles d'être affectés par l'infraction, ou alors sont trop différents.

En s'intéressant plus particulièrement à l'exactitude, les marchés sur lesquels certains indices donnent à penser qu'il existe des infractions analogues ne pourront probablement pas être utilisés comme marchés de comparaison. Cependant, les marchés connaissant des périodes d'entente effective attestée ou des monopoles sont toujours instructifs, dans la mesure où ils peuvent servir à comparer les prix observés par rapport à un prix de monopole (attesté). Une grande différence entre les deux – c'est-à-dire si le prix dans la région en situation de monopole attesté est nettement plus élevé que le prix pendant la période affectée – indiquerait que l'infraction a moins d'effet sur le marché affecté.<sup>27</sup> En l'absence d'autres méthodes, ces informations pourraient s'avérer utiles. Plus généralement, l'arbitrage consiste à déterminer si la distorsion potentielle qui est créée en incluant à tort un marché affecté dans le groupe des comparateurs exempts

<sup>25</sup> Harrington (2004).

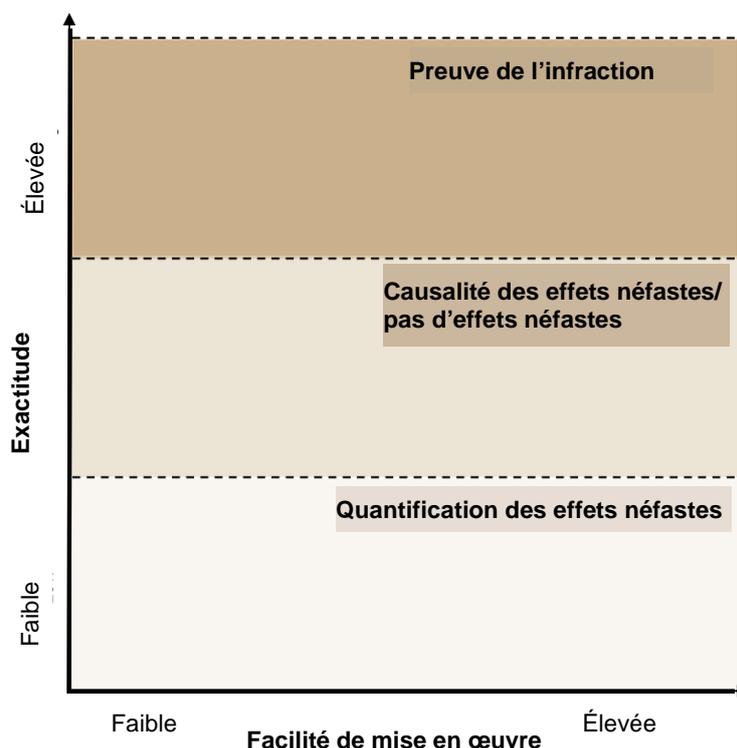
<sup>26</sup> En Europe, les effets d'une entente ne sont pris en compte que de façon indirecte au moment d'évaluer le montant des amendes. Par exemple, la gravité de l'infraction (qui détermine le montant de base de l'amende) est déterminée en vertu de facteurs tels que le type d'infraction, les parts de marché, la portée ou l'application régionale. Voir les lignes directrices sur la méthode de calcul des amendes, Commission européenne (2006).

<sup>27</sup> La situation inverse, c'est-à-dire lorsque le prix est plus élevé dans la région affectée que dans la région de monopole attesté – indique que la région est mal choisie pour servir de critère de comparaison en raison des grandes différences constatées dans les facteurs de demande ou de coût.

d'infraction ou un marché exempt d'infraction dans un groupe de marchés affectés est suffisamment importante pour neutraliser l'effet d'observations complémentaires.

Si la question de savoir s'il convient d'inclure dans l'analyse les marchés de comparaison affectés par une infraction est plus une question méthodologique, le critère de preuve juridique ainsi que la répartition de la charge de la preuve sont des questions essentielles qui déterminent le cadre juridique dans lequel l'estimation du surcoût doit être utilisée.

**Figure 11 : Les différents critères de la preuve**



Source : Friederiszick et Röller (2010)

Comme le décrit la Figure 11, il existe de grandes différences entre les normes juridiques selon les affaires (de même qu'il peut exister des différences selon les pays et les pratiques d'exclusion). Dans les affaires d'entente par exemple, l'opinion répandue en économie est que les constatations empiriques ne suffisent pas à prouver une entente.<sup>28</sup> En effet, la preuve d'une communication explicite est requise pour satisfaire à la norme juridique et prouver le comportement collusif dans le cadre d'une procédure administrative dans la plupart des pays.<sup>29</sup> Si une telle approche est adoptée, le rôle de l'économie se limite

<sup>28</sup> Motta (2004, p. 189) ou Kühn (2001). Reste à voir si, dans une approche davantage axée sur les effets au titre de l'article 82 et de la politique de la concurrence en général, cette opinion largement partagée en économie ne serait pas rejetée. Voir Davis et Garcés (2010, p. 316) pour un exposé penchant, semble-t-il, en faveur d'une approche plus interventionniste et Röller (2008) pour une analyse plus sceptique des pratiques d'exploitation.

<sup>29</sup> L'économie peut jouer un rôle beaucoup plus important dans l'orientation des priorités des autorités de la concurrence s'agissant des perquisitions dans les entreprises. Les vastes recherches indéterminées de preuves (« *fishing expeditions* ») sont considérées comme ayant une grande portée, mais la norme juridique justifiant les perquisitions dans les entreprises est relativement faible. Voir Friederiszick et Maier-Rigaud (2008).

aux étapes qui suivent la constatation d'une entente (qui peut tout de même ne pas avoir eu d'effet). De la même façon, dans les actions privées en dommages et intérêts, les critères de preuve applicables aux infractions et à l'existence d'effets néfastes sont élevés, alors que le critère de preuve applicable à l'évaluation des effets néfastes est plus faible. Une fois que l'existence d'effets néfastes est rapportée, les juges peuvent évaluer leur quantité selon un critère plus faible.<sup>30</sup> D'autres formes de comportement d'éviction comme le prix d'éviction reposent souvent davantage sur des preuves économiques et n'exigent pas de preuves « flagrantes » pour établir l'infraction.

La norme juridique a de grandes répercussions sur l'analyse économique et ses arbitrages : une norme juridique plus élevée peut exiger une analyse économique plus précise, par exemple en collectant des données de transaction et, à terme, en mettant en œuvre plusieurs méthodes parallèles. Cela entraîne d'importants efforts et coûts supplémentaires, raison pour laquelle les tribunaux doivent fixer les objectifs de l'évaluation économique et les normes juridiques applicables avec droiture et transparence.

Pour ce qui est de la charge de la preuve, un élément important pour l'analyse économique est de savoir qui a accès aux données. Cela concerne en particulier la « tragédie de l'asymétrie des données » dans les litiges privés. D'un côté, le demandeur, qui doit présenter ses arguments, ne dispose pas des informations démontrant assurément le préjudice. De l'autre côté, le défendeur, à qui il incombe de rapporter la preuve de la répercussion, ne dispose pas des bonnes informations pour le faire. En résulte dès lors un arbitrage difficile entre des règles strictes en matière de communication d'informations, qui assurent la communication des données en temps utile mais pourraient aussi conduire à une trop grande transparence. En effet, des enquêtes menées par des autorités de la concurrence ont parfois augmenté la transparence à un degré qui a permis la collusion tacite. L'intervention de l'autorité de la concurrence pourrait même ainsi entraîner une augmentation des prix a posteriori. Les règles strictes en matière de communication d'informations peuvent également être mal utilisées dans le cadre d'une stratégie consistant à augmenter les coûts des entreprises rivales lorsqu'un plaignant pousse son concurrent à engager une procédure contentieuse coûteuse.

Un autre aspect essentiel de la bonne marche de l'analyse économique dans les actions en justice réside dans les recommandations du tribunal à l'expert économique. Par exemple, dans l'affaire de l'entente sur les prix du ciment, le tribunal a décidé – après en avoir longuement débattu avec l'expert et les parties – de mettre en œuvre une approche pendant et après (c'est-à-dire d'exclure les comparaisons entre régions et entre produits). Le juge a adopté d'autres décisions importantes au regard des arbitrages économiques examinés précédemment, comme celles d'exclure la période de guerre des prix, de collecter des données régionales, etc. À cet égard, la procédure en trois étapes peut jouer un rôle important dans l'amélioration de l'efficacité de l'analyse économique.

Le tribunal pourrait en outre fournir des indications tenant à l'efficacité de l'infraction. Mettre à la disposition des experts économiques une analyse de l'efficacité des infractions présumées à travers diverses régions leur permettrait de vérifier leurs conclusions empiriques.

Enfin, la possibilité qu'ont les tribunaux de limiter les estimations de l'expert issues des techniques économétriques (au moyen de ce que l'on appelle les « remises de sécurité ») peut s'avérer un bon moyen d'équilibrer l'arbitrage entre exactitude et facilité de mise en œuvre. Par exemple, les préjudices prévus pourraient être moins précis pour les périodes antérieures (en raison du manque de données ou de prévisions empiriques à longue échéance). Cela étant, l'application de ces remises de sécurité doit être bien justifiée et appliquée avec soin de manière à ne pas rendre l'estimation superflue.

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<sup>30</sup> Par exemple le paragraphe 287 du Code de procédure civile allemand.

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## CHILE

### 1. Introduction

It is not easy to identify the theory of harm followed by Chilean competition authorities. In case-law, the identification of harm in cartels and exploitative abuses seems clearer than in exclusionary conducts. Quantification of harm, however, is generally uncommon.

Likewise, the idea of harm to competition plays only a minor role in antitrust private litigation. Civil judges tend to consider pecuniary losses rather than economic harms. Also, there are no relevant civil law cases on cartels and exploitative abuses, where the harm to competition seems clearer from a competition law perspective. All the relevant cases on private damages so far concern exclusionary conducts.

### 2. Harm to competition and its quantification

#### 2.1 Overview

The system of competition protects the competitive process. The Chilean Competition Act<sup>1</sup> (“the Act”) indicates that “...any act, agreement or convention, either individually or collectively, which hinders, restricts or impedes free competition, or which tends to produce such effects”.

Traditionally, competition authorities (including both the Fiscalía Nacional Económica or “FNE”, and the Competition Tribunal or “TDLC”) have understood this broad definition as inclusive of all economic actors (i.e. current and potential consumers, competitors and intermediaries), directly or potentially affected by the conduct, and as inclusive of any negative effect on welfare.

Since the creation of the TDLC in 2004, competition authorities have increasingly adopted economic efficiency as the main guiding criterion of analysis.<sup>2</sup>

In cartel cases, competition authorities have usually estimated the harm computing price differentials using a counterfactual. The counterfactual is estimated using, as much as possible, economic models and techniques, with data being provided by the defendants both during the investigation (under request of the FNE) or submitted directly to the TDLC in support of their position. The FNE, however, faces obstacles to obtain data, which in Chile must be mainly requested to private entities. The problem is even more relevant in the case of exclusionary conducts, because the identification of harm requires more information to develop the models and the counterfactual is more uncertain.

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<sup>1</sup> Decree Law No. 211, 1973, and its amendments.

<sup>2</sup> Although the Act expresses a broader goal (i.e. *to promote and defend free competition in markets*), the influence of neoclassical economics on competition law’s operators has led to understand the goal as a duty to promote and defend economic efficiency (i.e., productive efficiency, allocative efficiency and dynamic efficiency), with the expectation that in the long run this will contribute to consumer welfare maximisation.

Competition authorities have also used economic tools to assess the anticompetitive effects of the infringements. Nonetheless, they face the problem of quantification of harm to competition. Particularly, lack of data and time constraints have made difficult a sound process of quantification of antitrust harm in most cases.

The quantification of harm has been usually focused on transfers of wealth. Although innovation or dynamic efficiency has been affected in some cases, the approach is normally static.

## 2.2 Cases

### 2.2.1 *NUTRIPO et al vs. Los Andes Land Port Concessionnaire (PTLA) and the State of Chile*<sup>3</sup> (2010).

In this case, six importers of goods from Brazil and Argentina filed complaints before the TDLC against PTLA (an infrastructure concessionaire) and the Chilean Ministry of Public Works. Plaintiffs argued that PTLA had overcharged them, breaching the concession contract. Specifically, PTLA would have been charging them a higher amount for a different, lower cost service.<sup>4</sup>

The TDLC indicated that PTLA was a legal monopoly provider of, among others, sampling and support services for the inspections carried out by border control authorities that were different from cargo loading and unloading services – the latter being the only services subject to regulated prices. Unlawfully, PTLA charged its users the highest regulated flat-tariff (US\$ 210 each truck) notwithstanding the nature of the services.

The TDLC held the charged price was abusive. In fact, it was twice or three times higher than the TDLC's own estimation of a competitive fee for the rendered services. In order to estimate the competitive fees, the TDLC appointed an expert to technically assist in determining the costing method. The TDLC imposed PTLA a fine of nearly US\$ 320,000.<sup>5</sup>

The TDLC quantified the “benefits gained from the infringement” (which is the legal requirement) in US\$ 11.6 million. The quantification was based on the over-price paid by the plaintiffs (comparing the fee estimated by the TDLC as benchmark with the effectively paid price) and the number of inspections for sampling and support.<sup>6</sup>

### 2.2.2 *FNE vs. Cía. Chilena de Fósforos (CCF)*<sup>7</sup> (2009).

In this case the FNE filed a complaint against CCF, the dominant manufacturer of matches for domestic use (with over 90% market share), for alleged exclusionary practices. CCF gave its retailers (mainly supermarket chains, the most important distribution channel of matches) incentives such as rebates for the accomplishment of sales goals and exclusive dealing. Also, according to the affected company, Canada Chemicals, CCF would have incurred in sham litigation.

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<sup>3</sup> TDLC Ruling No. 100/2010, July 21<sup>st</sup>, 2010.

<sup>4</sup> The claim against the Ministry of Public Works (MOP) and its General Directorate of Public Works (DGOP) was dismissed because their oversight role did not include the services related to the infringement. (*Ibidem*, Gr. 102°)

<sup>5</sup> *Ibid*, Dec. No.5.

<sup>6</sup> *Ibid*, Gr. 105° and 106°.

<sup>7</sup> TDLC Ruling No. 90/2010, December 14<sup>th</sup>, 2009.

The TDLC ruled against CCF in December 2009. The TDLC held that these practices created entry barriers, producing market foreclosure and violating competition law.<sup>8</sup> The TDLC stated that the defendant's anticompetitive practices "... caused significant damages to the market, since, for a long period, CCF remained as the sole actor, depriving consumers' choice from different companies and brands, and, eventually, access to lower prices resulting from a stronger competition."<sup>9</sup> It fined CCF in US\$ 1 million.<sup>10</sup>

Whilst the TDLC's decision identified a negative impact on consumers, there was not quantitative measure of harm.

In June 2010,<sup>11</sup> the Supreme Court upheld the TDLC's decision and increased the fine originally imposed to US\$ 1,3 million, accepting the FNE and Canada Chemical's arguments.

### 3. Role of harm to competition

The FNE is not legally required to quantify or specify the harm to competition in its submissions. According to the Act, the FNE must describe only the conduct and the relevant market. However, the FNE frequently describes a theory of harm to competition. A quantification of harm is rare and done mainly in high impact cases.

Private actors and public bodies other than the FNE can also initiate proceedings before the TDLC. They do not need to prove damages from the infringement, and the "passing on defence" does not bring the proceeding to an end.<sup>12</sup>

The evidence submitted for supporting "harm to competition" is difficult to differentiate from evidence on other elements of a violation. In pricing conducts (either exploitative or exclusionary) much of the information refers to prices and costs, as well as concentration and market shares. If economic data suffices, the FNE uses quantitative methods. However, because of difficulties in obtaining relevant data, the evidence most frequently submitted is qualitative.<sup>13</sup>

In some cases, a mere reference to the existence of an actual or potential harm to competition is sufficient to condemn or acquit. This reference does not always detail or quantify the actual harm to competition.<sup>14</sup>

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<sup>8</sup> *Ibid*, Gr. 158°.

<sup>9</sup> *Ibid*, Gr. 161°.

<sup>10</sup> *Ibidem*, Dec. No. 2

<sup>11</sup> Supreme Court of Justice, Decision No. 277 issued in June 2<sup>nd</sup>, 2010.

<sup>12</sup> In an exploitative abuse of dominance case where construction companies and their trade association complained against excessive pricing by water supplier monopoly companies, the passing on defense raised by the defendants was dismissed.

<sup>13</sup> For instance, in *re Philip Morris vs. CCT*, *Infra*, the most important evidence submitted to prove that the plaintiff had been actually excluded from access to distributors was the deposition of witnesses as well as the written contracts between the defendant and its distributors.

<sup>14</sup> In cartel cases, for instance, the TDLC has required an 'objective capacity of the conduct to affect free competition'. In several unfair competition cases, the practice is proved but the infringement discarded because of lack of 'harm to competition'. In a case where the retailer was condemned for imitating a supplier's product, the harm to competition was apparently identified with the potential confusion of consumers in the downstream market. TDLC, Ruling N° 24/2005, July 28<sup>th</sup>, 2005.

For the determination of fines, the Act<sup>15</sup> orders to consider: the economic benefit obtained from the violation, the seriousness of the behavior, and recidivism. The TDLC's decisions consider economic benefits whenever applicable. When assessing the seriousness of the violation, the TDLC considers the impact of the infringement on competition. Although seriousness is not normally measured, the finding of certain antitrust harm increases the seriousness of the case and, in turn, this may have an impact on the TDLC's decision on fines.

In *Philip Morris vs. Cía. Chilena de Tabacos* (“CCT”<sup>16</sup>)<sup>17</sup> (2005), *Philip Morris International Tobacco Marketing Ltda.* (“PM”) filed a complaint before the TDLC against CCT, the main player in the Chilean cigarettes' industry (with 97.1% market share). In August 2005 the TDLC ruled against CCT,<sup>18</sup> indicating that CCT had driven PM's products out of the market by imposing artificial entry barriers to competitors.<sup>19</sup> The TDLC imposed a US\$ 560.000<sup>20</sup> fine on CCT and ordered the firm to refrain from future exclusionary conduct. The judgment does not contain any quantification of harm to competition. The Supreme Court upheld the TDLC's decision in 2006.<sup>21</sup>

In *Producción Química y Electrónica Quimel S.A. (“Quimel”) and Cementa S.A. (“Cementa”). vs. James Hardie Fibrocementos Ltda. (“Hardie”)*<sup>22</sup> (2006), Quimel and Cementa filed a complaint before the TDLC, claiming that since Hardie started its operations in Chile in 2001 it had been pricing its fiber cement sheets below costs. By engaging in predatory practices, Hardie would have significantly restricted competition, squeezing out of the market mid- and small-sized producers and causing the bankruptcy of some of those companies (including Cementa).

The TDLC dismissed the charges. It held that only dominant firms can engage in predatory practices,<sup>23</sup> which was not the case<sup>24</sup>. In addition, plaintiffs did not submit “irrefutable” evidence that defendant's prices were below average avoidable costs.<sup>25</sup>

The Supreme Court's overturned TDLC's ruling,<sup>26</sup> holding that “[...] it is not necessary for the party carrying out a predatory practice to have a dominant position in the market, given the fact that one of its objectives is precisely to attain this position due to not having it [...]”.<sup>27</sup> The Supreme Court also disagreed with the TDLC about the cost reference for predatory pricing. It held that prices were predatory

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<sup>15</sup> Art. 26

<sup>16</sup> *Chiletobacos* is the national subsidiary of British American Tobacco.

<sup>17</sup> TDLC Ruling No. 26/2005, August 5<sup>th</sup>, 2005.

<sup>18</sup> *Ibid.*

<sup>19</sup> *Ibid.*, Gr. 20°, 22°, 32° - 34°. The entry barriers consisted in different contractual arrangements with its distributors in order to block and or deter entry by other competitors.

<sup>20</sup> *Ibid.*, Decision No. 4.

<sup>21</sup> Supreme Court of Justice, Decision No. 4332/2005 issued in January, 10<sup>th</sup> 2006.

<sup>22</sup> TDLC Ruling No.39/2006, June 13<sup>th</sup>, 2006.

<sup>23</sup> *Ibid.*, Gr. 25°, 26°.

<sup>24</sup> Dominance was held by *Pizarreño Pudahuel* with more than 60% market share, while *Hardie* the defendant had near 32%.

<sup>25</sup> *Ibid.*, Gr. 31°- 33°.

<sup>26</sup> Supreme Court of Justice, Decision No. 3449/2006 issued in November, 29<sup>th</sup> 2006.

<sup>27</sup> Supreme Court decision, Gr. 2°.

because they were below “costs”, without specifying what measure of cost it considered relevant. In spite of the vote of two dissenting judges, the Court’s overturned the TDLC’s judgment and ordered Hardie to pay a fine of approx. US\$ 736,432. The Supreme Court’s ruling is rather formal, so no theory of harm can be clearly identified.

#### 4. Quantification of harm to competition and private damages litigation

##### 4.1 Overview

Before 2003 there was no provision in the Act regulating private damages actions. Damages claims for antitrust infringements were subject to the common provisions for civil awards contained in the Civil Code.<sup>28</sup>

In 2003, an amendment to the Act introduced a new provision that regulates civil damages suits for antitrust violation in the following terms:

*The damage claim that may result from the anticompetitive conduct judged as such by a final ruling of the Competition Tribunal, shall be filed in the competent civil court according to the general rules, and shall be handled according to the summary proceedings established in Book III Title XI of the Civil Procedure Code. / The competent civil court, when ruling on the damage claim, shall base its ruling on the conduct, actions and legal classification thereof, as established by the decision of the Competition Tribunal.*<sup>29</sup>

The amendment aimed at reducing the length of private actions proceedings and gave TDLC’s decisions an important role in civil proceedings. According to the law, the TDLC’s ruling on fact and law cannot be neglected in the civil procedure. This means that only the existence of the civil injury, causality and damages<sup>30</sup> can be debated.

Notwithstanding the improvements, the number of private actions is still very low. Up to date, there have been no private actions based on cartel infringements. This may be due to the absence of procedural incentives such as class actions, which in Chile are only available for consumer protection.<sup>31</sup> Case law on civil damages actions is so far limited to injuries from exclusionary abuses.

##### 4.2 Cases

###### 4.2.1 DAP, Pivcevic et al. vs. LAN Chile et al. (2000)

The regional airline *Aerovías DAP* (“DAP”) filed a complaint against Lan Chile airlines (“Lan”) and *National Airlines* (“National”), claiming damages for a total amount of approx. US\$12 million.<sup>32</sup> DAP

<sup>28</sup> Section starting at Art. 2314, Civil Code, for torts or non-contractual damages.

<sup>29</sup> Art. 30 of the Act.

<sup>30</sup> Some private litigators argue that this also means that civil judges cannot directly adjudicate on antitrust infringements or damages thereof without a previous decision by the TDLC.

<sup>31</sup> In the pending retail pharmacies case, once one of the defendants (FASA) settled with the FNE and the settlement was approved, although FASA tried to implement direct compensation mechanisms for paid overcharges, a few consumer groups filled three class actions suits before civil judges in different regions. One of the judges held a lack of competence on the case and another proceeding was abandoned. In the third proceeding the judge held his inadmissibility but the appeal is still pending.

<sup>32</sup> This amount decomposed as following: company’s actual damages, *lucrum cessans*, and moral damages plus shareholder’s moral damages.

supported its petition in the *Comisión Resolutiva*'s (one of the TDLC's predecessors) Ruling N° 479/1996,<sup>33</sup> which condemned Lan and National for exclusionary conducts and imposed fines of approx. US\$300,000.<sup>34</sup>

The *Comisión Resolutiva*'s decision contained no theory of competition harm. The lack of a specific provision on private actions in the Competition Act at that time left plaintiffs merely with the common legal grounds of the Civil Code for claiming damages.

Both reasons (i.e. the absence of theory of harm and the lack of a specific legal provision) may explain some of the economic elaborations made by the civil judge.<sup>35</sup> For example, an economist presented as witness by one of the defendants argued that the competition authority had not held that the defendant did not engaged in predatory pricing, since there was no evidence of prices below costs. The economist explained that markets were contestable and hence competitive, and that the Comisión's decision had reasoned on the basis of a strategic behavior.<sup>36</sup> The judge dismissed this argument.<sup>37</sup> However, other financial and non-financial evidence submitted to the civil proceeding led the judge to hold that

*Injuries had been caused by the conducts of the defendants, but in a lower entity than what the plaintiffs claim; the exit of the plaintiff from the market was not attributable to the defendants but to some relevant issues unforeseen by the plaintiffs; pecuniary losses should be limited to operational results and expected benefits within March 16<sup>th</sup> and May 31<sup>st</sup>, 1996.*<sup>38</sup>

The judge adjudicated in favor of the plaintiff, granting damages. The Court of Appeal upheld the decision, but decreased the amount of the damages.<sup>39</sup> The Supreme Court affirmed the Court of Appeal's decision.<sup>40</sup>

#### 4.2.2 *Cementa vs. Volcán (2009)*

The background of this civil damages trial was a Supreme Court's decision on predatory pricing previously ruled by the TDLC. In spite of the TDLC's acquittal,<sup>41</sup> the Supreme Court admitted the claim.<sup>42</sup>

In this case, for the first time a civil judge adjudicated in favor of the plaintiff on the grounds of the aforementioned special provision on civil damages actions introduced to the Act.<sup>43</sup> The judgment<sup>44</sup> limited

<sup>33</sup> *Comisión Resolutiva* was a quasi-judicial body in charge of adjudication on competition law issues before the establishment of the TDLC in 2004. Ruling N° 479/1996, December 31<sup>st</sup>, 1996.

<sup>34</sup> The conducts were a refusal to deal on land services for aircrafts and coordination to decrease retail prices in highly concentrated routes.

<sup>35</sup> Civil Judge, 4°, Santiago, June 22<sup>nd</sup>, 2000, docket number 4831-1997.

<sup>36</sup> *Ibid*, Gr. 22°.

<sup>37</sup> *Ibid*, Gr. 28°.

<sup>38</sup> *Ibid*, Gr. 24°, 31°.

<sup>39</sup> Court of Appeals, Santiago, July, 14th 2004, docket number 5954-1999

<sup>40</sup> Supreme Court, December 27th, docket number 5835-2004

<sup>41</sup> TDLC, Ruling N° 39/2006, June 13<sup>th</sup>, 2006.

<sup>42</sup> Supreme Court, Nov. 29<sup>th</sup>, 2006, docket number 3449-2006. A dissenting vote was issued by two members of the S.Court.

<sup>43</sup> Art. 30. Of the Act (see *supra*)

<sup>44</sup> Civil Judge, 26°, Santiago, April 24<sup>th</sup>, 2009, docket number 13272-2007.

the discussion to the legal standing of the plaintiff, the existence of injuries, causality and the quantification of damages. It explicitly held that if the TDLC found a competition infringement, it was not necessary to prove negligence during the civil trial.<sup>45</sup> This means that quantification of harm is not relevant in civil cases. The existence of a previous condemnatory ruling suffices.

Accordingly, in the judgment quantification of damages was independent from any theory of harm used during the competition proceedings. The state of the market before the exclusionary conduct was used as basis for the quantification<sup>46</sup> (as a sort of “but for” hypothesis). The judge considered as proven that the victim of the exclusionary practice had a stable financial situation during that time. Another basis for quantification was a previous due diligence report prepared for the defendant when it had evaluated the acquisition of the plaintiff’s company.<sup>47</sup>

The financial distress of the plaintiff’s company and its exit from the market occurred during the predation period. This fact proved the causality.<sup>48</sup>

The judge quantified three different types of damages: “actual” damages (i.e., the price of purchasing the company as reported by the due diligence) in approx. US\$ 7 million;<sup>49</sup> *lucrum cessans* (computed as annual benefits of 4% for the predation period) in approx. US\$ 5 million;<sup>50</sup> and “moral” damages (i.e., harm to company’s reputation, integrity and viability in approx. US\$ 1,5 million.<sup>51</sup>

The ruling was appealed. However, before the hearing the parties settled and the plaintiff withdrew his claim. The FNE had not access to the settlement terms.

#### 4.2.3 *Philip Morris (PM) vs. Cía. Chilena de Tabacos (CCT) (2010)*

The TDLC’s held that CCT had violated competition law by structuring several contractual arrangements and incentive mechanisms with different distributors. The arrangements were exclusionary and affected its rival PM.<sup>52</sup> PM filed a civil damages suit against CCT.

The plaintiff argued that without the exclusionary conduct, it would have reach a 25% market share – well above the 1% participation it had in the period of the exclusionary practice. The plaintiff claimed that the exclusion translated in injuries for approx. US\$ 145 million.<sup>53</sup>

During the trial several reports and depositions by national and foreign competition economists were submitted by both the plaintiff and the defendant. The discussion focused on the quantification of damages

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<sup>45</sup> *Ibid*, Gr. 10°, 14°, 15°.

<sup>46</sup> *Ibid*, Gr. 16°,

<sup>47</sup> *Ibid*, Gr. 17°,

<sup>48</sup> *Ibid*, Gr. 18° - 27°

<sup>49</sup> *Ibid*, Gr. 29° - 30°

<sup>50</sup> *Ibid*, Gr. 31° - 35°

<sup>51</sup> *Ibid*, Gr. 36° - 38°

<sup>52</sup> TDLC Ruling N° 26/2005, August, 5<sup>th</sup>, 2005, Upheld by the Supreme Court on Jan. 10<sup>th</sup>, 2006, docket number 4332-05. Vid. *supra*

<sup>53</sup> *Ibid* Gr. 17°

and not on the competition harm. As in previous cases, the judge limited the discussion to damages, causality and the quantification of damages in civil trials.<sup>54</sup>

One of the main arguments of the defendant was that civil actions claiming damages were beyond the scope of the TDLC's decision and that claimed injuries had not been caused by any of the conducts considered in the TDLC's judgment.

The civil judge decided on the case in January 2010,<sup>55</sup> dismissing the claim. First, the judge held that damages should be limited to the period taken into account in the TDLC's ruling.<sup>56</sup> Second, the burden of proof was borne by the plaintiff, who did not prove its claim. The plaintiff had not changed his strategy after TDLC's judgment and there were several additional factors that had prevented the plaintiff from reaching the pretended market share.<sup>57</sup> As a consequence, damages were not granted.<sup>58</sup>

## 5. Concluding remarks

Chilean competition authorities do not follow a single theory of harm to competition. In case law, the identification of harm to competition seems easier in cartels and exploitative abuses than in exclusionary conducts.

Economic analysis has been increasingly used in Chile in competition law enforcement and adjudication during the last decade. However, it is not common to find a detailed quantification of harm.

The Act has clear rules for linking antitrust infringements to damages claimed by private parties to be adjudicated in civil law fora.

All the significant cases on private damages deal with exclusionary conducts.

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<sup>54</sup> *Ibid* Gr. 25°

<sup>55</sup> Civil Judge, 10°, Santiago, January 25<sup>th</sup>, 2010, docket number 19655-2009. The appeal is pending.

<sup>56</sup> *Ibidem* Gr. 28°

<sup>57</sup> *Ibidem* Gr. 29°

<sup>58</sup> *Ibidem* Gr. 32° - 33°

## FRANCE

-- Version Française --

L'appréciation de l'importance du dommage causé à l'économie constitue l'un des quatre critères en fonction desquels la loi française (article L. 464-2 du code de commerce) prévoit que les sanctions pécuniaires imposées par l'Autorité de la concurrence (ci-après « l'Autorité ») en cas de pratiques anticoncurrentielles doivent être déterminées.

La notion de dommage à l'économie : conformément aux termes mêmes de la loi, le dommage à l'économie ne se limite pas au dommage causé à la concurrence. Selon la jurisprudence, il est traditionnellement entendu comme intégrant, d'une part, tous les dérèglements que les pratiques mises en œuvre sont de nature à causer au fonctionnement des secteurs ou marchés directement ou indirectement concernés, mais aussi, d'autre part, toutes les incidences négatives qu'elles peuvent avoir sur l'économie en général et sur les consommateurs dans leur ensemble. Il se distingue donc, notamment, des préjudices individuels ou de groupe causés aux victimes de pratiques anticoncurrentielles, y compris lorsqu'il s'agit de concurrents agissant comme plaignants devant l'Autorité (I).

L'appréciation de l'importance du dommage à l'économie au cas par cas : les modalités d'appréciation au cas par cas de l'importance du dommage à l'économie ont été précisées par la jurisprudence des juridictions de contrôle (cour d'appel de Paris et Cour de cassation) ainsi que par la pratique décisionnelle de l'Autorité. La méthode pratique suivie par cette dernière a été récemment synthétisée dans un projet de communiqué relatif à la méthode de détermination des sanctions pécuniaires (II).

Ce projet, fait l'objet d'une consultation publique, qui a été lancée le 17 janvier 2011 par l'Autorité sur son site Internet<sup>1</sup>, et qui est ouverte jusqu'au 11 mars 2011. Il sera ensuite discuté à l'occasion d'une table ronde prévue le 30 mars, avant la publication d'un document définitif.

### **1. Le dommage à l'économie : un critère à part entière de détermination des sanctions pécuniaires pouvant être imposées par l'Autorité en cas d'entente ou d'abus de position dominante**

#### ***1.1 Nature et portée du dommage causé à l'économie***

Le troisième alinéa du I de l'article L. 464-2 du code de commerce, relatif aux critères de détermination des sanctions pécuniaires, dispose que :

*« Les sanctions pécuniaires sont proportionnées à la gravité des faits reprochés, à l'importance du dommage causé à l'économie, à la situation de l'organisme ou de l'entreprise sanctionné ou du groupe auquel l'entreprise appartient et à l'éventuelle réitération de pratiques prohibées par le [titre VI du livre IV du code de commerce](...). »*

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<sup>1</sup> Le communiqué est disponible à l'adresse suivante :  
[http://www.autoritedelaconcurrence.fr/user/standard.php?id\\_rub=388&id\\_article=1531](http://www.autoritedelaconcurrence.fr/user/standard.php?id_rub=388&id_article=1531)

Le dommage à l'économie, au sens du code de commerce, intègre l'ensemble des perturbations que les pratiques anticoncurrentielles sont susceptibles de causer à l'économie. Indépendamment de l'appréciation qu'elle porte sur la gravité de l'infraction, l'Autorité tient donc compte de l'atteinte que cette infraction est par ailleurs de nature à causer à l'économie lorsqu'elle détermine la sanction imposée aux auteurs de pratiques anticoncurrentielles.

La prise en compte de ce critère s'inscrit dans une perspective de préservation de l'ordre public économique, et non dans une logique de réparation ou de restitution. Le dommage causé à l'économie se distingue ainsi des préjudices individuels ou de groupe subis par les victimes, directes ou indirectes, de pratiques anticoncurrentielles et ne se limite pas aux seuls gains illicites que l'auteur ou les auteurs de ces pratiques ont pu escompter en retirer, à l'époque où ils s'y sont engagés. Il intègre tant le transfert et la perte de bien-être que l'infraction est de nature à engendrer au détriment de la collectivité dans son ensemble, que son incidence négative sur les incitations des autres agents économiques. Dans un arrêt du 28 janvier 2009, « Epsé Joué Club », la cour d'appel de Paris a ainsi précisé que :

*« le dommage à l'économie ne se réduit pas à une perte objectivement mesurable, mais s'apprécie notamment en fonction de l'étendue du marché affecté par les pratiques, de la durée et des effets conjoncturels ou structurels de ces pratiques ».*

## **1.2 Mise en œuvre dans des cas individuels : exemples récents**

Dans la décision n° 09-D-05 du 2 février 2009 relative à des pratiques mises en œuvre dans le secteur du travail temporaire, le Conseil de la concurrence a pris en compte, pour déterminer le montant des sanctions pécuniaires imposées aux trois plus grandes entreprises de placement de travailleurs temporaires en France pour s'être entendues afin de limiter la concurrence entre elles vis-à-vis de leurs clients importants, non seulement la hausse du coût du travail temporaire causée par la pratique, qui a pu réduire le recours par les entreprises utilisatrices à cette forme d'emploi, mais aussi son incidence négative sur les travailleurs intérimaires eux-mêmes, dont certains peuvent ne pas avoir été employés en raison de la pratique. Cette dernière donnée représente tant un manque à gagner pour les travailleurs eux-mêmes qu'une perte pour la collectivité et pour l'économie dans son ensemble.

Dans la même décision, le Conseil a, en outre, souligné que la pratique a consisté, pour les entreprises en cause, à s'entendre pour confisquer à leur profit une partie des allègements de charges sociales (« allègements Fillon ») en les détournant des entreprises auxquelles ils étaient destinés. Au titre de l'importance du dommage causé à l'économie, le Conseil a donc pris en compte, au stade de la détermination des sanctions, cette importante perturbation des effets incitatifs des politiques publiques de l'emploi et son impact budgétaire. Elle a aussi tenu compte du fait que celui-ci était supporté par les contribuables, dans un contexte de lutte contre le chômage et de priorité accordée à la croissance économique.

De même, dans la décision n° 10-D-28 du 20 septembre 2010 relative aux tarifs et aux conditions appliquées par les banques et les établissements financiers pour le traitement des chèques remis aux fins d'encaissement, l'Autorité a examiné les conséquences de la pratique en cause sur chaque catégorie de clients remettants (Trésor public, « grands remettants », autres entreprises, particuliers). Elle en a fourni un ordre de grandeur, en estimant que, pour chaque centime de hausse, l'augmentation des prix payés par les clients s'élevait à environ 220 millions d'euros sur l'ensemble de la période considérée.

### 1.3 *Articulation entre la mise en œuvre publique des règles de concurrence et la réparation des préjudices subis par les victimes privées*

Compte tenu de la nature et des objectifs de sa mission de protection de l'ordre public économique, d'une part, mais aussi des outils procéduraux mis à sa disposition, d'autre part, l'Autorité ne procède pas à une appréciation ou à une quantification des préjudices qu'ont pu subir les victimes du cartel ou de l'abus dont elle constate l'existence, ni par conséquent à un calcul des dommages-intérêts que celles-ci seraient en droit de réclamer. Ce pouvoir est réservé au juge civil ou commercial, seul habilité à statuer sur les demandes en réparation émanant de ces victimes.

Néanmoins, en prenant en compte, dans ses décisions constatant l'existence de pratiques anticoncurrentielles, l'importance du dommage causé à l'économie dans le cadre de la détermination des sanctions pécuniaires imposées aux entreprises qui les ont mises en œuvre, l'Autorité aide les victimes potentielles de telles pratiques à construire leur(s) propre(s) action(s) en réparation (« *follow-on action* »).

En effet, conformément au code de commerce<sup>2</sup>, l'ensemble des décisions de l'Autorité, y compris ses décisions constatant l'existence d'une infraction et imposant une sanction, sont publiques (hormis les mentions couvertes par le secret des affaires) et disponibles gratuitement, dès leur adoption et leur notification aux entreprises condamnées, sur son site Internet.

Ensuite, ces décisions sont motivées de façon généralement très détaillée. Elles permettent donc à toutes les victimes d'avoir une idée précise des conséquences générales que le cartel ou l'abus qu'elles concernent a pu avoir sur les secteurs ou marchés concernés et sur les consommateurs (qu'il s'agisse de consommateurs finals, d'utilisateurs de biens intermédiaires, de distributeurs, de clients ou encore de concurrent). Elles peuvent aussi les renseigner sur l'incidence de cette pratique anticoncurrentielle sur le fonctionnement des secteurs ou marchés en aval et sur le fonctionnement plus général de l'économie. Enfin, les analyses et les estimations de surprix que l'Autorité peut être amenée à formuler dans certains cas où les données nécessaires pour les réaliser sont disponibles et fiables, sont accessibles aux victimes potentielles.

Ensuite, dans le cadre de l'examen des actions introduites par les personnes privées afin d'obtenir réparation de leur préjudice, le juge de la réparation a lui-même la possibilité de s'appuyer sur les analyses développées par l'Autorité, dans ses décisions, pour apprécier l'importance du dommage à l'économie, même si ces analyses et les qualifications juridiques auxquelles elles conduisent n'ont pas à ce jour l'autorité de la chose décidée, contrairement ce qui est le cas dans un nombre croissant de pays. Lorsque le demandeur en réparation s'en prévaut, ces analyses, toujours très motivées et circonstanciées, constituent en effet des éléments de contexte utiles, qui donnent des indications générales aidant le juge à resituer les arguments invoqués par le demandeur pour prouver son préjudice dans le contexte des conséquences économiques plus larges de l'infraction.

Enfin, les entreprises victimes, ainsi que les consommateurs par l'intermédiaire d'organisations agréées, ont la possibilité de jouer, plus en amont, le rôle de plaignant dans les procédures d'infraction menées par l'Autorité<sup>3</sup>. L'introduction d'une saisine devant l'Autorité leur donne, à l'image des entreprises qui sont ultérieurement mises en cause, la possibilité de bénéficier du statut de partie devant l'Autorité, qui leur assure des droits procéduraux très étendus : accès au dossier, droit de présenter des observations suite à la notification des griefs et au rapport des services d'instruction, droit d'être entendu oralement par le collège durant la séance, en particulier. Ils ont donc l'opportunité de faire valoir leur point de vue

<sup>2</sup> Article D. 464-8-1 du Code de commerce

<sup>3</sup> Articles L. 462-1 et L. 462-5 I du Code de commerce

notamment sur l'importance du dommage à l'économie, sur la base d'argumentaires économiques de nature qualitative ou quantitative.

Les possibilités que la loi donne aux victimes de pratiques anticoncurrentielles de contribuer à la mission de préservation de l'ordre public économique de l'Autorité jouent un rôle très important en pratique, en aidant l'Autorité à détecter des ententes ou des abus de position dominante potentiels, en produisant des informations utiles et en participant au débat contradictoire, aussi bien sur les faits que sur les éléments à prendre en considération pour déterminer le montant des sanctions. En particulier, les entreprises ou les consommateurs victimes, qui sont présents au quotidien sur le terrain, peuvent jouer un rôle déterminant en apportant à l'Autorité des informations et des données économiques utiles à la bonne compréhension des faits et de leurs conséquences, par exemple dans des secteurs tels que les services, la banque ou encore la grande distribution.

## **2. Les modalités d'appréciation de l'importance du dommage à l'économie**

### **2.1 Une appréciation objective**

Du point de vue de l'analyse économique, le dommage à l'économie peut schématiquement être divisé en deux composantes cumulatives, qui montrent que son appréhension va au-delà du seul gain illicite escompté. Il s'agit, d'une part, d'un transfert direct de surplus des consommateurs vers les auteurs de pratiques anticoncurrentielles – qui est assimilable au gain illicite en lui-même – et, d'autre part, d'une perte sèche de surplus et de bien-être pour la collectivité prise dans son intégralité, qui dépend du but et des effets, potentiels ou réels, de chaque infraction en cause<sup>4</sup>. Néanmoins, il s'agit là d'une vision abstraite du dommage à l'économie. En effectuer un chiffrage imposerait de procéder à des analyses contrefactuelles extrêmement fines reposant sur des hypothèses qu'il s'avère impossible de tenir pour certaines en pratique. En effet, la situation qui aurait prévalu en l'absence de la pratique anticoncurrentielle est impossible à reconstituer de façon fiable, les équilibres sur les marchés étant déterminés par de très nombreuses variables interagissant les unes sur les autres. C'est pourquoi il résulte de la jurisprudence constante des juridictions de contrôle que l'Autorité n'est pas tenue d'effectuer une quantification ou une évaluation chiffrée du dommage à l'économie.

Comme l'a récemment rappelé un arrêt de la Cour de cassation du 7 avril 2010, cela ne veut pas pour autant dire que l'importance du dommage causé à l'économie peut se borner à être présumée, y compris dans le cas des pratiques anticoncurrentielles considérées par l'OCDE comme les plus graves (cartels, ententes d'appels d'offres). Le texte de la loi impose au contraire d'en apprécier l'importance au cas par cas, ce qui doit être fait en fonction des éléments qualitatifs et/ou quantitatifs dont l'Autorité peut disposer dans chaque affaire. L'Autorité apprécie donc l'importance du dommage à l'économie en fonction des facteurs objectifs qu'elle peut réunir ou approcher avec un degré suffisant de fiabilité dans chaque cas d'espèce, comme, *inter alia*, l'élasticité des prix des produits objets de l'infraction.

### **2.2 Une appréciation au cas par cas**

En pratique, en vertu d'une pratique décisionnelle et d'une jurisprudence constantes, cette appréciation se traduit par la détermination d'un ordre de grandeur. Afin de déterminer cet ordre de grandeur, l'Autorité effectue une analyse au cas par cas de chaque situation d'espèce en fonction du secteur économique dans lequel intervient la pratique anticoncurrentielle, de l'étendue et des caractéristiques de cette dernière, ainsi que des conséquences qu'elle est de nature à avoir, en s'appuyant sur les informations et les données disponibles.

<sup>4</sup> V. Combe (E.), « Dommage à l'économie et sanction pécuniaire : une introduction économique », *Concurrences*, N° 4, 2010

Elle prend donc en considération des éléments de nature qualitative, mais aussi de nature quantitative lorsque les données pertinentes sont disponibles et fiables. La discussion contradictoire qui a lieu avec les parties sur les principaux éléments pouvant être prise en considération par l'Autorité pour déterminer le montant de la sanction, à commencer par l'importance du dommage à l'économie, est d'ailleurs l'occasion de tester la pertinence, la fiabilité et la robustesse de ces données, mais aussi si cela s'avère justifié de les compléter, de les affiner ou au contraire de les écarter de la discussion.

Parmi les éléments servant à apprécier l'importance du dommage à l'économie, l'Autorité peut notamment prendre en compte les éléments suivants, en fonction de leur pertinence qui ne peut être appréciée qu'au cas par cas :

- l'ampleur de la pratique (couverture géographique, parts de marché cumulées des entreprises en cause, etc.) ;
- les caractéristiques économiques des activités, des secteurs ou des marchés en cause (barrières à l'entrée, degré de concentration, élasticité-prix de la demande, marge, etc.) ;
- les conséquences conjoncturelles de la pratique (surprix escompté, absence d'une baisse de prix attendue, effets indirects sur des secteurs ou des marchés connexes ou en aval, etc.) ;
- ses conséquences structurelles (création de barrières à l'entrée, effets d'éviction, de discipline ou de découragement vis-à-vis des concurrents, baisse de la qualité ou de l'innovation, entrave au progrès technique, impact sur la compétitivité des opérateurs sur d'autres marchés ou sur celle du secteur en cause, etc.), et
- son incidence plus générale sur l'économie, sur les utilisateurs en aval et sur les consommateurs finaux.



## FRANCE

-- English version --

The assessment of the importance of the harm done to the economy is one of four criteria expressly mentioned in French law (article L. 464-2 of the Commercial Code), which should be taken into account by the Autorité de la concurrence (hereafter the « Autorité ») while setting fines sanctioning antitrust infringements.

**The concept of harm done to the economy:** under French law, the harm done to the economy is not limited to the actual harm caused to competition. According to the case law, this concept encompasses not only the disturbances that anticompetitive behaviours are liable to cause to the economic sectors and markets directly or indirectly concerned, but also the negative impact of such anticompetitive behaviours on the economy in general and on consumers. It is therefore different from individual or collective damages suffered by victims of anticompetitive practices, including when these victims have locus standi to lodge an antitrust complaint before the Autorité (I).

**Case by case assessment of the importance of the harm done to the economy:** the ground rules to assess on a case by case basis the importance of the harm done to the economy have been laid down by review courts (the Paris Court of Appeal and the Supreme Court (“Cour de cassation”)), as well as by the practice of the Autorité. The method used in practice by the Autorité to that effect has recently been synthesized in a draft guidance document on the setting of antitrust fines (II).

This draft guidance was published on January 17, 2011 on the Autorité’s website<sup>1</sup>, and is open to public consultation until March 11, 2011. It will then be discussed during a public roundtable on March 30, 2011 before publication of a final version.

## 1. The harm done to the economy: a fully-fledged criterion to set fines in antitrust cases (cartels, other anticompetitive agreements and abuses of dominant position)

### 1.1 Nature and scope of the harm done to the economy

Article L. 464-2, sub-section I, paragraph 3, of the Commercial Code, that outlines the criteria that must be taken into account while setting antitrust fines, provides that:

*Fines are proportionate to the seriousness of the conduct, to the importance of the harm done to the economy, to the individual situation of the undertaking or the group to which it belongs, and to the possible reiteration of the practices sanctioned by [title VI book IV of the Code](...).*

The harm done to the economy, as referred to in the Commercial Code, encompasses all disturbances that anticompetitive practices are liable to cause to the economy. Besides the seriousness of the infringement, the Autorité therefore takes into consideration this criterion when setting the fines imposed on undertakings that have engaged into anticompetitive practices.

<sup>1</sup> [http://www.Autoritedelaconcurrence.fr/user/standard.php?id\\_rub=388&id\\_article=1531](http://www.Autoritedelaconcurrence.fr/user/standard.php?id_rub=388&id_article=1531)

Consideration for this criterion is driven by a concern to safeguard the general interest (i.e. the defence of the economic public order), and not by a concern to compensate private tort. The harm done to the economy thus differs from the individual or collective damage incurred by direct or indirect victims of anticompetitive practices, and is not limited to the illegal profits that infringer(s) could expect to make thanks to such practices at the time they engaged therein. It incorporates not only the transfer and loss of welfare that the infringement is likely to cause to the community as a whole, but also its adverse impact on other economic agents. In this sense, in its ruling as of January 28, 2009, EPSE Joué Club, the Paris Court of Appeal ruled that:

*« the harm done to the economy is not limited to a loss that can be measured objectively, but is assessed with regard to the size of the markets concerned by the infringements, as well as the duration and the short term and structural effects of these infringements ».*

### **1.2 Individual cases: some recent examples**

In its decision N. 09-D-05 of February 2nd, 2009 regarding an infringement implemented by temping agencies, the Conseil de la concurrence, in order to fix the fines imposed on the three “majors” of the temporary work sector in France for having colluded and shared their most important corporate clients, took into account not only the increased cost of temporary work as a result of such a practice, which may have restricted demand for this type of employment by corporate users, but also its adverse impact upon temporary workers themselves, some of whom may have not been employed because of this practice. The latter element represents both a shortfall for the workers and a loss for the community and the economy at large.

In the same decision, the Conseil de la concurrence also pointed out that this practice consisted in colluding to confiscate a wide portion of tax reductions (so-called “allègements Fillon”) designed to spur this type of employment, by artificially diverting them from the corporate clients who were meant to recoup them. Considering the harm done to the economy criterion, the Conseil de la concurrence, when setting the fines, took into consideration the serious disruption caused to the incentives of public policies toward employment, and the negative budgetary impact thereof. It also took into account that such disruption was incurred by taxpayers, while significant efforts were made to lower unemployment and priority was given to promote economic growth.

Similarly, in its decision N. 10-D-28 of September 20, 2010 regarding multilateral exchange fees for processing checks, the Autorité examined the impact of the infringements on each category of remitting customers (the Treasury, as well as “large remitting customers”, other firms or retail banking customers). It provided an estimate, considering that for each extra cent of overcharge, the price paid by customers had increased by €220 million over the entire period of time.

### **1.3 Relationship between administrative enforcement of competition rules and damages caused to victims of anticompetitive conducts**

As a consequence of the nature and objectives of its mission to safeguard the economic public order, and also of the procedural tools at its disposal, the Autorité does not proceed with the assessment or quantification of the harm suffered by the individual victims of the cartel or abuse that it finds, nor does it subsequently calculate the damages that they are entitled to claim. Such power is vested exclusively with civil or commercial courts, which are entitled to rule on the claims for damages lodged by these victims.

However, when the Autorité, finding an anticompetitive practice through a final decision, takes into account the harm done to the economy so as to set the fines imposed on infringers, its enforcement action

provides a step-stone on which potential victims of such practices can build in order to substantiate their own action in tort (« follow-on action »).

Indeed, according to the Commercial Code, all decisions of the Autorité, including those finding an infringement and imposing fines, are public (with the exception of confidential business secrets contained therein) and made available on its website from the moment they are notified to the infringers.

Furthermore, these decisions are motivated in a detailed manner. Thus, they enable every victim to have a precise notion of the general consequences that the cartel or abuse they were victims of may have had on the sector or market concerned, and on the consumers (whether end consumers, intermediate users, distributors, customers or competitors). They may also provide information on how this anticompetitive practice affected the functioning of downstream sectors or markets and the general functioning of the economy. Finally, potential victims may also have access to the assessments and overcharge estimates that the Autorité may come to issue in cases where the required data is available and reliable.

When examining the action brought by claimants for private damages, the court can also rely on the analyses provided by the Autorité in its decisions in order to assess the importance of the harm done to the economy, even though its assessments and legal findings are not binding on judges, as opposed to the situation that prevails in an increasing number of jurisdictions.

The Autorité's assessments, which are always thoroughly motivated and substantiated, will help courts to put into context the arguments raised by the plaintiff in the broader picture of the consequences upon the economy incurred as a result of the infringement.

Finally, corporate victims (e.g. competitors), together with consumers via certified consumer associations, can also act earlier on as complainants in the procedures conducted by the Autorité. Lodging a complaint before the Autorité entitles them, in the same way as the alleged infringers, to be a party to the proceedings and benefit from extensive procedural guarantees: in particular, access to the file, right to submit written observations in response to the statement of objections and the report drafted by the Investigation Services of the Autorité, right to be orally heard by the Autorité's Board during the hearing held in each case. They enjoy wide opportunities to make their points heard, notably on the importance of the harm done to the economy, on the basis of an either qualitative or quantitative economic reasoning.

This right of the victims of anticompetitive practices to contribute to the Autorité's mission to preserve economic public order plays an important role in practice, as it greatly helps the Autorité to detect potential anticompetitive agreements or abuses of dominant position, by producing useful information, as well as by participating in the debate on the facts of the case, especially on some of the elements that can be considered when assessing the fine. Corporate or consumer victims, who are familiar with the actual daily environment of the infringement, can be instrumental in supplying the Autorité with information and economic data useful to better understand the facts and their consequences, for instance in sectors such as services, banking or retail.

## **2. The methods for assessing the importance of the harm done to the economy**

### **2.1 *An objective assessment***

From an economic theory viewpoint, the damage done to the economy may roughly be split between two cumulative features, evidencing that it is not limited to the mere illegal profit. On the one hand, it includes a direct transfer of consumer surplus to the infringers (a feature roughly equivalent to the mere illegal profit) and on the other hand, to the loss of welfare to the wider economy, which will very much depend on the aims and the actual or potential effects of each infringement.

In order to exactly quantify it, one would require to perform a very fine-tuned counterfactual analysis based on assumptions that can never be ascertained. This is because it is impossible to intellectually design in a reliable manner the situation that would have prevailed, should the anticompetitive practice have not occurred, since any market outcome is determined by a very large number of variables that interact with one another. As a result, it stems from consistent case law of review courts that the Autorité has no burden to quantify nor provide an exact figure for the harm done to the economy.

As recently pointed out by the French Supreme Court, in a ruling of the April 7, 2010, this does not entail that the harm done to the economy shall be presumed, even in the case of those anticompetitive practices that the OECD considers as the most serious infringements (cartels, bid rigging). On the contrary, the law requires that its importance be assessed on a case-by-case basis, which can be done in consideration of the qualitative and/or quantitative elements available to the Autorité in each case. Hence the Autorité assesses the importance of the damage to the economy according to the objective factors that it may gather or approximate with sufficient reliability in every particular situation, as, inter alia, price elasticity of the products concerned by the infringement.

## 2.2 *A case by case assessment*

On the basis of consistent decisional practice and case law, this assessment is substantiated in practice by a magnitude range. In order for such magnitude range to be determined, the Autorité carries out a case-by-case analysis of every particular situation, depending on the economic sector concerned by the infringement, the scope and characteristics of the infringement, and also on the consequences these are entailing, in consideration of the available information and data.

The Autorité takes a qualitative approach, but also a quantitative approach where relevant data is available and reliable. The discussion with the parties during the proceedings, which encompasses the main elements that can be taken into consideration so as to set the fine, including the importance of the harm done to the economy, grants significant room to test the relevance, reliability and robustness of this data, but also, as need may be, to complement it, polish it, or conversely dismiss it.

Among the elements to be considered in order to assess the importance of the harm done to the economy, the Autorité may look, inter alia, at the following features, depending on their relevance to be appreciated on a case by case basis:

- the extent of the anticompetitive practice (geographic coverage, combined market shares of the undertakings concerned, etc);
- the economic characteristics of activities, sectors or markets at stake (barriers to entry, concentration degree, price-elasticity on demand side, profits recouped, etc);
- the economic consequences of the practice (overcharge, absence of an expected price fall, indirect effects on downstream or closely-related economic sectors or markets, etc);
- the structural consequences (rising up or creation of barriers to entry, foreclosure effects, discipline or retaliation effects towards competitors, lower level of quality or innovation, hindrance to technical progress, impact on competitiveness of the players on other markets or on the sector at stake, etc), and
- more generally, any adverse impact on the economy, downstream users or end consumers.

## GERMANY

### 1. Introduction

The quantification of harm and damages plays an increasing role in the enforcement of competition law. This applies both to fine procedures by the competition authorities and to civil damages claims. Focusing on cartel agreements, this submission seeks to provide an overview of the German law and practice regarding the quantification of harm in public (II.) and private (III.) enforcement.

### 2. Public enforcement of national antitrust regulations in Germany

#### 2.1 *The role of the quantification of harm in public enforcement*

The *Bundeskartellamt* is competent to investigate and decide on collusive behaviour and to impose fines.<sup>1</sup> Fined parties may appeal the decision of the *Bundeskartellamt* to the Higher Regional Court of Düsseldorf which reviews the agency's decisions in their entirety. Decisions of the Higher Regional Court can be appealed to the Federal Court of Justice on points of law only. The quantification of harm has traditionally played a significant role in the practice of the competition authority and the courts in determining the level of fines.

##### 2.1.1 *Current legal basis*

The legal basis for fining cartels was revised in 2005 with the 7<sup>th</sup> Amendment<sup>2</sup> of the ARC. According to the current Section 81 (4) ARC, the fines imposed must not exceed ten percent of the worldwide overall turnover of the fined company in the previous business year. The fining rules of German law correspond to European practice.<sup>3</sup> Furthermore, the 7<sup>th</sup> Amendment aimed at attenuating the complex problem of estimating the additional earnings gained from a cartel agreement.<sup>4</sup>

With the 7<sup>th</sup> Amendment of the ARC the enforcement process of the *Bundeskartellamt* was further improved. The ARC now contains determining factors for calculating fines in a given case. According to Section 81 (4) ARC, the calculation of fines must be determined by the duration and severity of the infringement. A major indication of the severity is the volume of trade that has been affected by the infringement.<sup>5</sup> The overall harm to competition may be estimated and used as one criterion in the fine-

<sup>1</sup> Section 82 of the Act Against Restraints of Competition (ARC); for English version of the ARC see: [http://www.bundeskartellamt.de/wEnglisch/download/pdf/GWB/0911\\_GWB\\_7\\_Novelle\\_E.pdf](http://www.bundeskartellamt.de/wEnglisch/download/pdf/GWB/0911_GWB_7_Novelle_E.pdf)

<sup>2</sup> Seventh Law Amending the Act Against Restraints of Competition, of 7 July 2005, Federal Gazette of 12 July 2005, p. 1954.

<sup>3</sup> EG Council Regulation (EC) No 1/2003, Article 23.

<sup>4</sup> *Beschlussempfehlung des Ausschusses für Wirtschaft zum Entwurf eines 7. Gesetzes zur Änderung des Gesetzes gegen Wettbewerbsbeschränkungen* – Drucks 15/3640,- published in „Sonderveröffentlichung Wirtschaft und Wettbewerb, *GWB Gesetz gegen Wettbewerbsbeschränkungen i.d.F. der 7. GWB-Novelle*“, p. 72, 145.

<sup>5</sup> *Raum* in: Langen/Bunte, *Kommentar zum deutschen und europäischen Kartellrecht*, Vol. 1, 11th edition, Section 81 para. 161.

setting process but it is not a priority in and of itself. Other determining factors may include the position of the fined party within the cartel, cooperation with the antitrust authority, intent or negligence, etc., as laid down in the *Bundeskartellamt's* Guidelines on the Setting of Fines<sup>6</sup> and in Section 17 of the German Administrative Offences Act.

Under the provisions of the 7<sup>th</sup> Amendment, additional earnings are, at least *a priori*, not a key factor in setting the fine. This is not to say that the additional earnings are of no relevance in the fining process. An estimate of the additional earnings can be helpful in determining the severity of the cartel. Thus, additional earnings are an indicator of the overall harm to competition.

With the 7<sup>th</sup> Amendment the legislator aimed at convergence with the European rules under which the fines imposed by the European Commission have a clearly punitive character. In addition to the imposition of a fine, the *Bundeskartellamt* may also skim off economic benefits achieved from the cartel.<sup>7</sup> Here, the competition authority has the choice either to skim off benefits in the same proceeding in which fines are imposed or to initiate separate proceedings. Whichever method is chosen, the setting of the fine, as a punitive measure, has to be seen separately from the question of determining specific economic benefits.<sup>8</sup> Economic benefits may be estimated, though only with regard to their amount, not with regard to the question whether an economic benefit has been gained at all.<sup>9</sup>

### 2.1.2 Legal basis prior to the 7<sup>th</sup> ARC Amendment

Only infringements committed or terminated after 1 July 2005 fall under the new regulation of the 7<sup>th</sup> Amendment. For all cases pending, the previous regulations are still of significance.<sup>10</sup> For these cases it needs to be determined, in each case, which regulation is applicable and to what extent.<sup>11</sup>

Before the 7<sup>th</sup> Amendment of the ARC entered into force, fines in cartel cases could amount to three times the additional earnings generated by the collusive behaviour. It is established law that the term “additional earnings” refers to the additional overall proceeds generated by the competition infringement. Thus, the term is not to be equated with additional profits.<sup>12</sup> The Federal Court of Justice defined the additional earnings as the difference between actual earnings based on the collusive behavior and the earnings that would have been generated by the undertaking without the infringement,<sup>13</sup> without deduction

<sup>6</sup> Notice no. 38/2006 on the imposition of fines under Section 81 (4) sentence 2 of the Act against Restraints of Competition (ARC) against undertakings and associations of undertakings of 15 September 2006, available under [http://www.bundeskartellamt.de/wEnglisch/download/pdf/Merkblaetter/Bussgeldleitlinien-E\\_Logo.pdf](http://www.bundeskartellamt.de/wEnglisch/download/pdf/Merkblaetter/Bussgeldleitlinien-E_Logo.pdf); see also EU Commission Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003, (2006/C 210/02).

<sup>7</sup> *Raum* in: Langen/Bunte, Kommentar zum deutschen und europäischen Kartellrecht, Vol. 1, 11th edition, Section 81 para. 170.

<sup>8</sup> *Raum* in Langen/Bunte, Kommentar zum deutschen und europäischen Kartellrecht, Vol. 1, 11th edition, Section 81 para. 170.

<sup>9</sup> *Bundesgerichtshof* (Federal Court of Justice), decision of 19 June 2007 – KRB 12/07 (Paper Wholesaler) Id. 11; *Bundesgerichtshof* (Federal Court of Justice), decision of 26 June 2005 - KRB 2/05, para. 18.

<sup>10</sup> See below for a description of the legislation prior to the 7th ARC amendment.

<sup>11</sup> To mention one example, only for one company of the Cement Cartel the Higher Regional Court of Düsseldorf applied the new regulation, because that resulted in a milder fine in the given case.

<sup>12</sup> *Barth/Bongard*, Gesamtwirtschaftliche Analyse: Die große Unbekannte der Mehrerlösermittlung, WuW 2009, 30 (32).

<sup>13</sup> *Bundesgerichtshof* (Federal Court of Justice), decision of 19 June 2007 – KRB 12/07 (Paper Wholesaler) para. 10.

of tax and cost.<sup>14</sup> Consequently, when applying the relevant fining provision, additional earnings derived from the cartel had to be quantified as part of the fining process. The amount of the fines imposed had to exceed the additional earnings, thereby skimming off the economic benefits derived from the offence within the process of setting the fine. The amount of the additional earnings could be estimated; in this respect the provisions have not changed.

## 2.2 *Assessment of effects and methods applied to estimate harm and damages*

The most important negative effects of collusive behaviour, from a customer's perspective, are inflated prices and the resulting reduction in quantities bought (quantity effect). While the price effect applies to actual customers, the quantity effect applies to both actual and potential customers. Both groups would have made purchases, or greater purchases, at a lower, competitive price.

There is a range of possible methods<sup>15</sup> to estimate the additional earnings generated by a cartel agreement. In the practice of the *Bundeskartellamt*, the most relevant and preferable is the comparative market approach.<sup>16</sup> The comparative market may differ from the market under review in terms of time, region or product. This approach needs to address the challenge of adequately delineating the market used for comparison. In addition, potential structural differences (i.e. differences affecting the level of prices) between the market affected by the cartel and the market(s) used for comparison must be properly taken into account. Another important method, though in general only the second-best and suitable if an adequate comparative market cannot be identified, is a cost-based approach. One of the difficulties of this method is the problem of determining relevant (i.e. competitive) cost estimates and deciding on a suitable profit margin ("mark-up").

## 2.3 *Economic expertise in the proceedings of the Bundeskartellamt and courts*

When it comes to the estimation of damages, in complicated cases there may arise the need, especially in court proceedings, for outside economic expertise. Courts may have to rely on quite complex econometric analyses and in this regard may want to call upon the assistance of (court-appointed) economic experts.

Economic analysis in antitrust cases needs to establish practically relevant results within a limited timeframe. Therefore a trade-off between accuracy and feasibility may be unavoidable.<sup>17</sup> The empirical work needs to be conducted in a given timeframe and with limited resources, within the framework of procedural law. The results have to meet the requirements of procedural standards of proof.<sup>18</sup>

In its decision on the *Paper Wholesaler Cartel*<sup>19</sup> the Federal Court of Justice stated that the courts have broad discretion with regard to the quantification of additional earnings. The courts are free to choose

<sup>14</sup> *Bundesgerichtshof* (Federal Court of Justice), decision of 24 April 1991- KRB 5/90 (Bußgeldbemessung).

<sup>15</sup> *Barth/Bongard*, Gesamtwirtschaftliche Analyse: Die große Unbekannte der Mehrerlösermittlung, WuW 2009, 30 (32).

<sup>16</sup> *Barth/Bongard*, Gesamtwirtschaftliche Analyse: Die große Unbekannte der Mehrerlösermittlung, WuW 2009, 30 (32).

<sup>17</sup> *Friederiszick/Röller*, Quantification of Harm in damages actions for antitrust infringements: Insight from German cartel cases, *Journal of Competition Law & Economic*, 6 (3), 595-618 (608).

<sup>18</sup> *Bundesgerichtshof* (Federal Court), decision of 19 June 2007 – KRB 12/07 (Paper Wholesaler), para. 12.

<sup>19</sup> *Bundesgerichtshof* (Federal Court of Justice), decision of 19 June 2007– KRB 12/07 (Paper Wholesaler), available in German only at: <http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&Datum=2007-6-19&nr=41404&pos=9&anz=26>

the methodology best suited to approximate reality, leading to an estimate which is conclusive and yields economically plausible results.<sup>20</sup> However, the Federal Court of Justice also stated that the comparative market approach, i.e. comparing cartelised prices to prices in other, unaffected markets (in terms of region or time), has to be the preferred method to quantify additional earnings. A different approach should only be used if an estimate based on a comparison with competitive markets is not feasible.<sup>21</sup>

In the *Cement Cartel Case*<sup>22</sup> the *Bundeskartellamt* fined the six largest companies involved a total of €660 million. It found that the cartel lasted from 1997 to 2001 and covered certain regions within Germany. To estimate the additional earnings the *time-based comparative market approach* was used. Quantity effects were not considered due to the very low short-term elasticity. In the subsequent appeal of several companies to the Higher Regional Court of Düsseldorf, the court confirmed the infringement, extending the duration of the cartel to the period of 1991 to 2001 and the geographic scope to all regions in Germany.

The Court appointed an economic expert to support it in its estimation of the additional earnings. In a first step, different methodologies were discussed in court hearings, followed by the issue of the expert mandate. Ultimately, an approach for estimating the harm was chosen where the prices charged during the cartel period were compared to the post-cartel prices (comparative market on a time basis). The expert appointed by the Court used the methodology of a time-series regression analysis to estimate the effect of the cartel on the level of market prices. Besides establishing the cartel infringement by using the dummy-variable technique, the time-series analysis incorporated different cost-related (e.g. labor-cost, cost of energy) as well as structural (e.g. HHI) exogenous variables. In addition the expert also considered a “price war period” following the detection and breakdown of the cartel was not a suitable benchmark for estimating the overcharge. All involved parties had the opportunity to pose questions to the expert and comment on the details of the quantitative analysis as well as its results. The *Bundeskartellamt* thoroughly analysed and replicated the quantitative analysis, discussed several technical deficiencies and also proposed refinements to the expert’s estimate. In its decision the Court largely followed the expert’s estimate and made, *in dubio pro reo*, an additional “tentative deduction” of 25% of the estimated additional earnings. The Court considered quantity effects in its estimation of the additional earnings,<sup>23</sup> which the *Bundeskartellamt* had refrained from doing. Following the expert’s estimate it came to different conclusions than the *Bundeskartellamt* concerning the overcharge. Ultimately the court imposed fines totalling €330 million. The decision has been appealed, the final decision by the Federal Court of Justice is still pending.

The consideration of quantity effects in estimating additional earnings poses some conceptual and methodological problems. The debate on what should be the adequate approach continues. An important argument against considering quantity effects is that fines might lose their deterrent character if the quantity effect leads to the reduction of fines.<sup>24</sup>

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<sup>20</sup> *Bundesgerichtshof* (Federal Court of Justice), decision of 19 June 2007 – KRB 12/07 (Paper Wholesaler), para. 12.

<sup>21</sup> *Bundesgerichtshof* (Federal Court of Justice), decision of 19 June 2007 – KRB 12/07 (Paper Wholesaler), para. 19.

<sup>22</sup> See press release by the *Bundeskartellamt* of 14 April, 2003, available at [http://www.bundeskartellamt.de/wEnglisch/News/Archiv/ArchivNews2003/2003\\_04\\_14.php](http://www.bundeskartellamt.de/wEnglisch/News/Archiv/ArchivNews2003/2003_04_14.php)

<sup>23</sup> *Oberlandesgericht* (Higher Regional Court) *Düsseldorf*, June 26, 2009 – VI-2a Kart 2-6/08, para. 525; *Bongard*, Mehrerlöse, Mengeneffekte und volkswirtschaftliche Kartellschäden, WuW 2010, 762-772.

<sup>24</sup> *Bongard*, Mehrerlöse, Mengeneffekte und volkswirtschaftliche Kartellschäden, WuW 2010, 762-772.

### 3. Civil damages actions

Private enforcement of competition law plays an important role in Germany.<sup>25</sup> In the past, the focus was mostly on cease-and-desist proceedings in abuse of dominance cases. However, private damages claims have gained ground in recent years. In this respect, a number of legal provisions introduced with the 7<sup>th</sup> Amendment of the ARC in 2005 are of relevance, most notably: competitors as well as customers are entitled to claim damages; the decision of the competition authority on the matter of a case establishes facts that are to be taken as given in any ensuing damages proceedings; the judge, in a private damages action, has the power to estimate the actual harm caused by the cartel.

Those who have standing to claim damages due to an antitrust violation are competitors or other market participants impaired by the infringement<sup>26</sup>. This also encompasses end-consumers.<sup>27</sup> The related question of how to deal with the alleged passing-on of overcharges is not addressed in the statutes. The question of whether indirect purchasers should be able to claim damages if overcharges were passed on to them has not yet been settled by the Federal Court of Justice. So far, there have been two decisions from higher regional courts, one granting the indirect purchaser the right to sue<sup>28</sup> and the other denying it.<sup>29</sup>

Class action suits are generally not provided for in German law. Although, under certain circumstances, some associations may seek an injunction on behalf of their members, this does not apply to damages claims. A way of compensating the lack of class action suits is a concept according to which a company purchases damage claims from a multitude of companies damaged by the same cartel infringement, and then sues the cartel members for the damages.<sup>30</sup> The first cases in which this concept was applied are currently still pending.

The overall assessment of the harm resulting from an infringement usually does not indicate the damages suffered by an individual plaintiff. The specific damage incurred by a plaintiff in civil damages proceedings is determined by comparing the actual financial situation of the plaintiff with the hypothetical financial situation that would have existed in the absence of the infringement.<sup>31</sup> In cartel cases, the damage incurred by the plaintiff is usually the difference between the (higher) cartel price and the price that would have prevailed in a competitive market. Further damage may consist in potential gains that could not be realised. This refers to the scenario that in a competitive market, the customer would have purchased and resold more goods than he actually did due to the cartelised price. In determining the

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<sup>25</sup> It can be estimated that competition law was an issue in private law claims in more than 1300 cases in 2004 – 2009 (based on notifications by civil courts to the Bundeskartellamt).

<sup>26</sup> Section 33 (1) ARC.

<sup>27</sup> *Bornkamm* in Langen/Bunte, Kommentar zum deutschen und europäischen Kartellrecht, Vol. 1, 11th edition, Section 33 para. 21.

<sup>28</sup> *Kammergericht Berlin* (Higher Regional Court of Berlin), decision of 1<sup>st</sup> October 2009 – 2 U 10/03 Kart.

<sup>29</sup> *Oberlandesgericht* (Higher Regional Court) *Karlsruhe*, decision of 11<sup>th</sup> June 2010 – 6 U 118/05 Kart.

<sup>30</sup> In a pending case the Belgian Company Cartel Damage Claims (CDC) sued Dyckerhoff, Lafarge and the former Readymix Group for the damage caused by the German cement cartel. CDC had purchased the claims from about 30 harmed companies. The case was first filed in August 2005 at the Regional Court of Düsseldorf – 34 O (Kart) 147/05. The German Federal Court of Justice confirmed in the meantime that the damage action of CDC and this concept is admissible – decision of 17 April 2009 – KZR 42/08.

<sup>31</sup> Section 249 Civil Code.

damage the court may estimate the concrete sum based on certain indicators, in particular the additional earnings the cartel participant has obtained (Section 33 (3) ARC, Section 287 Code of Civil Procedure).<sup>32</sup>

The quantification of harm that may have been established in a previous administrative fine proceeding is of indicative relevance for the civil proceeding. Decisions reached in proceedings by enforcement agencies are even binding with regard to the determination of the infringement itself. This is true not only for decisions by the *Bundeskartellamt* but also by other competition authorities, particularly the European Commission or the authority of another member state.<sup>33</sup>

Private damages actions have become increasingly important in recent years. These days, according to information available to the *Bundeskartellamt*, most enforcement authority decisions against hard-core cartels are followed by private damages proceedings.

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<sup>32</sup> *Bornkamm* in Langen/Bunte, Kommentar zum deutschen und europäischen Kartellrecht, Vol. 1, 11th edition, Section 33 para. 99.

<sup>33</sup> Section 33 (4) ARC.

## GREECE

### 1. Introduction

Quantification of harm resulting from anti-competitive behaviour is usually related to private antitrust litigation where the victims of such behaviour put forward claims for damages. This is a process that will be put in effect either by the court itself, after the court has established that the conditions of both antitrust and civil liability are fulfilled, or even by the parties in the course of a settlement.

However, competition authorities may also have to quantify antitrust-related harm in prosecuting conduct. They may be obliged to do so under their law, in order to prove an infringement or in the process of imposing fines.<sup>1</sup> Alternatively, they may find it simply useful, in terms of raising awareness and enhancing the visibility and popular legitimacy of their actions. Doing so might be easy, because it may result from the case file, or difficult, if the harm can only be quantified following certain complicated economic methodologies. It is fair to say that competition authorities, usually, avoid engaging in this process, unless they have specific reasons to do so.

Then, competition authorities, when enforcing the competition rules, do not usually resonate in terms of “quantifiable harm”, in the same way as courts do in private actions. Instead, taking as an example Greek competition law, the Hellenic Competition Commission (“HCC”) resonates in terms of “anti-competitive object” and “anti-competitive effect”. Thus, the underlying rationale behind these two concepts is precisely that certain conduct is detrimental to competition because it causes or is likely to cause anti-competitive harm. However, the latter concept of “harm” is seen in an all-encompassing and abstract manner, unlike the concept of “harm” employed in the context of civil litigation, which is direct, causal, more concrete and personalised. At the same time, the fact that certain conduct is considered anti-competitive by object or (actual or potential) effect, does not necessarily imply the actual existence of quantifiable and compensable harm.<sup>2</sup>

The HCC proceeds below to a sketching of the objectives of competition law enforcement, describes how these integrate the task of the quantification of harm and also makes some observations as to whether competition authorities should be more involved in quantifying compensable harm, from a policy perspective. It then goes on to analyse the conditions for damages liability under Greek law and examines how Greek courts deal with the problem of quantification of harm. Finally, it makes some observations about the quantification of harm in the various most typical categories of anti-competitive behaviour and raises some basic questions for discussion.

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<sup>1</sup> For example, the latest draft of the new Greek Competition Bill provides that among the other factors (severity, duration, geographical coverage, degree of liability), for the determination of the level of the fine, the financial benefit obtained by the defendant shall be taken into account. If calculation of such financial benefit is possible, the level of the fine may not be lower than that.

<sup>2</sup> See e.g. Case C-534/07 P, *William Prym GmbH & Co. KG and Prym Consumer GmbH & Co. KG v. Commission*, [2009] ECR I-7415, paras 79-82.

## 2. Objectives of enforcement and roles of competition authorities and courts

Competition law enforcement pursues three systematically different, yet substantively interconnected, objectives.<sup>3</sup> The first one is *injunctive*, i.e. to bring the infringement of the law to an end, which may entail not only negative measures, in the sense of an order to abstain from the delinquent conduct, but also positive ones to ensure that that conduct ceases in the future. The second objective is *restorative* or *compensatory*, i.e. to remedy the injury caused by the anti-competitive conduct. The third one is *punitive*,<sup>4</sup> i.e. to punish the perpetrator of the illegal acts in question and also to deter him and others from future transgressions.

As to the mechanisms used for competition law enforcement, a fundamental distinction is between public and private enforcement. Public enforcement refers to the application of the competition rules by state organs vis-à-vis private individuals in a “vertical” setting. Private enforcement, on the other hand, refers to a litigation, in which private parties advance independent civil claims or counter-claims based on the competition provisions (i.e. in a “horizontal” setting).<sup>5</sup> Then, a further categorisation can be made within the area of public enforcement between administrative or civil enforcement, where a public authority imposes or proposes the imposition by a court of administrative or civil fines against undertakings (usually corporate entities), and criminal enforcement, where a court imposes penal sanctions (including custodial sentences) usually on natural persons.

Ideally, the above three basic objectives can be pursued inside an enforcement system that combines both public and private elements (public and private enforcement).

Private actions, on the one hand, pursue compensatory and injunctive objectives. The restorative-compensatory objective is served by ensuring compensation for those harmed by anti-competitive conduct, while injunctive objective is served with cease and desist orders and negative or positive injunctions ordered by the civil courts.<sup>6</sup> In the Greek setting, the civil courts have recognised in the past that there is a right to damages for the victims of anti-competitive conduct but there are very few, if any at all, cases of damages awards.

Public administrative enforcement, on the other hand, primarily pursues injunctive and punitive objectives. The punitive objective is pursued through the imposition of fines, which punish the perpetrators and deter them from breaching the law in the future (specific deterrence) but also deter other persons from engaging in, or continuing, behaviour that is contrary to the competition rules (general deterrence).<sup>7</sup> The

<sup>3</sup> See C. Harding and J. Joshua, *Regulating Cartels in Europe, A Study of Legal Control of Economic Delinquency* (Oxford, 2003), p. 229 *et seq.*

<sup>4</sup> The term “punitive” is used here in its generic sense and does not necessarily correspond to criminal law.

<sup>5</sup> See Assimakis P. Komninos, *EC Private Antitrust Enforcement, Decentralised Application of EC Competition Law by National Courts* (Oxford/Portland, 2008), pp. 1-2.

<sup>6</sup> Private actions indirectly serve the punitive objective, too, and may increase deterrence. First, private actions may supplement the retributive and deterrent effect of the public sanctions by attaching punitive elements to the civil nature of the remedies sought (punitive or multiple damages). Second, the very existence of a credible threat of a functioning private enforcement system increases the deterrent effect of the competition law prohibitions. See further European Commission Green Paper on Damages Actions for Breach of the EC Antitrust Rules, COM(2005) 672 final, under 1.1; Assimakis P. Komninos, *EC Private Antitrust Enforcement, Decentralised Application of EC Competition Law by National Courts* (Oxford/Portland, 2008), pp. 7-10.

<sup>7</sup> See European Commission Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003, OJ [2006] C 210/2, para. 4; Case 41/69, *ACF Chemiefarma v. Commission*, [1971] ECR 397, para. 173; Case C-308/04 P, *SGL Carbon AG v. Commission*, [2006] ECR I-5977, para. 37; Case C-76/06 P, *Britannia Alloys & Chemicals Ltd v. Commission*, [2007] ECR I-4405, para. 22.

injunctive objective is pursued through the imposition of positive or negative measures aiming at the discontinuation of the illegal behaviour.

The above, however, does not suggest that competition authorities never pursue restorative or compensatory objectives. There are cases where the public agency enforcing the competition rules may take into account the injury to specific victims of an anti-competitive practice and impose on the perpetrator the obligation to compensate those persons. Indeed, the public agency may pursue this informally, for example through an informal settlement. In addition, some competition regimes also provide for a role for the State in claiming damages, acting on behalf of the victims. The truth, nevertheless, remains that competition authorities are better suited to prosecute and punish illegal behaviour, while leaving the task to compensate the victims of that behaviour to courts. If, in the course of the public proceedings, the authority finds it easy to quantify the resulting harm (e.g. because it has discovered relevant evidence), there is no reason why it should not proceed to do so, but this task should not be primary.

In the Greek setting, the HCC has invariably not proceeded to quantify the harm of anti-competitive practices. It has rather preferred to find an infringement of the competition rules by object or effect. Indeed, especially in the cases where a competition authority finds an infringement by object, its reluctance to quantify the resulting harm is reasonable. The HCC is satisfied that such infringements, pursuant to basic principles of economics, harm competition and prefer to leave the task of quantifying the specific harm, if any, to the courts in the context of private actions. There is no difference in cases of infringements by effect. This is because, at least as far as the HCC is concerned, most such cases refer to exclusionary conduct and it is notoriously difficult for a competition authority to quantify the resulting harm. At the same time, the fact that the authority has proved an anti-competitive effect is sometimes seen as “sufficient” and the authority may see no advocacy benefit in quantifying the harm that a specific competitor has suffered.

Generally, the very few infringement decisions, where the HCC has made a reference to the specific harm caused by the anti-competitive conduct, refer to facts that easily flow from the file. For example, in the HCC’s very recent decision against the professional organisation of civil engineers and architects, the HCC found that the relevant association infringed the competition rules, by adopting, without having any regulatory power, a “minimum cost for construction projects”, which is used for the calculation of architects’ and engineers’ fees. In that context, the specific conduct aimed at and resulted in raising minimum fees for the latter. The HCC found it useful to refer to facts about the specific overcharge that resulted from the association’s actions. In fact, the association itself had calculated the resulting overcharge for the fees and ultimately for the overall construction cost.

### **3. Liability in damages and quantification of harm in Greek civil law**

Under Greek law there is no provision for tort liability specifically for violations of EU or national competition law. Instead, such liability is based on the general provision of Article 914 of the Greek Civil Code (GCC), according to which “*a person who has caused prejudice to another illegally and culpably shall be liable for compensation*”. Therefore, victims of anti-competitive behaviour can rely on this provision and on the substantive provisions of Articles 1 and 2 of the Greek Competition Act (L. 703/1977) and/or 101 and 102 of the Treaty for the Functioning of the European Union (“TFEU”), in order to claim damages. Indeed, it can be argued that, concerning violations of EU competition law, there is a right to damages stemming from the Treaty itself, pursuant to the Court of Justice’s *Courage* and *Manfredi* rulings.<sup>8</sup>

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<sup>8</sup> Case C-453/99, *Courage Ltd v. Bernard Crehan and Bernard Crehan v. Courage Ltd and Others*, [2001] ECR I-6297, paras 25-28; Joint Cases C-295/04 to C-298/04, *Vincenzo Manfredi v. Lloyd Adriatico*

Under Greek law, for damages to be awarded, four cumulative conditions must be fulfilled:<sup>9</sup>

- Illegal conduct: The defendant's conduct must constitute a violation of EU and/or Greek competition law. Like EU competition law, the Greek Competition Act aims also at protecting individual victims, apart from competition as such.<sup>10</sup> Therefore, all persons (including indirect purchasers and consumers) fall within the protective scope of Greek competition law and are thus entitled to claim damages.<sup>11</sup>
- Prejudice-harm: It is essential that the claimant has sustained harm due to the illegal conduct of the defendant. Harm encompasses any deterioration of the tangible and intangible assets of the claimant.<sup>12</sup>
- Causal link: There must be a causal link between the illegal conduct of the infringer and the harm sustained by the victim. Therefore, the illegal conduct must be both *conditio sine qua non* and *causa adaequata* of the harm. With respect to the requirement of *conditio sine qua non*, the infringer's anticompetitive behaviour must be a "necessary condition" for the resulting harm.<sup>13</sup> Furthermore, according to the requirement of *causa adaequata*, the infringer's anticompetitive behaviour must also be a "material cause" of the resulting harm, in the sense that it generally tends to cause such harm in the normal course of events.<sup>14</sup> Thus, the compensation which the infringer will be ordered to pay must be a foreseeable consequence of his conduct.
- Fault: In addition to the abovementioned conditions, Greek tort law also requires that the infringer is at fault, meaning that the infringer acted either intentionally or at least negligently.<sup>15</sup>

As for the calculation of damages, these encompass any deterioration of the claimant's tangible and intangible assets.<sup>16</sup> Greek civil law follows the "theory of difference", which obliges the infringer to compensate for the difference between the victim's actual financial situation after the infringement and the victim's hypothetical financial situation as it would have developed if no infringement had taken place.<sup>17</sup>

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*Assicurazioni SpA, Antonio Cannito v. Fondiaria Sai SpA and Nicolò Tricarico and Pasqualina Murgolo v. Assitalia SpA*, [2006] ECR I-6619, paras 60-61.

<sup>9</sup> See Michalis Stathopoulos, *Law of Obligations: General Part*, (Athens, 1998) [in Greek], pp. 287 *et seq.*

<sup>10</sup> Judgment 18/2002 of the Patras Court of Appeal, *DEE* 2003, 524; Judgment 6042/2002 of the Athens Court of Appeal, *DEE* 2003, 282; Judgment 8843/2004 of the Athens Court of Appeal, *EllDni* 2006, 543; Judgment 1565/2006 of the Athens Court of Appeal, *DEE* 2006, 762; Judgment 2093/2006 of the Athens Court of Appeal, *DEE* 2006, 757; Judgment 1554/2008 of the Supreme Court (*Areios Pagos*).

<sup>11</sup> Antonis Bouchagiar, *Civil Liability for Violations of EC Competition Law*, (Athens, 2009) [in Greek], p. 117.

<sup>12</sup> Michalis Stathopoulos, *Law of Obligations: General Part*, (Athens, 1998) [in Greek], p. 164.

<sup>13</sup> *Idem*, pp. 175-176.

<sup>14</sup> *Idem*, p. 178.

<sup>15</sup> There are doubts, however, as to whether the condition of fault is compatible with EU law, in particular with the *Courage* and *Manfredi* rulings, which do not mention fault. See further Assimakis P. Komninos, *EC Private Antitrust Enforcement, Decentralised Application of EC Competition Law by National Courts* (Oxford/Portland, 2008), pp. 194-197.

<sup>16</sup> Michalis Stathopoulos, *Law of Obligations: General Part*, (Athens, 1998) [in Greek], p. 164.

<sup>17</sup> The "theory of difference" corresponds in fact to the "but for" test, which is employed by other legal systems such as Australia and the United States (See Antonis Bouchagiar, *Civil Liability for Violations of*

The victim's hypothetical financial situation is constructed in accordance with the requirement of "causal link", so that it does not encompass damages which are not caused by the infringement or totally unforeseeable damages.

Under Article 298(1) GCC, the damages cover the claimant's actual loss (*damnum emergens*) and his lost profits (*lucrum cessans*). "Actual loss" is defined as the decrease of value of the claimant's assets or the increase of his debts. "Lost profits" are defined as the claimant's lost opportunity to increase the value of his assets or to reduce the amount of his debts. Since lost profits are hypothetical, they are less certain than actual loss. For that reason, Article 298(2) GCC allows compensation only for lost profits which are expected as probable in the normal course of events or in view of special circumstances, such as specific preparatory actions by the claimant. Therefore, lost profits are estimated from an *ex ante* point of view and they are harder to demonstrate than actual loss, which can be calculated accurately *ex post*.<sup>18</sup>

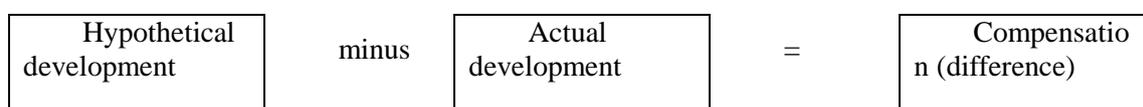
Solely in cases of tort liability, the victim may also seek "reasonable satisfaction for non-pecuniary harm" caused by the competition law infringement.<sup>19</sup> Such is the moral damage caused to the victim's personality. For example, it is settled case-law that legal persons can claim reasonable satisfaction for the harm which the infringement has caused to their reputation and professional credibility.<sup>20</sup>

According to Greek civil law, the courts have no discretion when awarding pecuniary damages. The principle is that damages have to be strictly compensatory: any difference in the property of the plaintiff has to be indemnified - no more, no less. When the extent of damage has been sufficiently proven and substantiated, the court must award indemnification. On the other hand, no indemnification can be awarded, that has not been proven in the court. This strict rule poses a burden on the plaintiff, which, in cases of competition law, is difficult to overcome. The only discretion of the court concerns non-pecuniary harm, for which the courts can award "reasonable" damages. In this area the court has a wide area of discretion, although Greek courts have been until now reluctant to adjudicate high sums of damages.

#### 4. Typical problems arising in the process of the quantification of harm

In the process of the quantification of harm, competition authorities and courts have to deal with a variety of problems.

One problem is accurately to compare the situation of the victim before and after the anti-competitive conduct. The starting point is accepted to be the so-called "but for" test. This defines as harm the difference between the actual state of affairs and the state of affairs that would ensue in the absence of the harmful event (counter-factual scenario). This measure of compensation is essentially reflected in the "theory of difference", which Greek courts generally follow in tort law and can be presented schematically in the following diagram:




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*EC Competition Law*, (Athens, 2009) [in Greek], pp. 51-53; Michalis Stathopoulos, *Law of Obligations: General Part*, (Athens, 1998) [in Greek], pp. 164-165).

<sup>18</sup> *Idem*, pp. 170-172.

<sup>19</sup> Article 932 GCC refers to harm caused to non-pecuniary goods, such as life, health, freedom, honour and reputation. Since such "moral" damage is not quantifiable, courts award reasonable satisfaction rather than compensation.

<sup>20</sup> Judgment 2/2008 of the Supreme Court.

The “but for” test is dependent on the nature of the anti-competitive behaviour and, in particular, on the nature of the harm.<sup>21</sup> In a case of exploitative conduct, where the price of products or services has been artificially increased or kept at a supra-competitive level, the harm covers the overcharge, but one must further take into account and deduct those parts of the inflated price that were passed on downstream and eventually to the final consumers. At the same time, the higher anti-competitive price may also result in existing customers purchasing lower volumes and in customers who would have purchased the product at the competitive price not purchasing at all or purchasing less-preferred alternatives.

In cases of exclusionary conduct, the identification of harm is more complicated, because the excluded actual (or potential) competitors have suffered harm, either in the form of reduced sales because their market presence was limited, or because they were obliged to exit the market altogether (or they were prevented from entering the market in the first place). At the same time, the purchasers and ultimately the consumers may also have suffered harm due to supra-competitive prices they had to pay or due to reduced quality and innovation in the products or services they bought.

In that process, a thorny question relates to the degree that the anti-competitive overcharge was passed on further downstream.<sup>22</sup> The ultimate harm caused to particular direct and indirect customers by the overcharge will depend on the extent to which the price increase caused by the anti-competitive behaviour is passed along the supply chain. This is a significant and complex issue depends on the conditions of the markets concerned.<sup>23</sup> Passing-on is also an area prone to making policy choices, i.e. whether to restrict, abolish or allow the corresponding defence.

Another difficult problem is to establish a causal link between the anti-competitive conduct in question and the harm. While it may be that certain conduct may in theory have many prejudicial effects on various layers and persons, in the end, it will be easier for certain categories of harmed persons to identify and quantify their harm, than for others (due to causation problems). For example, the harm of a direct purchaser in a cartel overcharge case is easier to quantify than the harm of the consumers who were obliged not to purchase products because of inflated prices that were passed on downstream.<sup>24</sup> In addition, certain kinds of harm are usually more difficult to prove and quantify, such as lost profits in comparison to actual losses.

Courts and competition authorities may sometimes find it expedient to quantify harm based on calculations made by the antitrust offenders themselves. If the latter, who by definition know the market much better than the former, aimed at a specific effects on the market and calculated such effects, there is no reason why the competition authority should not refer to such calculations and presume that they represent the actual harm. The situation of courts is slightly different: they can only draw inferences from such evidence but cannot consider it as conclusive, since they have to resolve a civil dispute and arrive at a concrete damages award by proving and quantifying the harm in question. In all such cases, the authority or the court should be open to arguments and evidence showing that the offenders’ calculations were misplaced.

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<sup>21</sup> See further Oxera, A. Komninos *et al.*, “Quantifying Antitrust Damages: Towards Non-binding Guidance for Courts”, Study Prepared for the European Commission, December 2009, p. 12 *et seq.*

<sup>22</sup> *Ibid*, p. 116 *et seq.*

<sup>23</sup> See Bryan Ray and Steven Schwartz, “Monopoly Overcharges, Pass-through Pricing, and Economic Damages”, in: Wu (Ed.), *Economics of Antitrust, Complex Issues in a Dynamic Economy* (White Plains, 2007), p. 210 *et seq.*

<sup>24</sup> Oxera, A. Komninos *et al.*, “Quantifying Antitrust Damages: Towards Non-binding Guidance for Courts”, Study Prepared for the European Commission, December 2009, p. 27.

Another interesting question is whether courts and authorities can rely on certain proxies or presumptions about the existence and (possibly) the quantification of harm. Empirical studies show that certain types of anti-competitive behaviour, such as cartels, result in harm and such studies have actually referred to averages of harm per type of infringement (e.g. cartels). It may be that courts, in particular, may find such proxies *prima facie* useful, but their use by competition authorities is unlikely, since the proxies usually refer to types of conduct that are patently anti-competitive: in such cases the authorities are either unlikely to research the effects of the practice in question or bound to arrive at a specific figure of harm (for reasons related to calculation of fines).

Finally, with reference to the specific role of competition authorities, while, as explained above, quantification of harm should not be their core duty, it may be possible for them to make certain statements about the harm in question, based on sound factual and economic evidence. Such statements should fall short of actually quantifying the harm, but can be extremely useful to courts and victims, which can then avail themselves of a strong basis and starting point in their efforts to prove and quantify the specific harm they suffered.



## HUNGARY

This contribution discusses the aspects of quantification of harm to competition in the competition law enforcement activity of the Gazdasági Versenyhivatal (Hungarian Competition Authority, hereinafter referred to as the 'GVH') and the Hungarian Courts.

The submission follows the structure of the questionnaire of the OECD Secretariat.

### 1. **The role of quantification of harm to competition in public and private enforcement of national antitrust legislation**

Quantification of harm does not play a special role in the enforcement of competition law in Hungary, although harm to competition is of course a crucial element in enforcement. For example, according to Hungarian Act LVII of 1996 on the Prohibition of Unfair and Restrictive Market Practices (hereinafter referred to as the 'Competition Act'):

- one of the criteria of issuing an order opening an investigation is that the proceeding is necessary to safeguard the public interest;
- the investigation may be terminated if the continuation of the procedure does not serve the public interest.

According to the practice of the GVH, in both of the above cases, the definition of safeguarding/serving the public interest includes some form of quantification of harm to competition. This quantification is not based on hard-core economic evidence, and it is more or less a simple estimation, based on common sense. For example, in case Vj-42/2008, the Competition Council<sup>1</sup> terminated part of the proceeding because the Competition Council concluded that the harm to competition caused by the agreements under investigation was minor and only theoretical.

Finally, it should also be added that some form of quantification of harm to competition arises when the Competition Council finds that a certain agreement has the effect of distorting competition. Once again this is only a quasi- logical (theoretical) deduction that usually has no economic background based on calculations. For example, in case Vj-51/2005, where the two market leader insurance companies agreed with individual automobile dealers that they would accept higher hourly wages in return for new insurance contracts, the Competition Council concluded that harm to competition must have arose, because, for example, other insurance companies on the market also had to apply higher hourly wages and increase their expenses, (it is worth admitting that in this case the agreements were found to be unlawful even by object).

### 2. **Admissibility**

As we have no knowledge of judgments that deal with damage actions in the field of competition law, we can only base our submission on the general rules of Act IV of 1959 on the Hungarian Civil Code, and Act III of 1952 on Civil Procedures.

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<sup>1</sup> The Competition Council is the decision-making body within the GVH.

According to the Act on Civil Procedures, any natural or legal person can sue or can be sued. A claimant can only enforce its claim if it has standing, i.e. its rights or interests are affected by the legal dispute, or it is authorised by law to bring an action.

It is worth mentioning here that there are special legal provisions that in some cases authorise public authorities to bring actions against the illegal behaviour of those who have caused damage to a significant number of consumers (private individuals acting outside their business or profession). The GVH is also authorised by the Competition Act to file an action to enforce the civil law claims of consumers. This is possible where the conduct of the undertaking that infringes the provisions of the Competition Act concerns a large group of consumers, the identity of whom is unknown, but which can be defined based on the circumstances of the infringement. In such a claim, the existence of a uniform legal basis of the claim put forward, together with a common uniform amount of damages claimed; have to be verified as a consequence of the fact that the consumers concerned by the claim are in an identical situation. The court admitting such a claim shall oblige, by its judgement, the undertaking to satisfy the demand raised by the claim and shall identify the group of consumers entitled to request the fulfilment of the obligation imposed by the judgement and determine the data required for verification the an individual is part of the group of consumers concerned. Nevertheless such actions, mainly due to the fact that this possibility is relatively new, have not yet been initiated by GVH, though in cartel cases affecting consumers directly (eg. price fixing of consumer products) using such means may also be considered.

The Civil Code enables any injured party to sue the alleged tortfeasor. For a successful action, the general elements of liability have to exist (i) illegal conduct, (ii) existence of damage, (iii) causal link between the illegal conduct and the damage, and (iv) fault.

### **2.1 Indirect customer**

We do not see any obstacles as to why an indirect customer would not be able to sue. As mentioned above, anyone who has standing can sue, and the fact that a customer is not in a direct relationship with the defendant does not pose as an obstacle to suing.

### **2.2 Passing on defence**

Please see the answer to point E.

### **2.3 Rebuttable presumptions**

Article 88/C of the Competition Act contains the following rebuttable presumption (emphasis added):

*In the course of civil proceedings for any claim conducted against a party to a restrictive agreement between competitors aimed at directly or indirectly fixing selling prices, sharing markets or setting production or sales quotas that infringes Article 11 of this Act or Article 81 of the EC Treaty, when proving the extent of the influence that the infringement exercised on the price applied by the infringer, it shall be presumed, unless the opposite is proved, that the infringement influenced the price to an extent of ten per cent.*

Anyone who sues can rely on this presumption, so it makes no difference whether a direct, indirect customer is suing, or whether it is a single or class action. It is for the defendant in such cases to prove that no damage has occurred as a result of its conduct. This could happen, for example, if the conduct has no influence on the price, or the extent of the influence on price is less than 10 %.

In absence of any judgments, it is not clear whether this presumption only applies to the sum of the damage or whether it also touches upon the causal link.

### **3. Defining harm to competition**

Once again we have to emphasise that our answer is based on the rules of the Hungarian Civil Code and the practice of the courts in other – non- competition law related – fields of damages actions.

Damage in civil law involves (i) pecuniary damage: actual damage, lost profit and cost in connection with reducing the damage, as well as (ii) non-pecuniary damage. As a general principle, all damage suffered by the person suing should be compensated.

### **4. Methods**

We do not know what methods would be applied when estimating the damages. As mentioned earlier, there has been a rebuttable presumption since June 2009 that the extent of influence on price is 10%. However, this does not automatically mean that there is 10% damage.

As to cases which took place before this presumption of law came into effect, and that, therefore, could not apply this presumption, we know that there are ongoing cases where the claimants are relying on international studies, according to which the harm caused by cartels is usually 16 %. As far as we know, no economic-based study/calculation is prepared by the claimant. There have been no judgments in any of these cases up until this point and we, therefore, have no knowledge of how the court will handle this method, but we feel that the claimant should produce harder evidence (more evidence) on the quantity of harm, it is not enough for a successful claim to say that according to international studies the harm is usually 16 %.

### **5. Pass-on defence**

The Hungarian courts have no established practice on this issue either. We think that passing on should be dealt with under the ‘damage’ or ‘causal link’ elements of the liability. For example, as a simple method one could say that if a price increase is passed on then the direct customer suffered no harm, unless the customer can prove other harm (e.g. less sold quantity).

### **6. Data availability**

Without having any practice on private enforcement, we feel that the issue of data availability is going to be one of the key issues.

#### **6.1 *Stand alone cases***

Hungarian civil procedure does not entail discovery rules that are known in the United States or the United Kingdom. As a general principle, the facts, based on which the case can be decided, shall be adduced by the party bearing a vested interest in persuading the court to recognise them as true. The court shall order the taking of evidence on its own initiative if permitted by law. At the request of the party bearing the burden of proof, the court may order the opposing party to present any document that is in his possession that he is otherwise liable to submit or present under the rules of civil procedure. This obligation is in particular bestowed upon the opposing party if the document in question was made out to the benefit of the party adducing evidence, or if it embodies a relationship pertaining to him, or if it pertains to a hearing connected to such a relationship. The consequence of not fulfilling the court’s request is a procedural fine, which is rather low (cc. 2000 Euros maximum)

- Where a document is held by a person who is not involved in the action, then this person shall be heard as a witness and shall be ordered to present the document during questioning. However,

this person can refuse to produce the document if he has a legal obligation to protect the content of the document as a business secret.

- Regarding documents in the possession of another court, authority, etc. the court shall take the necessary steps to obtain them if they cannot be released directly to the party. Once again if the document contains a business secret then the court has to request a waiver and if the waiver is denied the document cannot be admitted as evidence.
- To summarise the above, it is not easy for a claimant to collect data that could support the claim as he probably does not have the necessary data. The business secret defence can be used by third persons, and the defendant will not be willing to produce the requested documents.

## **6.2 Follow-on actions**

We do not think that the situation is better in the case of a follow-on action regarding data, as the file of the Competition Authority does not typically include the data that is necessary for quantifying the harm. In case it does, it would probably be a business secret and the rules mentioned above would apply, which means that in the absence of a waiver the data cannot be used as evidence. (We have to mention at this point that there is slight uncertainty as the Public Administrative Procedures Act<sup>2</sup> states that access to a file cannot be denied based on the business secret “defence” if the denial impedes rights guaranteed by law. It seems though that there is a contradiction between the Civil Procedure Act and the Public Administrative Procedures Act regarding the question of access to business secrets.)

## **7. Integration of economics in legal processes**

N/A

## **8. General experiences**

N/A

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<sup>2</sup> Act CXL of 2004 on Public Administrative Procedures

## ITALY

### 1. Introduction.

In the last decade the debate on private antitrust enforcement has progressively grown in Italy as well as in the European Community. The attention of the experts primarily focused on the issue of quantification of *private damages* and on the existence of an effective legal framework for compensation of the harm suffered by victims of anticompetitive conducts. There is growing awareness of the fact that sanctions imposed through public enforcement might not be a sufficient deterrent to anticompetitive behaviours if not complemented by private damages actions.<sup>1</sup> Such quantification is very complex and Italian Courts often find it difficult to assess the economic damage consequent to an antitrust violation. In some cases, the Courts have drawn on elements and arguments used by the Italian Competition Authority in its decisions on the infringements originating the civil claims. However, the Italian Competition Authority does not engage in an analysis of the aggregate harm to the economy flowing from any anticompetitive conduct, because the evaluation of harm to competition is not required by the Italian Competition Law; moreover, the quantification of such harm raises complex methodological issues and the data are difficult to obtain.<sup>2</sup>

At present, according to Art. 15 of the Italian Competition Law, when the Italian Competition Authority determines the measure of the sanction, it does not do so on the basis of an assessment of the aggregate harm to the market, but only on the basis of the seriousness of the anticompetitive conduct.

This contribution will firstly analyse the Italian general legal framework under which Courts will assess the economic harm caused by antitrust violation.

The second part of the contribution will focus on the types of harm entailed by anticompetitive conducts, with a survey of cases where the Italian Courts themselves conducted a quantification of harm.

### 2. Harm and damages: the legal framework in Italy

#### 2.1 Overview

According to the Italian Competition Law (Law no. 287 of October 10<sup>th</sup>, 1990, hereinafter the “Competition Act” or “CA”), the participation in a cartel and the abuse of a dominant position in the market constitute administrative offences. The public enforcement the Competition Act is deferred to the Italian Competition Authority, which enjoys investigative and adjudicative powers.

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<sup>1</sup> See Sabbatini, *Interesse private e interesse pubblico al risarcimento del danno antitrust*, in *Mercato concorrenza regole*, n. 2/2010; a different opinion is held by L. Prosperetti, *Il danno antitrust*, Bologna, 2009, p. 98.

<sup>2</sup> Economic analysis aimed at assessing an effect evaluation of the anticompetitive behaviour has, nevertheless, been carried out internally, with reference with some recent cases assessed by the Authority, see Sabbatini, *Assessing the Impact of Antitrust Intervention by the Italian Competition Authority*, *De Economist*, 2008, vol. 156, issue 4, p. 491-505.

Italian law provides no ad hoc rules in respect of antitrust damages. In this respect antitrust law differs, for instance, from unfair competition law and intellectual property law, under which special rules on damages (and on methods of assessing their quantification) are expressly provided for.<sup>3</sup>

## 2.2 *The elements required for damages by Italian tort law*

According to the Italian case law, tort liability rests on three conditions: unjust damage, the causal link between conduct and harm, and the fault of the infringer. Only once the existence of all these three conditions has been established, the quantification of damages can be assessed.

### 2.2.1 *“Unjust” damage*

Firstly, according to the Italian civil code, tort liability subsists when a conduct causes an “unjust” damage, which is a damage caused by an illicit conduct breaching a duty provided for by the law.<sup>4</sup>

Since the first point to consider in evaluating a claim for damages is the subsistence of an illicit conduct, the activity of the Competition Authority becomes an important basis for private actions as it eases the plaintiff in proving the existence of a competition law violation. In fact, in Italy private actions for antitrust damages can be started before civil Courts: a) subsequent to a Competition Authority’s decision (follow-on actions), or b) in absence of any public enforcement procedure (stand-alone actions). In general terms, stand-alone actions are much more uncertain in terms of probability of success as the plaintiff is required to offer evidence of the anticompetitive conduct. The burden of proof is lower, in practice, when the private actions follow a decision of the Competition Authority, since Italian Courts in most cases tend to align themselves with the position of the Competition Authority, although formally they are never bounded by administrative decisions.<sup>5</sup>

### 2.2.2 *Causal link*

In addition to the juridical connection between the illicit conduct and the harm, the law requires a *causal link* between the illicit conduct and the harm. According to the Italian civil code, the harm must be *directly* related to the violation, and this means that no further event or behaviour (of the plaintiff, of the

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<sup>3</sup> With reference to unfair competition, according to Art. 2600 of the Civil Code, if the anticompetitive conduct are held in fault or intentionally, the author must restore damages deriving from said conduct. Moreover, once the conduct is qualified as unfair, the fault is presumed. With reference to intellectual property law, Art 125 of legislative Decree n. 30 of February 10th 2005 (Intellectual Property Act) introduced a special rule for the quantification of damages: besides the general criteria of quantification provided for by art. 1223, 1226 and 1227 of the Civil Code, it is possible to take into account the profit of the violator.

<sup>4</sup> Article 2043 of the Italian Civil Code: “Compensation for unlawful damage. Any wilful or negligent conduct, causing an unjust harm to third parties, obliges the tortfeasor to compensate the damages.” Article 2043 is the basic provision establishing the system of liability in tort. This liability is fault based and requires plaintiffs to prove that the unlawful damage was caused by wilful and negligent action.

<sup>5</sup> Moreover, according to the Italian Supreme Court (Corte di Cassazione, ruling n. 2305 of February 2nd 2007, *Fondiarria SAI SpA v. Nigriello*), whilst it is sufficient to allege the assessment of the competition infringement by the Competition Authority in order to prove the existence of an illicit conduct, in any case private actions for damages before the civil courts do not depend upon the assessment of the competition infringement by the Competition Authority since such an allegation is not required by the law for the plaintiff.

violator or of other subjects) must interfere with the consequences of the charged conduct.<sup>6</sup> If, for instance, a competitor injured by an exclusionary conduct exits the market, damages will not be fully accorded by Italian Courts if the exit from the market can be attributed, even only in part, to the firm's inefficiency.

The difficulty of gathering evidence of a direct harm varies according to the type of violation taken into account.

With reference to overcharge offences, costumers suffer a direct harm where they pay a supracompetitive price for a product purchased as a result of competition infringements. It is worth mentioning that, in 2005, the Italian Supreme Court stated that the overcharges paid by clients of some insurance companies involved in a cartel case (previously sanctioned by the Competition Authority) were directly connected to the violation of the competition rules as they represented the outcome of the cartel.<sup>7</sup>

With reference to exclusionary practices consumers would presumably not be able to claim that they suffered a direct harm even if the exclusion of competitors meant that the intensity of competition on the market was lower than it would have been otherwise.

### 2.2.3 *Fault*

Finally, under Italian tort law the restoration of damage is due when the conduct breaching the law is caused by *fault*, which must be always proved by the plaintiff.

## 2.3 *Legal standing*

Until 2005 the Italian Corte di Cassazione held a restrictive position on the possibility for consumers to start private actions in relation to competition rules infringements. Similarly to unfair competition law, the Court interpreted antitrust rules as intended to be protecting the economic freedom of those which were directly subject to their application, that is competitors. Hence it was held that, since effective competition benefits only indirectly consumers, they could not have standing before the Court of Appeal (competent for antitrust private actions according to the Competition Act) and, at most, it would have been through an ordinary action for damages that they could be entitled to obtain restoration of the harm they suffered.<sup>8</sup>

Later, after the Italian Competition Authority sanctioned in July 2000 the members of a car insurance price fixing cartel,<sup>9</sup> (see the box below) a large number of *small claims* for damages followed before the "Giudice di Pace" (which is judge competent for low-value ordinary claims) and the Supreme Court had the opportunity to revise its position on the consumers' legal standing issue.

<sup>6</sup> In Italian general tort law, Art. 2056 of the Civil Code (Harm evaluation) refers to the contractual law of damages as to the issues of "Compensation of the harm" (Art. 1223), "Ex aequo et bono evaluation" (Art. 1226), "Contributory negligence" (Art. 1227).

<sup>7</sup> Corte di Cassazione, ruling n. 2207 of February 4th 2005, *Unipol / Mario Ricciarelli*. This was a follow-on case related to the inquiry of the competition Authority into the motor vehicle insurance sector (See the box in the following paragraph).

<sup>8</sup> See for instance Corte di Cassazione, ruling n. 17475 of December 19th 2002, *Axa Assicurazioni / Larato*, where the Supreme Court held that the client of an insurance company could not stand before the Court of Appeal, claiming damages subsequent to a competition infringement.

<sup>9</sup> Italian Competition Authority, Case I-377, *RC Auto*, decision n. 8546 of July 28th 2000, published in Bulletin n. 30/00.

In ruling n. 2207 of 4.2.2005 the Corte di Cassazione, aligning its position with the one of the Court of Justice expressed in *Courage* (2001),<sup>10</sup> stated that

*antitrust law is addressed not only to competitors but to all market's subjects, which are all those subjects involved by its competitive structure so that they could allege a specific prejudice in case said competitive structure be removed or reduced.*<sup>11</sup>

This position was later confirmed by the Corte di Cassazione with ruling n. 2305 of 2.2.2007.<sup>12</sup>

As a consequence of the Corte di Cassazione's *revirement*, consumers (as well as competitors) have today standing to sue before the Court of Appeal, in respect to domestic antitrust violations.<sup>13</sup>

### Box 1. Motor vehicle liability insurance

In July 2000 the Italian Competition Authority concluded a complex inquiry into the motor vehicle insurance sector concerning the practice of providing insurance for fire and theft only in conjunction with mandatory car liability insurance and the exchange of information between insurance companies.

The conduct in question was evaluated with reference to two significant markets: mandatory car liability insurance and other motor vehicle insurance, particularly for fire and theft. Geographically, both markets were defined as national, inasmuch as the conduct examined was perpetrated directly by the companies supplying insurance policies and influenced the entire national market.

During the inquiry an absolute parallelism of conduct was found between insurance companies, consisting in tying the sale of insurances for fire and theft to the sale of mandatory car liability insurance. From the evidence gathered in the investigation it was possible to ascertain the absence of plausible explanations, other than a concerted action, for the companies' parallel conduct. The Authority considered the following circumstances in this regard: i) the two types of risk covered are fundamentally different and statistically independent, even though they refer to the same good; ii) the characteristics of the insured relevant for the evaluation of mandatory car liability insurance (for example, age, occupation, sex, driving experience, etc.) have no bearing on the evaluation of fire or theft insurance; iii) the two types of insurance are governed by very different rules (only car liability insurance is compulsory) and their prices are determined using different criteria. On this basis, the Authority found that the degree of complementarity of the demand for the two products was very limited and not such as to justify forcing customers to buy joint coverage.

<sup>10</sup> The European Court of Justice, in Case C-453/99 of September 20th 2001, *Courage vs Crehan*, held that the right of victims to antitrust damages is directly conferred by Community law since "the practical effect of the prohibition laid down in Article 81 (1) EC (now: Art. 101 TFEU) would be put at risk if it were not open to any individual to claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition".

<sup>11</sup> Corte di Cassazione, ruling n. 2207 of February 4th 2005, *Unipol / Mario Ricciarelli*, where the Italian Supreme Court explained that the injury protected by antitrust law is the injury to the right to benefit of an effective competition, which is not only a right of competitors but a right of consumers as well.

The harm that shall be compensated is only the one that the violated rule is meant to protect: therefore, with reference to harm to competition, the harm which can be compensated must be an antitrust injury, that is an injury falling into the type antitrust laws were intended to prevent, and not each and all economic injury related to an antitrust violation. For instance, the "indirect damage" is not subject to compensation. An example of indirect damage might be the one suffered by the suppliers of a company injured by the anticompetitive exclusionary conduct held by the incumbent.

<sup>12</sup> Corte di Cassazione, ruling n. 2305 of February 2nd 2007, *Fondiarria SAI SpA v. Nigriello* (See the box below).

<sup>13</sup> While, as to conducts not falling within the scope of the Italian Competition Act but having relevance at a Community level, according to EC Reg. 1/2003 the competent judge is the ordinary national Tribunal having jurisdiction over the place.

As to the exchange of information between insurance companies, the information gathered showed that the conduct of the insurance companies constituted a complex horizontal agreement for the exchange of sensitive commercial information. The understanding was achieved by means of a single information circuit based on the principle of reciprocity, with each company transmitting its own data to a consulting firm in order to receive the data of its competitors. The Authority found that the mechanism put in place by the parties constituted an institutionalised system for the exchange of sensitive data (rates, discounts, risk assumption procedures, contractual conditions, collections, claims and operating costs) designed to make it easier to foresee the conduct of competitors, with the consequence of creating an artificial transparency in the market.

The conduct found was considered a particularly serious infraction, involving a large number of companies and capable of reducing competition significantly in the relevant markets. The Authority therefore imposed a substantial fine on the companies that had been parties to the restrictive agreement, equal to an amount ranging from 1% to 3.8% of the companies' turnover in the relevant markets, according to their responsibility, for an amount equivalent to € 350 mml.

The legal framework can be completed with some notions on the recent introduction of a *collective redress mechanism* into a consolidated Act called "Consumer Code".<sup>14</sup>

Art. 140bis of the Consumer Code was lastly amended by Law n. 99 of July 23rd 2009 and now provides for a collective redress mechanism aimed at facilitating protection of consumers' rights and the subsequent compensation of damage. Such a *collective redress mechanism* applies to antitrust violations on the basis of the explicit provision of article 140bis, point (c), which refers to unfair competition conducts and to anticompetitive conducts. According to Art. 140bis, only eleven Tribunals having place in the main Italian cities are competent for actions sued through the *collective redress mechanism*.

In general terms the *collective redress mechanism* follows the scheme of the opt-in class action, but with many procedural specificity.

#### **2.4 General legal principles in damages actions**

Some important general legal principles that may help to understand the condition under which Courts will assess the economic harm alleged in antitrust claims.

- In general terms there should be no enrichment without cause (Civil Code Art. 2041), meaning that the victim of the harm should be integrally compensated for the exact value of the damage suffered, but no more than that.
- the Courts apply the principle *ne bis in idem*, meaning that no legal action can be instituted twice for the same cause of action.

The first principle represents the reason why punitive damages are not compatible with general Italian tort law.<sup>15</sup> Moreover it also determines the impossibility for Italian Courts to assess the economic harm

<sup>14</sup> In Italian "Codice del Consumo", provided for by Legislative Decree n. 206, dated 6 September 2005.

<sup>15</sup> According to the European Court of Justice, Joined Cases C-295/04 to C-298/04, *Vincenzo Manfredi and Others / Lloyd Adriatico Assicurazioni SpA and Others* (Reference for a preliminary ruling from the Giudice di pace di Bitonto), par. 92-93: "As to the award of damages and the possibility of an award of punitive damages, in the absence of Community rules governing the matter, it is for the domestic legal system of each Member State to set the criteria for determining the extent of the damages, provided that the principles of equivalence and effectiveness are observed."

consequent to an antitrust violation on the basis of the defendant's gains rather than the plaintiff's losses.<sup>16</sup> Finally, and in conjunction with the second, it explains why it is held that defendants in antitrust civil cases should be given the opportunity of a passing on defence.<sup>17</sup>

### 3. Harm to competition assessed by the Italian Courts

#### 3.1 Types of harm

In general, according to the Italian Law, the components of an antitrust injury which must be proved in a claim for damages are:

- the "material damage" (*damnum emergens*), representing the actual reduction in the economic situation of the person who has suffered the injury;
- the "loss of profits" (*lucrum cessans*), representing the profit which could reasonably have been expected but that was not gained as a result of the violation;
- the "loss of chance", as a specific aspect of the loss of profit and representing the loss opportunity to do business;
- the "loss of reputation".

#### 3.2 Empirical methods for quantification of damages

As for the empirical methods used in the assessment of antitrust damages, from a theoretical point of view, three approaches should be mentioned:

- *The before and after approaches* compare prices during the alleged period of violation, with prices before the violation or after its termination, or both. Before and after approaches can be carried out by a comparison of average prices between the periods or by more sophisticated

In that respect, first, in accordance with the principle of equivalence, it must be possible to award particular damages, such as exemplary or punitive damages, pursuant to actions founded on the Community competition rules, if such damages may be awarded pursuant to similar actions founded on domestic law".

As regards Italy, it is worth mentioning that, with ruling of January 19th 2007, n. 1183 (see Ponzanelli, *Danni punitivi: no grazie*. in Foro it. 2007, I, 1460), the Italian Supreme Court denied the possibility to enforce a US Court's decision imposing punitive damages, on the basis that punishment is not within its scope of civil liability, which under Italian law is only addressed to restoration of harm.

<sup>16</sup> For a different perspective on this issue, in general terms see H. Hovenkamp, *A primer on antitrust damages*, available at: <http://ssrn.com/abstract=1685919>. "The rationale for private antitrust damage actions could be either compensation or deterrence. The goal of an enforcement system based on compensation is to restore injured parties to their position had the violation not occurred. The goal of an enforcement system based on deterrence is to identify some optimal level of violations that should be eliminated, and make that level of violations unprofitable by imposing costs on prospective violators. An economic model for assessing the optimal level of antitrust damages will employ a deterrence rationale, making conduct unprofitable precisely to the extent that it is inefficient. As a result, there is a correlation between the expected profitability of harmful conduct and the proper measure of damages needed to deter it."

<sup>17</sup> On the harm translation and passing-on defence translation issues, see Court of Appeal of Turin, ruling of July 6th 2000, *Indaba / Juventus*. The case concerned tying contracts (football match tickets tied to travel packages) which the agent resulted not able to resell to consumers. In its judgement the Court rejected the claim for damages on the basis that the plaintiff had mostly translated the harm to its clients.

econometric tests in order to control for changes in other market conditions. The main difficulty for these approaches is to establish the exact period of violation. Moreover, markets change greatly through time and if a substantial change in supply conditions or consumer preferences causes a shift in the supply curve or in demand curve the before and after method may substantially overstate or understate the true measure of damages.<sup>18</sup>

- *Yardstick approaches* compare the price in the region affected by the anticompetitive conduct with prices in other geographic regions which are not affected by it (*regional benchmark*). Alternatively, when product markets exist with comparable market characteristics, they may be used as a yardstick (*product market benchmark*). The ideal case for the yardstick method is a local cartel where a nearby market can be found, which has the same basic cost structure.
- *Analytical approaches*. A *cost-based approach* constructs the but-for price ‘bottom up’ by measuring the relevant costs of the affected product and adding a reasonable profit margin (which would emerge under normal market conditions). The main difficulty of this approach is in finding robust cost estimates, since accounting costs do not generally reflect economic costs. Moreover competition authorities, Courts and customers often lack a proper understanding of such robust cost measures.

### 3.3 *Private damages decisions by Italian Courts*

In the last few years Italian Courts were involved in several private damages decisions consequent to antitrust violations. The exact number of cases is not available, but overall the phenomenon seems to be significant. For instance, hundreds of damages actions followed the insurance case assessed by the Authority, which found that the members of a car insurance cartel had collectively raised their premiums by 20% between 1994 and 1999 (see case E and F of Appendix). In general, the requests for private damages seem to be growing. Several new cases were reported by a number of legal firms involved in antitrust cases in their answers to a survey recently conducted by the Italian Competition Authority.

As for the methods used by the Courts, few observations can be made. Firstly the Courts seem to be using a case by case approach, difficult to frame within the three methods described above.<sup>19</sup> Secondly it is also difficult to reconstruct the precise reasoning of the Courts because the content of the technical advices provided by the experts to the Courts is not public and may not be reported in the Courts’ decisions. Moreover, the experts advising the Courts are not antitrust economists, this because, giving a restrictive interpretation to procedural rules, the Courts tend to involve professionals that are enrolled in Public Registers (such as accountants) and there are no Public Registers for economists.

With respect to the content of the decisions, there doesn’t seem to be a problem of over-deterrence, since damages accorded to the plaintiffs were, in most cases, modest from a quantitative point of view.

The following Appendix contains a brief description of the most significant cases in which the Courts provided a quantification of harm.

<sup>18</sup> For example, using the before-and-after method to estimate the impact of a uranium cartel would exaggerate the monopoly overcharge if the estimator failed to consider that during the same period a cartel in crude oil also came into existence. The price increase for oil would have pushed the price for uranium up even absent the uranium cartel. In this case, the creation of the oil cartel effectively shifted the demand curve for the uranium to the right. If the before-and-after method is to be accurate, it must take the shift into account. See H. Hovenkamp, *A primer on antitrust damages*, available at: <http://ssrn.com/abstract=1685919>.

<sup>19</sup> Although this has been attempted in L. Prosperetti, *Estimating Damages to Competitors from Exclusionary Practices in Europe: A Review of the Main Issues in the Light of National Courts’ Experience* (February 2009), available at SSRN: <http://ssrn.com/abstract=1551276> and L. Prosperetti, *Il danno antitrust*, Bologna, 2009 (see section III).

## Appendix A

### **Corte d'appello di Milano (Milan Court of Appeal) Case: Bluvacanze / Viaggi del Ventaglio judgment of July 11th2003**

This is a stand-alone case concerning a concerted refusal to deal by two leading Italian tour operators against a discount travel agent. This is, in substance, a collective boycott aimed at enforcing a Resale Price Maintenance scheme with fixation of a minimum price. The practice took place in 2001 and lasted three months (April-June). The claimants sought to recover two heads of loss: a) damage as a result of loss of customers and b) damage to their commercial reputation.

The Court calculated the loss of income suffered by Bluvacanze taking into account the company's income registered in March 2000 with reference to products coming from the defendants and comparing it with the average monthly income registered in the same year with reference to products coming from the defendants. The Court explained that the profit lost could be quantified "by forecasting the earnings that could have been made in the absence of the unlawful behaviour and by projecting the data noted in the past and that could have reasonably been noted in the subsequent period". The Court awarded Euro 185,000 for loss of profits and Euro 50,000 for damage to the commercial reputation.

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## Appendix B

### **Corte d'appello di Milano (Milan Court of Appeal) Case: INAZ Paghe / Associazione Nazionale Consulenti, judgment of December 10th 2004) Follow on Italian Competition Authority (I308), decision of February 3rd 2000**

This damages claim followed on from a February 2000 decision by the Italian Competition Authority, which considered that the collective boycott of the claimant's software packages by the members of the National Association of Employment Consultants constituted a violation of Article 2 of the Italian Competition Law (equivalent of Article 101 of the TFEU).

In its judgment, the Milan Court of Appeal applied a 'but for' test in order to assess the harm suffered by INAZ as a result of the collective boycott. The Court compared the average number of contracts with INAZ terminated by the Association's members in the two years of the collective boycott (1997-98) with the average number of contracts terminated in the years prior to the boycott. On that basis, the Court awarded INAZ €148,200 in damages. As to the loss of chance, the Court considered that it could not be sure that the annual 10 % growth of INAZ business would have continued at a similar rate but for the boycott. This is a classic example of the problems arising from before and after methods (When does "after" begin?).<sup>20</sup>

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<sup>20</sup> See Prosperetti, Luigi, *Estimating Damages to Competitors from Exclusionary Practices in Europe: A Review of the Main Issues in the Light of National Courts' Experience* (February 2009). Available at SSRN: <http://ssrn.com/abstract=1551276>.

### Appendix C

**Corte d'Appello di Roma (Rome Court of Appeal),  
Case: International Broker / Raffineria di Roma, judgment of March 31st 2008  
Follow on Italian Competition Authority (I124), decision of March 13th 1996**

The case related to an anticompetitive agreement between the shareholders of the company owner of the “Raffineria di Roma” (refinery of Rome) aimed at concentrating the distribution of bitumen – which before was sold by each shareholder autonomously – in the hands of one single subject.

International Broker, an agent researching the best price for bitumen and purchasing it on the clients’ behalf, once the prices became uniform due to the co-ordination agreement, lost all potential acquirers for its services.

In its judgment, the Court of Appeal of Rome confirmed the anticompetitive nature of the agreement (which in 1996 was declared illicit by the Italian Competition Authority) and declared that International Broker was entitled to recover damages.

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### Appendix D

**Corte d'Appello di Roma (Rome Court of Appeal),  
Case: Albacom S.p.A. and others v. Telecom Italia S.p.A, judgment of January 20th 2003  
Follow on Italian Competition Authority (A285), decision of April 27th 2001**

The case related to an abuse of a dominant position by Telecom Italia by foreclosing access to the market for services of data transmission through digital subscriber line (DSL) and other technologies. The market had been liberalised and the incumbent with market power (Telecom) was required to allow access to the network upon request to potential competitors. However, Telecom had denied access to the network for data transmission to competitors, and thereby abused its dominant position.

The claimants sought to recover two heads of loss:

- damage to their commercial reputation;
- damage as a result of loss of customers.

In its judgment, the Court of Appeal of Rome considered that while the claimants had failed to prove that they had suffered any loss of commercial reputation, they were entitled to recover damages resulting from their exclusion from the market during the period of Telecom Italia’s exclusionary conduct, based on findings of the Italian Competition Authority which had previously fined Telecom for the same behaviour. The total amounts of damages awarded were as follows: Wind — equivalent to approximately €137,468; Albacom — equivalent to approximately €1,312,402; and Cable & Wireless equivalent to approximately €174,987.

## **Appendix E**

**Giudice di pace di Bitonto (Justice of the Peace of Bitonto),  
Case: Vincenzo Manfredi v. Lloyd Adriatico Assicurazioni SpA, judgment of May 21st 2007  
Follow on Italian Competition Authority (I377), decision of July 28th 2000**

In support of his damages claim, the claimant relied on Article 2043 of the Italian Civil Code and argued that he had suffered harm as a result of the cartel. He quantified the harm by relying on the finding of the Italian Competition Authority that premiums had been raised by 20% as a result of the cartel. On the basis of a simple calculation (20% increase of premiums for the five years of the cartel's duration), he sought to recover €444.55 in damages.

In the judgment, the Justice of the Peace of Bitonto, adjudicating on the basis of equity further to Article 113(2) of the Code of Civil Procedure, went further than full compensation by awarding the claimant double damages (€89.10) in order to increase deterrence and to skim off the illegal profits made by the defendant as a result of the cartel. The decision was later reversed by Corte di Cassazione (Italian Supreme Court).

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## **Appendix F**

**Corte di Cassazione (Italian Supreme Court),  
Case: Fondiaria SAI SpA v. Nigriello, judgment of February 2nd 2007 n. 2305  
Follow on Italian Competition Authority (I377), decision of July 28th 2000**

According to the Supreme Court, the causal link between the anti-competitive conduct and the alleged damage can be established on the basis of 'probabilistic presumptions' in order to deduce the relationship between antecedents and consequents, although the judge is always under a duty to take into account any evidence provided by the defendant aimed at rebutting such presumptions and at proving that other factors have caused, or have contributed to causing, the loss.

The Supreme Court also confirmed that when the exact quantum of the loss is difficult to prove, the Italian Courts can rely on Article 1226 of the Italian Civil Code and award an equitable amount of damages (ex aequo et bono).

## Appendix G

**Corte d'Appello di Milano (Court of Appeal of Milan),  
Case: Telystem SpA v. Telecom Italia SpA, judgment of December 24th 1996  
Follow on Italian Competition Authority (A71), decision of January 10th 1995**

This damages claim proceeded in parallel with an investigation by the Italian Competition Authority, which was closed in 1995 with the authority adopting a decision stating that Telecom Italia had abused its dominant position by preventing the claimant from entering the market for telecommunication services for closed user groups.

In its judgment, the Court of Appeal of Milan accepted that the defendant's conduct was anticompetitive and that damages should be awarded. The experts appointed by the Court calculated the claimant's actual losses on the basis of documented costs that the claimant had incurred. In relation to lost profits, the experts considered that the claimant's future expansion would have been limited by the fact that it had not made sufficient investments in publicity and other promotional activities, by the lack of direct and incentivised sales staff, and by the significant delays between the signing of new contracts and the activation of the service. No damages were awarded for lost opportunity for entry into the new market because the Court considered that "after the obstacles have been overcome and Telystem has reacquired full operational capacity, there is no reason to believe that the planned activity could no longer be put into effect. The market's potential was not modified; no other competitor has entered the market; the same SIP has not implemented particular market penetration policies; the attractiveness of Telystem's proposal has not faded". The damages calculation was therefore concentrated on the plaintiff's lost business and profits foregone as a direct result of the infringements.



## JAPAN

### 1. Introduction

Impediments to fair and free competition in the market harm the Japanese economy as they discourage the incentives of enterprises to exert their originality and ingenuity and disturb sound and democratic developments of the national economy. The Antimonopoly Act (hereinafter referred to as “the AMA”) provides for rules to be followed by enterprises in their business activities and the Japan Fair Trade Commission (hereinafter referred to as “the JFTC”) is responsible for enforcing the AMA with the aim of maintaining the competitive mechanism of the market.

Generally speaking, possible approaches for quantifying the harm caused by conduct that restrains competition include calculating damages incurred by the direct victims and estimating the deadweight loss, which refers to the loss to society caused by anticompetitive conduct. Japan has yet to undertake sufficient studies on the quantification of harm. The following focuses on the calculation of damages incurred by the direct victims, given that there are a relatively large number of such cases. Specifically, the following discusses the system for damage suit under the AMA, reports of the JFTC’s study group on quantification of harm, and examples of the calculation of harm in judicial practice.

### 2. Overview of the damage suit system

#### 2.1 *Violation acts subject to liability for damages*

Pursuant to Article 25 of the AMA, any enterprise or trade association that has committed private monopolisation, unreasonable restraint of trade, unfair trade practices, certain international agreements or contracts (concerning unreasonable restraint of trade or unfair trade practices), or acts that restrain or inhibit competition shall be liable for faultless (i.e. non-existence of intention or negligence) damages suffered by another party.

Apart from cease and desist orders issued by the JFTC for ruling out any conduct in violation of the AMA, the provision for liability without fault for damages in relation to violations of the Act is intended to ensure that the damages caused by violations of the Act will be properly and swiftly covered to eliminate any harm from such conduct to the economy, while simultaneously restoring the competitive order and preventing violations of the Act.

#### 2.2 *Scope of victims*

An enterprise or a trade association must accept liability without fault for damages caused by private monopolisation or any other violation with respect to the party suffering from the damages arising from the violation. This applies irrespective of whether the victim is a consumer or an enterprise, whether it is a competitor of or has trade with the violating party, or whether it trades with the violating party directly or indirectly.

It is understood that the scope of the victims is broadly interpreted for the purpose of increasing the effect of eliminating the harm caused by any act in violation of the AMA to the economic society and of preventing such acts.

### **2.3      *Liability without fault for damages***

The reason why the AMA provides for non-fault liability for damages is considered to be aiming at easing the burden on the plaintiff (i.e. the victim) to provide evidence and at facilitating compensation for damages caused by the violation. According to the Civil Code as general legislation that governs relationships between private persons, claims for damages on the grounds of tort require intent or negligence on the part of the party causing the damages. Nevertheless, the reason why the AMA does not have such requirements is thought to have the purpose of enhancing the effect of preventing any conduct in violation of the AMA by imposing greater liability to tort.

### **2.4      *Cease and desist order and decision of the JFTC as a prerequisite***

Under Article 26 of the AMA, no claim for damages may be filed prior to any finalised cease and desist order or decision of the JFTC. Without a cease and desist order or decision of the JFTC, any litigation seeking compensation for damages would be deemed without basis and would consequently be dismissed.

It is understood that finalisation of the JFTC's cease and desist order or suchlike brings into existence the effect of facilitating the plaintiff's proof of the existence of the violation of the AMA.

The right to claim damages expires by prescription three years after the date of the finalisation of the cease and desist order or the decision.

### **2.5      *System for seeking opinions***

The AMA prescribes in Article 84 that if a suit for damages under the provisions of Article 25 of the Act has been filed, the court may ask for an opinion of the JFTC with respect to the amount of damages caused by the violation as provided in the said Article.

This system where the court asks the JFTC for an opinion is intended to allow the court to seek opinions from the organisation specialised in the enforcement of the AMA and deciding on cases, as well as about the harm caused by the violation of the AMA. This system helps to ease the burden on the plaintiff to present evidence.

### **2.6      *Exclusive jurisdiction***

The Tokyo High Court shall have jurisdiction in the first instance over any suit seeking compensation for damages under the AMA and hearings shall be held before a panel of judges dealing exclusively with cases involving the Antimonopoly Act (Item 2 of Article 85 and Article 87).

Given that the suit is filed on the basis of a final decision of the JFTC and in connection with an alleged act in violation of the AMA requiring a technical and unified judgment, the provisions mentioned above are designed to concentrate the hearings and judgment in a single court so that relief can be swiftly given to the victim.

## **3.      *Quantification of harm***

### **3.1      *Report on quantification of harm in a damages claim under Article 25 of the AMA***

The JFTC published a report titled "Quantification of Harm in a Damages Claim under Article 25 of the AMA" in 1991. The report studied methods for quantification of harm caused by an act in violation of the AMA. The following shows specific methods for quantification of harm:

**Table 1. Table 1: Approaches for quantification of harm by type of conduct**

| Plaintiff<br>Type of Conduct                              | A party directly trades with the plaintiff                                                                                         |                                                                                                                                               | A party indirectly trades with the plaintiff                                                                   |                                                                       |
|-----------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------|----------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------|
|                                                           | Consumer                                                                                                                           | Enterprise                                                                                                                                    | Consumer                                                                                                       | Enterprise                                                            |
| Price raising cartel                                      | ([Actual purchase price] – [Assumed purchase price]) x [Purchase quantity during the period of causing damage]                     | {(A - B) x C} - {(D - E) x F}                                                                                                                 | ([Actual purchase price] – [Assumed purchase price]) x [Purchase quantity during the period of causing damage] | {(A - B) x C} - {(D-E) x F}                                           |
| Bid rigging                                               | [Bidding price for the project] – [Assumed bidding price without violation (e.g. the lower limit price set by the ordering party)] | --                                                                                                                                            | --                                                                                                             | --                                                                    |
| Refusal to deal<br><br>(in the event of new market entry) | --                                                                                                                                 | [Hypothetical Profit without violation] – [Actual profit]<br><br>[Hypothetical profit in the case of entry into the market] – [Actual profit] | --                                                                                                             | [Hypothetical Profit without violation] – [Actual profit]<br><br>(--) |
| Resale price restriction                                  | --                                                                                                                                 | {(A - B) x C} - {(D - E) x F}                                                                                                                 | ([Actual purchase price] – [Assumed purchase price]) x Purchase quantity during the period of causing damage   | {(A - B) x C} - {(D - E) x F}                                         |

Notes: A: Assumed selling price without violation // B: Assumed purchase price without violation // C: Assumed sales quantity without violation // D: Actual selling price // E: Actual purchase price // F: Sales quantity during the period of damage

### 3.2 *Estimation of assumed price*

As discussed above, for the purpose of quantification of harm arising from a violation, it is necessary to demonstrate the price that would have been realised without the cartel (“the assumed price”), for example, in the case of a price raising cartel. This price actually did not come into being and has to be estimated somehow so that the existence of the actual damages can be confirmed and that the amount of the damages can be estimated. The methods described below may possibly be employed for estimating the assumed price.

#### 3.2.1 *Method based on comparison with the actual price*

In a case of a price raising cartel, for example, the assumed price may be estimated as the actual price prior to the violation based on the before-and-after theory or as the actual price in a similar region where the violation did not occur based on the yardstick theory. The resulting assumed price may then be compared to quantify the harm with the actual price resulting from the violation. (This approach is hereinafter referred to as “the method based on comparison with the actual price.”) Given the limitation that the yardstick theory is only applicable on the condition that a similar region exists, the before-and-after

theory will be more commonly used for “the method based on comparison with the actual price” in the case of a price raising cartel. In this method, as the price before the violation is not affected by the violation, it is empirically reasonable to assume that this price would have been maintained subsequently if the violation had not taken place. It is therefore considered appropriate to estimate the assumed price as identical with the price before the violation. Court precedent suggests that this method is generally valid for cases concerning a price raising cartel.

### *3.2.2 Method based on regression analysis*

However, the Supreme Court has ruled that it is impermissible to estimate the assumed price solely from the actual price just before the violation if there is any outstanding change in the economic factors that influence the determination of the retail price between the time when the cartel was implemented and the time when consumers purchase the goods concerned, and that the assumed price must be estimated by overall consideration of the price determining factors such as the characteristics in the pricing of the goods, the details and extent of the economic change and others, in addition to the price immediately before the violation.

The judgment on whether or not particular circumstances constitute an outstanding change in economic factors mentioned above is made depending on the individual cases of violation. If any such change is deemed to have taken place, the amount of damages will normally be quantified after estimating the assumed price as a result of comprehensively studying various pricing factors as well as the actual price immediately before the violation. For statistical analysis in a case like this, it is possible to use regression analysis, for instance, in cases concerning price raising cartels.

This approach ensures an estimate of the assumed price in overall consideration of pricing factors to the extent they can be measured. If the regression analysis is statistically reliable, it is possible to quantitatively calculate how much of the actual price increase can be attributed to the price raising cartel. That suggests that this approach is appropriate to quantify the harm where it is difficult to employ the method based on a comparison with the actual price.

However, the use of this method involves plenty of constraints. For instance, it is necessary to secure data on pricing factors for a length of time sufficient to make an analysis, as well as information on actual market conditions that constitute a basis for the use of the data. In addition, the theoretical foundations for the regression model must be confirmed as being appropriate and the results of estimates must be statistically reliable.

## **4. Recent court cases claiming compensation for damages**

Among the court cases claiming compensation for damages based on Article 25 of the AMA, to the extent the JFTC realises, the following two judgments are the most recent judgments where violations of the AMA were found and claims for compensation for damages were affirmed.

### ***4.1 Bid-rigging case in pavement restoration work for the remains of water service pipes ordered by Osaka city***

On May 18th, 2004, the JFTC made recommendation decisions containing orders to eliminate violations against a total of 26 companies for 7 violations concerning bid-rigging for the construction contracts of pavement restoration work for the remains of water service pipes ordered by Osaka city. After the recommendation decisions became final, the Osaka municipal government, which ordered the contracts, filed a lawsuit claiming compensation for damages, to the Tokyo High Court, against Okumura Engineering Corporation and 3 other juridical persons based on the provision of Article 25 of the AMA.

With regard to the case, on December 11th, 2008, a settlement between Osaka city and one of the defendants was reached. On June 8th, 2007, a judgment was made in which claims against 2 of the defendants were affirmed. On January 25th, 2009, a judgment was made in which claims against 1 of the defendants was dismissed with prejudice on the merits. Thereafter, all these judgments became final and binding after the period of appeal expired. The following is the outline of the method of quantifying the damages based on the judgment in which the claims were approved.

#### *4.1.1 Outline of the method of quantifying the damages in the judgment*

The damages incurred by the plaintiff are the difference between the amount of money for the construction contract resulting from the violation (actual price) and the amount of money for the construction contract assuming no violation (assumed price).

In this case, the objects of each construction work are different from each other, and thus, there is no identical object of the work. Therefore, there is no choice but to calculate its assumed price based on the ratio between the actual price for construction works irrelevant to the violations and a target price set in advance by the plaintiff (winning bid ratio).

The assumed price is a price that does not actually exist. Therefore, it is typically appropriate that the assumed price is estimated based on a winning bid ratio immediately before the violation unless there are any changes in economic factors, including economic conditions, market structure or the like, which underlie the formation of prices. On the other hand, if there is a possibility that similar conducts existed before the violation, it is appropriate to estimate the assumed price based on not the winning bid ratio immediately before the violations but the winning bid ratio immediately after the termination of the violations.

#### **4.2 Bid-rigging case in a construction display ordered by Japan Highway Public Corporation**

On April 27th, 2005, the JFTC made a recommendation decision that ordered the elimination of violations to SEIWA ELECTRIC MFG. Co., Ltd. and 2 other juridical persons for violations of bid-rigging, associated with a construction display ordered by Japan Highway Public Corporation. After the recommendation decisions became final and binding, Japan Expressway Holding and Debt Repayment Agency (a juridical person that succeeded the rights and the duties of Japan Highway Public Corporation dissolved on October 1st, 2005, according to the law) filed a lawsuit claiming compensation for damages incurred by Japan Highway Public Corporation due to the bid-rigging found in the recommendation decision, to the Tokyo High Court, against SEIWA ELECTRIC MFG. Co., Ltd. and two other juridical persons based on the provisions of Article 25 of the AMA.

With regard to the case, on October 1st, 2010, a judgment was made by the Tokyo High Court in which the claims against 3 defendants were affirmed. A final appeal and a petition for acceptance of the final appeal thereto were made by the 3 defendants. The following is the outline of the method of calculating the damages based on the judgment.

#### *4.2.1 Outline of the method of calculating the damages in the judgment*

The damages incurred by the ordering party from the bid-rigging is the difference between the actual winning bid price and the winning bid price based on the assumption that there has been no bid-rigging (assumed winning bid price). It is appropriate that the assumed winning bid price is estimated to be the winning bid price immediately before the violation. However, if there is a possibility that violations existed before the found violation and lasted for a considerable period of time, it is appropriate that the assumed winning bid price is calculated based on the actual winning bid prices in bids submitted under fair and free competition after the termination of the violation in question. In addition, if there is no identical object

which can be compared to the object that was the target of the bid-rigging due to the differences in size and specifications and thereby the estimation using the actual winning bid price is inappropriate, it is appropriate to make use of the ratio (winning bid ratio) between the actual winning bid price and the target price of an object irrelevant to the violation in question. In this case, it should be necessary to gather a considerable number of similar cases both in a period during which the violations were committed and in a period during which there are few significant changes in economic factors, including economic conditions, market structure or the like, which underlie the formation of prices. With regard to the concerned bid-rigging case, in light of the recommendation decision, since there is a possibility that similar violations have been committed by defendants before April 1st, 2001, on which date the bid-rigging was found, it is appropriate that a plurality of similar bid cases during the equivalent period after the termination of the violation is used as a reference thereto. Since the construction works ordered by Japan Highway Public Corporation differ in size and specifications depending on each object, it is to a certain degree reasonable to employ a method of estimating the amount of damages by using an assumed winning bid price which is calculated by use of average winning bid ratio thereof.

## NEW ZEALAND

### 1. Introduction

This paper sets out the New Zealand Commerce Commission's (the Commission) approach to quantifying harm to competition and the challenges faced. Specifically, it discusses the approach taken by the Commission in its most recent cartel cases relating to damages.<sup>1</sup> Damages assessment for these cartel cases focused on quantifying the price increase encountered by direct customers.

In theory, anti-competitive conduct can have the effect of imposing higher prices, as competitive forces are dampened and consumers pay more than they would have absent the cartel. There is also the deadweight loss as consumers are forced to withdraw from the market due to higher prices and use an inferior product, if available.

In most cases, damages may be simply computed as the increase in price from the conduct multiplied by the amount of units purchased. This is also referred to as the overcharge. However, this result reflects only a proportion of detriment. This is because the calculation does not take into account the deadweight loss triangle and other factors that cannot be readily obtained and measured.<sup>2</sup> This practical approach is adopted due to conceptual and empirical challenges involved in quantifying the potential effect of anti-competitive conduct.

There are various techniques available to estimate the overcharge rate which focus on predicting what the price would have been in the counterfactual scenario without the cartel. There are two main types of techniques that can be used to estimate the overcharge, namely:<sup>3</sup>

- comparator methods, which include the before-and-after, and yardstick methods; or
- methods based on direct information available, such as critical loss analysis and simulation.

In the Commission's experience, every calculation of harm to competition involves comparing the market situation with the anti-competitive conduct with a hypothetical market situation without the conduct (i.e. the counterfactual). The extent of analysis that has been undertaken on the likely scale of damages has varied considerably between the cases that have been investigated, influenced by factors such as the availability of data.

To date, cases that have been taken to Court have not required the Commission to produce evidence of the extent of damages, and generally defendants have not been asked to provide their own assessments.

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<sup>1</sup> There are not many cases of calculating damages for other anti-competitive conduct in New Zealand.

<sup>2</sup> See, for example, M. Motta. 2008. "Cartel Deterrence and Fines in the European Union". *European Competition Law Review*: 209, 219. In his model, Motta established that the overcharge is around 60% of total damages. Motta assumes a near perfect competitive market in the counterfactual. Also see Leslie. 2006. "Antitrust Damages and Deadweight Loss", *The Antitrust Bulletin* volume 51: 521.

<sup>3</sup> Van Dijk and Verboven. 2005 "Quantification of damages", in Collins (eds), *Issues in competition law and policy*, forthcoming, ABA, Antitrust section.

## 2. What is the relevance of detriment for the Commission?

Ascertaining the extent of damages caused by anti-competitive conduct is particularly important for the Commission to:

- decide whether or not to proceed with enforcement action against the parties under investigation;
- demonstrate that the alleged conduct substantially lessens competition, if required (this analysis is not required for *per se* violations, such as a price fixing conduct); and
- recommend an appropriate penalty to the Court.

The Commission has recently considered the question of detriment in relation to several cases involving cartel conduct, which is a *per se* violation under the Commerce Act 1986. Accordingly, this submission focuses on the damages analysis involved in deciding whether to proceed with enforcement action and recommending an appropriate penalty to Court.

Quantifying damages is not a mandatory criterion for the purposes of the Court assessing penalty under section 80 of the Commerce Act, but it may be regarded as a relevant factor by the Court and be taken into account for the purpose of imposing a penalty. The emphasis placed on damages is clear from the reference to as a relevant matter in the penalty provisions.

Section 80(2A) requires the Court to consider all relevant matters when determining the appropriate penalty, in particular the nature and extent of damages as a result of the conduct. In price fixing cases, because it is deemed that competition has been substantially lessened under section 30 of the Commerce Act, it does not need to be proved to be substantially lessened for the penalty provisions to apply.<sup>4</sup> However, the degree of the lessening of competition above the contravention threshold will be material in determining an appropriate penalty.<sup>5</sup> Similarly, although the extent of detriment is not listed as a mandatory factor for the purposes of determining the appropriate penalty under section 80(2A), it may be considered by the Court to be a relevant factor.

Section 80(2B) stipulates that the maximum penalty for a body corporate is the greater of \$10 million; or 3 times the value of the commercial gain<sup>6</sup> if this can be readily ascertained; or if this cannot be readily ascertained, 10% of the turnover of the body corporate or interconnected bodies corporate. It is interesting to note that the Act specifically provides for an alternative formula for determining the maximum penalty, if commercial gain cannot be readily ascertained.

The Commerce Act has provisions for any party to claim damages in private party litigation. The ability to claim private damages is not hindered by the imposition by the Courts of pecuniary penalties under the Commerce Act.

Anyone who contravenes the restrictive trade practices provisions of the Commerce Act is liable for any resulting loss or damages. The entitlement to damages under this provision is subject to a three-year limitation period from when the “contravention ought reasonably to have been discovered”, subject to a

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<sup>4</sup> *Commerce Commission v Taylor Preston Ltd* [1998] 3 NZLR 498 and *Lowe Walker NZ Ltd v Commerce Commission* [1998] 3 NZLR 385.

<sup>5</sup> *Lowe Walker NZ Ltd v Commerce Commission* [1998] 3 NZLR 385 and *Commerce Commission v Caltex NZ Ltd [Penalty]* (2000) 9 TCLR 366.

<sup>6</sup> The Commission considers commercial gain as the change in profits as a result of the anti-competitive conduct.

10-year longstop (as set out in section 82(2) Commerce Act 1986). Although the Commerce Act has been around in New Zealand for 25 years there is no jurisprudence yet on the issue of private damages. However, it is anticipated that the award of private damages will likely be measured on a tort basis.

The defence of “passing on” in private damages claims in the competition law context has not yet been considered by the New Zealand courts. This defence, however, was rejected by the Court in a different private law case (*Equiticorp Industries Group (In Statutory Management) v The Crown* (Judgement No 47) [1998] 2 NZLR 481). Although, in a later case (*Waikato Regional Airport Ltd v Attorney General* [2004] 3 NZLR 1)), the Privy Council does not totally rule out this defence and stated “Even if the defence of “passing on” or “windfall” were available (which was doubted), there was no factual basis here for its application”.

The Commission has had limited experience in quantifying private damages as this is a matter between private parties and does not necessarily involve the Commission. Accordingly, the balance of this submission focuses on direct harm to consumers only.

### **3. Challenges faced by the Commission in quantifying damages**

It is widely accepted that the quantification of damages relating to any anti-competitive conduct is notoriously complex and fraught with difficulty. In the Commission’s experience, any exact calculation of the commercial gain/harm is very time consuming and involves expert evidence at major cost.

The legal framework provides the following challenges in applying the commercial gain in calculating penalties in practice:

- Firstly, no definition of commercial gain is contained in the Commerce Act, which gives rise to the question as to what conception of “*gain*” should be used in the calculation.
- Secondly, the Commerce Act prescribes the use of the commercial gain in setting the penalty cap only where the commercial gain is “*readily ascertainable*”. It could therefore be argued that 3 times commercial gain can only be used as a statutory maximum where it can be determined without delay and/or difficulty. In practice this may be unlikely since there will generally be significant difficulties in the collection of the necessary information for calculating gain even where an appropriate methodology is available.

From an economic perspective, the question to consider in most cases was whether or not prices over the period of the alleged period were likely to have been higher than they would have been absent the anti-competitive conduct. The Commission’s approach focuses on the assessment of commercial gain, which is a concept related to damages. In the Commission’s view, for calculation purposes, the preferred interpretation of commercial gain is that it is equal to the monetary value of the overcharge. Commercial gain is, therefore, a proportion of damages which excludes deadweight loss and other dynamic factors.

The Commission seeks to measure the overcharge by first establishing an overcharge rate, and then multiplying that by the total relevant sales over the relevant period. The overcharge rate is found by comparing the factual price with the likely counterfactual or competitive price absent the anti-competitive conduct. The overcharge rate is considered as the difference between the factual price and the counterfactual price, divided by the factual price. For example, if the price, during the anti-competitive conduct, was \$5 and the counterfactual price \$4, the overcharge rate would be 0.20 (= (5 - 4) / 5). If 100 units were sold at the factual price, then sales value would be \$500 (= \$5 x 100), and the overcharge would be \$500 multiplied by 0.20, or \$100.

The fundamental problem in calculating commercial gain/damages is defining the counterfactual to calculate the counterfactual price. Quantifying the price in the counterfactual is challenging due to data limitations. In most cases considered by the Commission, the data available only covered the cartel period and did not include data prior to the alleged cartel period, or after the cartel period or in relation to any similar product or geographic market.

This meant that a ‘before and during’ comparison method was not possible. Further, a ‘during and after’ comparison method was not ideal because the Commission is of the view that using post-cartel prices could lead to an underestimation of overcharges due to the fact that implicit or tacit collusion is more likely after explicit collusion.

Another ideal counterfactual would be a market with no cartel. The Commission was not able to establish such a counterfactual in the cases that have been investigated because most of the alleged anti-competitive conduct involved international cartels. It was, therefore, difficult (if not impossible) for the Commission to define the counterfactual on a comparator basis in quantifying damages.

Damages are further complicated by factors that cannot be readily obtained and measured such as dynamic effects and potential effects. For example, dynamic effects are likely to increase damages due to the adverse effect on quality or innovation. It is also the case that the existence of a cartel that had been formed relatively recently, and with no measurable detriment at that point, could raise justified concerns if there was significant potential detriment. In such a case, the Commission may take account of the potential detriment.

#### **4. Methods applied by the Commission in quantifying damages**

The extent of analysis that has been undertaken on the likely scale of damages/ commercial gain has varied considerably between the cases that have been investigated. To overcome these challenges, the Commission applied the following approaches in recent cases:

- empirical models;
- theoretical models; and
- a combination of theoretical and empirical models.

##### **4.1 *Empirical models***

This is considered a robust method for calculating the counterfactual price. There are two basic econometric specifications used in cartel analysis, i.e. a dummy variable model and a residual model.

The Commission applied a dummy variable model in some of its recent cartel cases. The main analysis was a statistical regression to determine the extent of the change in price that was due to the alleged cartel behaviour, based on data during and after the cartel period.

The data covered revenues and quantities supplied for each of the alleged cartel members’ customers and the input costs. A dummy variable indicating the period of the alleged cartel behaviour was set up as unity for the cartel period, and a zero value allocated for the period after the cartel conduct.

The Commission analysed panel data using fixed effects models, with price being dependent on explanatory variables such as input cost variables, quantity, a dummy variable for the cartel, as well as cross products of the independent variables. In all cases, the coefficient for the cartel dummy indicated that the cartel had a very substantial effect, beyond that suggested even by theoretical models and certainly

counter to what is indicated in empirical studies of the effects of cartels. Such studies usually indicate an overcharge of around 20%.

However, the Commission considered that the appropriate price effect is the difference between the non-cartel regression and the cartel regression. This calculation in the price rise involved the difference between regressions at the average of other independent variables (holding other regressors constant).

This approach found an average price increase due to anti-competitive conduct in New Zealand between 5% and 10%. This effect is lower than expected due to factors such as members' imperfect knowledge of each other's pricing and marketing behaviour, the likelihood of a certain amount of cheating on the terms of the alleged arrangement and learned tacit collusion after the cartel.

## 4.2 *Theoretical models*

Given the data limitations, the Commission also considered theoretical models with either a perfect competition model or a generic Cournot model as the counterfactual to provide a very rough approximation of detriment caused by the cartel under a variety of assumptions.

### 4.2.1 *Perfect competition*

In this approach the overcharge or direct harm to consumers is calculated as the difference between the price increase and the relevant underlying actual cost. This provides an estimate of the cartel overcharge or additional direct profits to cartel members.

This approach is based on economic theory, indicating that in a highly competitive industry, the pass through of variable cost increases (or decreases) should be nearly one for one. If cartel members are (nearly) price takers in highly competitive industries with a high supply elasticity, the incidence of increased variable costs can be considered to fall almost totally on consumers as firms increase their price when (marginal) variable costs increase.

Thus, under near perfect competition the price should increase one for one with an increase in variable costs, so any amount above this increase in cost is an estimate of the overcharge or direct harm to consumers. In applying this approach, the Commission found that the overcharge (commercial gain) was substantial.

### 4.2.2 *Cournot model*

This theory-based approach compared the price that would have occurred in a Cournot oligopoly counterfactual with the monopoly (cartel) factual. The model predicts the monopoly overcharge compared to what would have happened in an oligopolistic market.

This approach has the advantage that it requires only two inputs: the number of competitors that would have been present in the market absent the cartel and the profit margin of the cartel.<sup>7</sup> However, while the number of firms is somewhat easy to assume (using either the number of firms currently supplying the market or the number of firms in the cartel), the profit margin is difficult to estimate because the Commission is unlikely to have good data on marginal cost.

The Commission applied a range of likely cartel profit margins: 10% as a very conservative estimate, 20% and a 30% cartel margin, which fall well short of some of the levels found in the academic literature.

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<sup>7</sup> The cartel's profit margin is defined as price less marginal cost, divided by price.

The results showed that, based on a very conservative cartel margin and assuming no entry, the overcharge or direct harm to consumers was substantial.

#### **4.3 Combination of a theoretical model and an empirical model**

In the cases with data only available during the cartel period, the Commission used an empirical model to estimate the increase in prices during the cartel and adopted a theoretical model to estimate the counterfactual.

The empirical models developed used so-called panel data sets to quantify the price increases in the factual. The frameworks for the models were derived from the determinants of demand and supply. The models expressed the price in terms of several determinants or factors that have an effect on the price, without themselves being affected by the price in return. Dummy variables were used to estimate the average effect of the cartel on prices over the cartel period, after controlling the other variables that were thought to have an impact on prices.

The Commission then applied a theoretical counterfactual to estimate the price increases in a workably competitive market. The determination of what constitutes a normal pass-through for a particular cost in a particular market can only be established empirically if the data is available or if the values of market demand and supply elasticities are known. Given the data limitations in the cases investigated, the Commission assumed a cost pass-through in a workable competitive environment based on an assumption about the price elasticity of demand and a supply elasticity assuming a normal market with an upward sloping supply curve, but one reflecting near constant returns to scale.

Using a combination of empirical and theoretical results, the Commission estimated the overcharge or damages suffered as the difference between the increase in price attributable to the cartel and the increase in the price that would normally be expected. Results suggested that the increases in price attributable to the cartel conduct were substantial.

#### **5. Conclusion**

This submission details the Commission's approach in quantifying damages as a result of anti-competitive conduct. The Commission follows a case by case approach to assess the damages of alleged anti-competitive conduct, taking into account factors such as data available and cost implications.

Quantifying damages is subject to economic and legal restrictions and practicalities. Not only must a quantitative economic analysis be undertaken, which may be limited by the amount of reliable data available or non-measurable factors, but a legal analysis must be undertaken to take into account the interpretation of "commercial gain" and "readily ascertainable" and other qualitative factors such as judicial interpretation.

## SLOVAK REPUBLIC

The aim of this contribution is to briefly describe the situation in the quantification of harm to competition and quantification of damages from infringement of competition law in the Slovak Republic and also to describe the role of the Slovak Competition Authority (PMU) in this field.

According to the Slovak competition law PMU is not obliged to quantify the harm to competition or damages arising from competition law infringement and until recently there was no specific quantification of harm to competition or damages suffered by the victims of anticompetitive practices in the antitrust decisions of PMU.

As regards private enforcement, PMU is aware of two cases that were brought before the Court and where the claimants asked for compensation of damages suffered from the breach of competition law. Both cases are based on PMU decision on abuse of dominant position (which are approximately 10 years old) and are still pending. Apart from other things there are three issues, which are problematic in the Court decisions: how to calculate damage, how to prove causal nexus between the behaviour of dominant and the damage and who has the right to ask for compensation of damages. There are two ways of damage calculation used in the Court's decisions: calculation of damage by an expert witness and simple price comparison.<sup>1</sup>

In the last year PMU paid more attention to the quantification of damages arising from an infringement of competition law. In few cases we have tried to calculate these damages<sup>2</sup> as we consider it important. We see calculation of damages as a logical consequence of more economic approach to antitrust cases – it makes the competition case complete, as it is not only said what the anticompetitive behaviour incurred but also how big the damage is. Quantification of damages would facilitate claims of the victim of anticompetitive behaviour for compensation. Besides, companies more often require precise specification of negative consequences of the practice they are alleged of.

So far the calculations done by PMU have been fairly simplistic. The starting point of calculation is theory of harm and calculations are based on an average overcharge caused by the infringement to direct customers; we have not taken into account pass on effects, qualitative effects and so on.

There is one Court decision which influenced the approach of PMU in the field of the harm/damage calculation. In 2007 PMU adopted a decision, in which Slovnaft, the owner of the only oil refinery in Slovak Republic, was fined for an anticompetitive behaviour – Slovnaft abused its dominant position on the wholesale markets of gasoline and diesel oil by pricing unreasonably different prices to different customers. Slovnaft brought an action before the Court for annulment of the PMU decision and inter alia claimed that PMU is obliged for purposes of fine setting to quantify the amount of gains improperly made by dominant as a result of infringement. The Court annulled the contested decision and one of the reasons for annulment was that PMU did not express its view on this issue in the decision, although Slovak

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<sup>1</sup> Dominant refused to sell its product to a particular customer (or it sold the product to this customer for a price substantially higher than to other customers). The customer concerned based the calculation of damage on the difference between its price and price for other customers.

<sup>2</sup> Only in one case the calculation of damages was made public.

competition law does not exclude gains improperly made as a result of infringement to be taken into account when setting the fine. So in December 2010 PMU adopted a new decision in Slovnaft case, which contained calculation of damage (to be more precise calculation of the gains made by dominant from the aforementioned anticompetitive behaviour).

Regression model was used to calculate the damage where the wholesale price of gasoline and diesel oil was explained by variables representing the main determinants of the price and dummy variables representing the extent of discrimination. For the purpose of analysis cross-sectional data were obtained. Fortunately, PMU was given within reasonable time period an extensive database of all Slovnaft's customers on the wholesale markets of gasoline and diesel-oil.

Although this exploitative practice was conducted on individual customers, there could be clearly identified three distinct groups of customers with different degree of importance to other suppliers. Even after taking into consideration different costs and rebates, the group of the least important customers had higher average price than the other two groups. Three dummy variables were created to represent the group the customers belong to. The most attractive group was chosen as a "benchmark group" (and was omitted from the model) and therefore each of the statistically significant coefficients next to the other two dummy variables measured the level of discrimination between the benchmark group and the correspondent group. The estimated model was an approximation of the real pricing strategy of Slovnaft. By omitting all the dummy variables the model estimated the price which would have got the customers in the absence of discrimination. The difference between the estimated real pricing strategy and the "but-for-price" for each customer represented the direct damage for the given customer. The main idea of this approach was to compute the profit gained by Slovnaft which represents the direct damages to customers during the infringement period.

The decision of the Court in this case will be very important. It will be interesting to see how the Court will evaluate economic evidence in the decision and also its view on how the damage was calculated.

## SPAIN

### 1. Introduction

The Spanish Competition Authority (CNC) very much agrees with the statement of the Secretariat in the call for contributions that “[t]he concept of harm to competition resulting from anticompetitive conduct is distinct from the concept of damages suffered by particular victims as a result of that conduct. In this context, ‘harm’ means the general harm done to the economy, so there is a difference between assessing harm to competition and assessing private damages”. In administrative competition systems, like ours, the assessment of the overall harm caused by competition law infringements is the job of the Competition Authorities, while determining private damages is the job of the competent Courts.

Nevertheless, the Spanish Competition Act assigns an advisory role to the CNC in the evaluation of private damages. Indeed, it establishes a cooperation mechanism between the Courts and the CNC, by which the former may request non-binding opinions in private enforcement cases, including damages claims.<sup>1</sup> Until now, the CNC’s opinion on damages has formally been requested in three occasions.

### 2. Overall harm to competition

In some cases the CNC has tried to, not only find but also quantify, the extent of the harmful effects of an anticompetitive conduct, for example, in the abuse of dominance *Case 626/07 Canarias de explosivos* and in the cartel *Case S/0037/08 Seguro Decenal*. In these cases, the CNC estimated the excess price charged to customers by the infringers, by comparing the abusive prices with those charged by the same undertaking in other geographic markets, in the first case, and by comparing the cartel prices with those corresponding to a counterfactual scenario of no infringement, in the second case.

In February 2009 the CNC issued Guidelines on the quantification of sanctions.<sup>2</sup> The formula consists on a “base amount”, which is related to the impact of the infringement on the overall welfare, adjusted to consider, as the case may be, aggravating or mitigating circumstances. Besides, the final sanction needs to be under a ceiling established by Law, and over a floor determined by the illicit benefit obtained through the infringement.

As established in the Competition Act, as well as in the Guidelines, the base amount of the sanction must take into account the size and characteristics of the affected market, the market share of the infringer, the scale and scope of the violation, its duration and, in sum, the effects of the infringement. However, taking into account the difficulties often encountered in the quantification of the effects, the Guidelines establish that an adequate proxy for the base amount is 10% of the infringer’s sales volume affected by the violation. The 10% becomes 20% when the infringement is considered to be very serious, or when the product affected is an intermediate input to the manufacturing of other products. In addition, this percentage can reach 30% where both circumstances concur. The sales volume for the year immediately

<sup>1</sup> Article 25 c) of Competition Act 15/2007

<sup>2</sup> [http://www.cncompetencia.es/Inicio/GestionDocumental/tabid/76/Default.aspx?EntryId=30716&Command=Core\\_Download&Method=attachment](http://www.cncompetencia.es/Inicio/GestionDocumental/tabid/76/Default.aspx?EntryId=30716&Command=Core_Download&Method=attachment)

previous to that of the infringement is computed in its entirety, whereas sales of preceding years are weighted less than 1 in a decreasing scale.

### 3. Private damages<sup>3</sup>

Private damages case-law in Spain is still limited but seems to be taking up. The required legal framework is already in place, allowing to deal with both *stand-alone actions*, i.e., damages can be claimed before the Courts even when no previous administrative infringement decision by the Competition Authority has been issued, and *class actions*, i.e., collective actions where a number of potential affected parties by a competition infringement join their efforts in one single filing. The current regulation on class actions was introduced in the Spanish Civil Procedure Act in 2000 and allows associations of affected in a specific case to represent their associates, and consumer associations officially recognised by the Spanish Administration to represent either a determined or an undetermined plurality of affected.

For the first time after the adoption of the 2007 Competition Act, the Spanish Courts have recently granted civil damages to the victims of a cartel. In addition to this milestone, damages have also been awarded in relation to several vertical agreements and abuse of dominance cases. Although the sample of cases is yet small, it is on the rise and Court judgements are becoming more sophisticated.

#### 3.1 *The sugar cartel case*

Following a decision of the Spanish Competition Authority (later confirmed by the two upper Courts), on October 9 2009 a Court of second instance<sup>4</sup> overturned a lower Court decision and required a sugar manufacturer to pay €1.1 million to nine producers of biscuits and confectionary, in compensation for the higher prices they had paid for their main input as a result of the cartel.

Both parties made experts' submissions on the calculation of damages. The plaintiff's calculation was based on the estimated costs of the cartel members; the damages were calculated as the share of the increase in price which did not correspond to an increase in the costs of the cartelists. The defendant's submission refuted the estimates without offering an alternative valuation. The Court accepted the claimants' estimates and awarded the damages. The Court stated that the defendant's submission disqualified itself since it considered that there was zero damage, even though both the Competition Authority and the Court of appeal had previously concluded that the cartel had caused severe damages. The judgement is under appeal. Meanwhile, according to press news, other proceedings on damages in this same cartel case have started.

#### 3.2 *Vertical agreements in the fuel market*

Damages claims have often been related to cases in the fuel market.

In many cases, while the judge recognises the infringement of competition law and declares the concerned contracts null and void, he does not award damages.<sup>5</sup> In others, he does, as in the judgement of

<sup>3</sup> Based on the article by Delgado, J. and Pérez Asenjo, E., "Economic evidence and the quantification of damages in competition cases in Spain", Agenda Bulletin, Oxera, June, 2010. [http://www.oxera.com/cmsDocuments/Agenda\\_June%2010/Quantifying%20damages%20in%20Spain.pdf](http://www.oxera.com/cmsDocuments/Agenda_June%2010/Quantifying%20damages%20in%20Spain.pdf)

<sup>4</sup> Audiencia Provincial de Valladolid nº 3, Judgement 261/2009 of 09-10-2009.

<sup>5</sup> Juzgado de lo Mercantil nº 1 de Sevilla, Judgement of 12-12-2008 (Cepsa). Audiencia Provincial de Madrid sección 28ª, Judgement of 23-01-2008 (GALP). Audiencia Provincial de Madrid sección 28ª, Judgement of 23-01-2009 (GALP).

March 2009 concerning two petrol stations in Majorca.<sup>6</sup> The claimants submitted estimations of the *lost profits* through the duration of the contract, i.e., the earnings the plaintiff would have obtained absent the infringement. The estimation of earnings in the counter-factual scenario was based on the alternative contracts the parties would have signed, as observed in the market. The judge referred the proposal for consultation to the CNC, which considered that its underlying principles were essentially correct. The judge then declared the contract null and void and awarded the requested compensation to the claimants.

Some damages claims cases have followed competition concerns expressed by the European Commission that long-term supply agreements between oil companies and gas stations could have created a significant foreclosure effect on the fuel retail market, as in the EC Repsol case, which concluded with commitments on the termination of the suspected anticompetitive agreements.<sup>7</sup> Several petrol stations then claimed compensation for the *lost profits* incurred during the period the null and void contracts were in force. In some cases, compensation for the damages was not awarded, the reasons being diverse: lack of adequate evidence of the magnitude of the damages, lack of causality between the infringement and the damages, formal errors in the proceedings, errors in the calculations of the damages -in some cases the Courts suggested to start new proceedings-, or a too complex method for calculation of the damages.

### 3.3 *Abuse of dominant position cases*

In two of these cases the defendant was the former telecommunications monopolist, Telefónica.<sup>8</sup> The first concerned the leasing of lines to competitors and followed a decision of the Competition Authority (later confirmed by an upper Court) which found that Telefónica had unjustifiably delayed the supply of lines to 3C Communications.

The claimant's expert submission estimated the profits the company would have earned absent Telefónica's abusive conduct, i.e., in case it had supplied the lines in due time. In order to calculate such *lost profits*, 3C Communications made a number of assumptions regarding the average duration of the delay, the number of lines, the number of terminals 3C Communications could have installed and the net earnings per terminal and day it could have made. The Court determined that the average duration of the delay and the average number of terminals contained in the claimant's estimate were too high, and decided to use new and more conservative estimates to calculate the final compensation.

The second case concerned the supply of data for telephone directory services.<sup>9</sup> The claim followed a decision of the Telecoms regulator which established both a first refusal to supply data, and a supply of poor quality data afterwards, to a competitor in the telephone directory enquiries business. The claimant, Conduit, submitted an expert estimate of the damages which included the additional expenses Conduit had to incur because of the infringement and the profits it could have earned in the absence of that infringement, i.e., *the lost profits*.

With respect to the costs incurred, Conduit indicated that as a result of the poor quality of the data supplied by Telefónica, it was forced to hire external services to gather the data and to devote to that work

<sup>6</sup> Tribunal de lo Mercantil de Palma de Mallorca nº 2, Judgement 15/2009 of 03-03-2009 (Repsol).

<sup>7</sup> Commission Decision of 12 April 2006 relating to a proceeding pursuant to Article 81 of the EC Treaty (Case COMP/B-1/38.348 — Repsol CPP).

<sup>8</sup> Audiencia Provincial de Madrid nº 28, Judgement 73/2006 of 25-05-2006 and Audiencia Provincial de Madrid nº 25, Judgement 235/2007 of 08-05-2007.

<sup>9</sup> For a thorough analysis of the case, see G. Siotis and M. Martínez-Granado (2010) "Sabotaging Entry: An Estimation of Damages in the Directory Enquiry Service Market," *Review of Law & Economics*: Vol. 6, Iss. 1, Article 1.

a larger share of its own resources than necessary, had the data been correct. Both actual extra costs, external and internal, were quantified by the plaintiff's expert submission and finally awarded by the Court.

To calculate the *lost profits*, Conduit estimated the market share the company would have reached in the Spanish market, had Telefónica supplied the correct data in due time. In order to do so, Conduit's expert submission compared the Spanish market with the British market, where Conduit was also present. But the Courts challenged such assumption arguing that the conditions for Conduit in the British and the Spanish markets were far different, since the company had been operating for long in the UK while it was a newcomer in Spain, and therefore the experience and expertise of Conduit's staff in each country were different. Moreover, the judge refused the causality connection between the infringement and the damages. The judge argued that there were other elements, specially advertising costs, which were more important than the quality of the data provided in determining the market share of the entrant. Thus, the judge refused to award any compensation as *lost profits*.

In a judgement concerning software for the management of medical files data,<sup>10</sup> the Court of first instance also awarded the actual costs incurred by the claimant and denied the *lost profits*. The damages proceedings followed a decision of the Competition Authority (later confirmed by an upper Court) which sanctioned 3M for imposing anticompetitive conditions to one of its direct competitors in the sale of an essential input: software used in public hospitals to gather the data from patients' medical files.

Both the claimant and the defendant submitted expert documents. The judge refused the assumptions made to estimate the *lost profits* in the claimant's submission for two reasons: the number of years and the number of contracts on which the estimate was based exceeded those for which the infringement had been proven, and the cost estimates did not realistically reflect the cost structure of the claimant's business.

In March 2010, a Court of first instance<sup>11</sup> awarded more than €30 million on damages for an abusive conduct in the market for football broadcasting rights. The judgement related to a *stand-alone* action (there was no prior Decision of the Competition Authority) by a cable TV operator, Cableuropa, who had acquired the rights from AVS and Sogecable and claimed that the effective price paid from 2003/2004 to 2008/2009 was excessive.

The Court first declared that the defendants had abused their dominant position in the market for the distribution of football broadcasting rights by charging unfair and excessive prices, which were far higher than the *economic value* of the rights.

Both parties submitted experts' estimates for the calculation of damages. The plaintiff estimated the *economic value* of the rights based on its underlying costs, and concluded that the price was far higher than necessary to cover all the risks incurred by the defendants. In addition, the claimant compared the defendants' profits with those of other similar operators managing football broadcasting rights in the UK, and concluded that profits were far higher in Spain. The defendants' submission criticised the claimant's arguing that their costs had been underestimated. Finally, the Court accepted the claimant's estimates and awarded the damages claimed. The judgement is under appeal.

A relevant decision where damages were finally not awarded involved a TV station, Antena 3, and the Spanish Football Association (LNFP). A decision of the Competition Authority (later confirmed by the two upper courts) declared that LNFP had abused its dominant position in the market for football broadcasting rights, by signing long-term contracts with TV channels excluding Antena 3. Then Antena 3 claimed

<sup>10</sup> Juzgado de primera instancia de Madrid nº 71, Judgement of 01-06-2007

<sup>11</sup> Tribunal de lo Mercantil de Madrid nº 7, Judgement 64/2010 of 07-03-2010.

compensation from LNFP and estimated the damages in €34 to 36 million as advertising *lost profits*. The Court of first instance partially accepted the demand and awarded €25.5 million.<sup>12</sup> The judgement was appealed by both parties and the Court of second instance revoked it and awarded no damages. The judge argued that the claimant's expert document was based on a subjective and theoretical scenario which did not correspond to reality.<sup>13</sup> Finally, the Supreme Court did not accept the appeal on procedural grounds.<sup>14</sup>

#### 4. Conclusions

Private actions in the context of competition infringements are just taking up in Spain, but the legal framework in place seems adequate. A number of recent Court decisions concerning cartels and abuses of dominance indicate good prospects for further development of private damages in the field of competition. In such judgements, the Courts have sometimes directly applied antitrust law and have already used the concept of *lost profits* to evaluate damages.

In its advisory role to the Courts, the CNC can provide consistency to case law and help the Courts in their assessment of the often complex economic analyses submitted by the parties. This *amicus curiae* cooperation by the CNC is particularly important at present, when case-law is still very limited.

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<sup>12</sup> Juzgado de primera instancia de Madrid nº 4, Judgement of 07-06-2005.

<sup>13</sup> Audiencia Provincial nº 25bis de Madrid, Judgement of 18-12-2006.

<sup>14</sup> Tribunal Supremo Sección nº 1, Judgement of 14-04-2009.



## SWEDEN

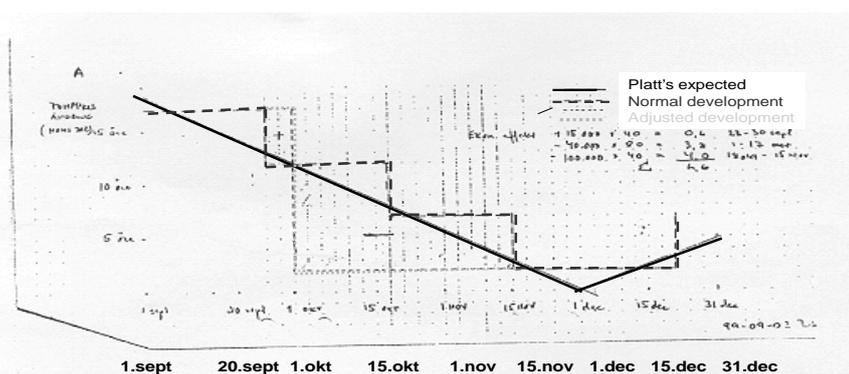
### 1. Quantification of harm in Swedish cartel cases

The Swedish Competition Authority (SCA) is not legally required to quantify the harm to competition in competition law cases. We typically consider cartel cases to be restrictions by object where the harmful effects can be presumed. Our experience however is that in all major cartel cases we bring to court, we are faced with claims from parties that the alleged cartel did not raise prices. We will in the following describe the quantifications done in the three major cartel cases we have brought to court, the petrol cartel case, the asphalt cartel case and the Volvo car dealer cartel case. We will also describe the strategies used by the SCA in order to refute the claims of the parties.

The SCA has to apply to the Stockholm City Court for a company to be fined and forced to pay an administrative fine. The judgement of the Stockholm City Court may be appealed to the Market Court which is the final court. In competition law cases, both courts consist of at least two judges and two economic experts. The economic experts come from academia or the business sector. Some are trained in microeconomics but few have knowledge of econometrics.

### 2. The petrol cartel case

In the autumn of 1999, representatives of the five largest oil companies in Sweden (Statoil, OKQ8, Shell, Preem and Hydro) held secret meetings, ostensibly to discuss collaboration on environmental matters. Instead, they colluded on a rebate adjustment. They cut the rebates on fidelity cards while at the same time lowering the announced price at the pump. In letters to customers, the companies claimed that the net effect would be zero. The plan was however to return to the normal price after a while as illustrated in the figure below found at one of the firms premises.



In December 1999, the SCA visited the companies' offices unannounced, in "dawn raids", in order to secure evidence. As a result of its investigation, the SCA called on the Stockholm City Court to impose administrative fines on the five companies. The court's ruling in December 2002 with fines of SEK 52 million was appealed by both the SCA and the five companies to the Market Court. The Market Court reached a decision in February 2005 with fines of SEK 112 million.

### **2.1 *The SEK 500 million money transfer***

The petrol cartel differs from classic cartels in some aspects. First, the meetings were held over a short time period (three months). Secondly, the visible price change was downward. However, the negative effects of the coordinated rebate adjustment could last a long time. Rebate adjustments on the Swedish petrol market typically take place every five years. In order to illustrate the size of the money transfer from customers to the oil companies, the SCA calculated that, given that the announced price at the pump returned to the normal one month after the rebate adjustment, the customers would lose SEK 500 million over the following five years. This figure was mainly used in speeches and press. It was officially taken out of the SCA's claims early on in the court process, but may have triggered the arms race of economics.

### **2.2 *The (near) return to normal price***

The announced price at the pump was lowered by SEK 0.15 at the same time as the rebate adjustment was made. The SCA claimed that the price returned to the normal price after the rebate adjustment. The SCA hired two external economic experts to give expert reports on the pricing on the Swedish petrol market. Shell hired one external economic expert to perform a similar analysis, Hydro hired another external economic expert to perform a similar analysis and Statoil, OKQ8, Preem and Hydro hired jointly two external economic experts to criticise the works of the SCA's external economic experts. Daily data on costs and prices was easily available and shared between the experts. Almost all of the variation in the price was found to be determined by the spot price, the exchange rate and the tax rate. The explanatory value in the regressions was well over 99%. After several rounds of reports, the experts' analyses nearly converged with one showing a full return of SEK 0.15 and two rejecting a full return of SEK 0.15 and arriving at a return of SEK 0.12-0.13.

### **2.3 *The courts' assessment of the effect analyses***

The Stockholm City Court basically denounced the value of all of the econometric studies (and the theory of econometrics) by stating in the verdict that it is not possible to observe a "normal price" and determine which factors influence the price.

The Market Court did not comment on the econometric studies in its verdict.

### **2.4 *Conclusion***

In hindsight, the decision of the SCA to present the calculation of customer loss shifted the focus in the court process away from the infringement. On the other hand, it is hard to see that the parties gained much from the use of econometric studies.

## **3. *The asphalt cartel case***

The cartel was detected in the autumn of 2001 when three persons who had previously been employed at one of the companies contacted the SCA and reported that unlawful collusion was taking place between several companies in the asphalt surfacing industry. On 21 March 2003, the SCA applied for a summons against eleven companies, later changed to nine companies. The companies were suspected of having divided up the market between them and of having agreed on prices, at least since 1993. The SCA demanded that the companies be given administrative fines totalling SEK 1.6 billion, later reduced to 1.2 billion. Nine municipalities sued the companies for damages.

In 2007, the Stockholm City Court ordered nine asphalt companies to pay more than SEK 500 million in administrative fines. Some parties appealed to the Market Court.

In 2009, the Market Court ruled in favour of the SCA and found the companies in the asphalt cartel guilty of anti-competitive behaviour. The Market Court imposed the heaviest fines ever in a cartel case in Sweden. The Market Court increased the original fine imposed on one firm by SEK 50 million to SEK 200 million.

### **3.1 *The economic reports commissioned by NCC***

NCC hired one external economic expert to perform a statistical analysis of the bids in the public procurements by the Swedish Road Administration. The expert found no statistically significant difference in winning bids in allegedly cartelised public procurements compared to the winning bids in the control group (of which we had no information regarding cartel behaviour).

NCC also hired a consultancy firm to analyse the economic effects of the alleged cartel in the municipalities that had sued NCC for damages. The latter report was meant to be used both in the court process against the SCA and in the damages proceedings. The consultancy firm looked at international price and profitability comparisons and concluded that the price level and the profitability in Sweden were low, something they saw as indicating that the alleged cartel did not have any economic effects. The consultancy firm then used three methods in order to analyse the economic effects of the alleged cartel. First they compared the price during the duration of the cartel with the price after the cartel had been disclosed. Secondly they compared prices in municipalities where the cartel allegedly operated with the price in municipalities where there was no claim of cartel presence. Thirdly they calculated the contribution margin during and after the duration of the cartel. They reported no statistically significant effects of the alleged cartel.

### **3.2 *The request for data***

The reports of the consultancy firm and the external economic expert were presented after the court proceedings had been initiated. They did not disclose the data. The SCA asked NCC for the data that the consultancy firm and the external economic expert used. NCC claimed that they did not have the data and when the SCA asked the consultancy firm and the external economic expert for the data they referred the question to NCC. The SCA also tried to get the Stockholm City Court to issue a court order forcing the consultancy firm and the external economic expert to submit the data. The Stockholm City Court did however not rule in favour of the SCA. As no data was disclosed, the SCA was not able to check and replicate the analyses.

### **3.3 *The strategy of the SCA***

The SCA argued that there is no need to prove any actual effects of hard core cartels as the effects are presumed when the object of the cartel is to distort competition. In court, the SCA cross-examined NCC's economic experts. Questions were asked to show that the reports contained faults and that some conclusions were not based on the findings of the report. The SCA further questioned the methodology used by the experts in order to show the court that there were problems.

### **3.4 *The courts' assessment of the effect analyses***

The Stockholm City Court did not comment on the analysis of the external economic expert and the consultancy firm. They did however state that the SCA had not proven that the cartel had raised prices.

The Market Court, on the other hand, commented on the economic studies. They first stated that the international price and profitability comparisons made by the consultancy firm were hard to interpret due to methodological problems. The Market Court went on to state that the consultancy firm's other methods and the external economic expert's econometric studies were all based on comparisons between two

categories of public procurements, those that are allegedly cartelised and those that are not. Since the spread in bids was high and the number of observations low, one must have very large price differences to get statistically significant results. A further problem was that there may be cartelised public procurements in the control group. According to the Market Court, the economic reports could therefore not be accorded significant importance when assessing cartel cooperation and the effects thereof.

### **3.5 Conclusion**

NCC was not helped by the economic experts showing that the cartel had no statistically significant price-raising effect. The Market Court's findings on the economic reports can however not be generalised to say that there is no value in such evidence. The findings of the Market Court were rather that the specific economic reports in the case were of poor quality. We do not know which value the report of the consultancy firm had in the damages cases, which have subsequently been settled, between the nine municipalities and the asphalt companies. The municipalities sued the companies for damages of SEK 57 million and reached a settlement of SEK 35.5 million.

## **4. The Volvo car dealer cartel case**

In 2002, a dealer in Volvo and Renault cars sent an e-mail to seven competitors. He suggested in the message that they should add SEK 3 000 to Volvo's recommended price "as usual". When this was brought to the attention of the SCA, unannounced visits "dawn raids" were made to the dealers' premises to secure evidence. The dealers had, for instance, met regularly in the 'Skåne Group', a local group within the Volvo Car Dealers' Association. Both at such meetings and in e-mail exchanges, the dealers had concluded agreements on prices (part of price) and discounts.

The SCA argued in the Stockholm City Court that the eight dealers had engaged in price collusion, which is prohibited under the Swedish Competition Act and Article 81 of the EC Treaty. The Stockholm City Court did not agree with the SCA. They concluded that there was an agreement that had as its object the restriction of competition but that this restriction of competition did not satisfy the criterion of "appreciable extent". The SCA appealed the ruling. In 2008, the Market Court agreed with the SCA and the dealers were ordered to pay fines of over SEK 21 million in total.

### **4.1 The economic reports commissioned by Bilia**

Bilia hired two external economic experts to perform a theoretical analysis of the car dealer market. They wrote a report with a theoretical model showing that dealer collusion would not hurt consumers as long as the producer accepts the fact that dealers are colluding. Bilia also hired two external economic experts to perform an econometric analysis in order to see if the alleged collusion had any price-raising effects. They produced a report showing that there was no statistically significant difference in prices and margins at Bilia's dealership in the allegedly cartelised region compared to prices and margins at Bilia's dealership in another region.

### **4.2 Why the SCA lost in the Stockholm city court**

A cartel among dealers of the same brand is not a classical cartel. First, there is still the inter-brand competition between cars of different brands. Secondly, car dealers are subject to vertical restraints by the manufacturers. Both these aspects were brought forward by the parties. The court was not convinced that collusion and market sharing between retail companies should not be allowed, even when they sell the same brands. Further, the court found that the SCA had not proven that the relevant geographical market for car-selling is regional rather than national. The court noted that on a national basis the market shares of the parties were only three per cent.

### **4.3 *What the SCA did to win in the Market Court***

The SCA presented new analyses supporting the market delineation. The SCA hired economic experts to refute the claims by the parties on the lack of intra-brand competition and the effects of the vertical restraints. In this note we will not elaborate on all aspects but focus on the claim of no price-raising effect. The SCA hired an external economic expert to scrutinise the econometric analysis presented by Bilia's economic experts. He noted several peculiarities and reasons to question the results. Since neither he nor the SCA had access to the data used in the analysis, he could not replicate the results. The SCA handed in the external economic expert's comments in the appeal and Bilia asked their experts to respond. They produced a report which took care of most of the comments. This new report still showed a lack of statistically significant difference in prices and margins at Bilia's dealership in the allegedly cartelised region compared to prices and margins at Bilia's dealership in another region.

The SCA's focus in the Market Court process was to show that the dealers used to compete with each other and that a cartel between dealers of the same brand would reduce that competition. The SCA argued that a cartel is a restriction by object and there is no need to show a price effect.

### **4.4 *The courts' assessment of the effect analysis***

The Stockholm City Court stated in its decision that the econometric analysis indicated that there was no effect of the agreement.

The Market Court stated on the other hand that the empirical evidence in itself gave some support for the claim that there was no effect on pricing, but that this did not affect the court's assessment.

### **4.5 *Conclusion***

Six of the eight companies were required to pay the fines the SCA called for<sup>1</sup>. This would indicate that showing a no-effects result did not help in reducing the fine in this case.

## **5. *Concluding remarks***

Even though the SCA is not required by law to quantify the harm to competition in competition law cases, such quantifications (showing that the cartel had no statistically significant price-raising effect) have been presented by the parties. In those cases, the SCA faces severe data disclosure problems. Whereas the SCA is legally obliged to give access to its files and has a policy to disclose the data used in analyses, the parties and their economic experts are not obliged to disclose the data used.

On the basis of these three cases, it is difficult to draw a firm conclusion that the parties do not gain by presenting quantifications showing that the cartel had no statistically significant price-raising effect. There are however clear indications in that direction in the Market Courts' judgements in the asphalt cartel case and the Volvo car dealer cartel case.

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<sup>1</sup> Bilia got a reduced fine due to the fact that the SCA's original claim was based on Bilia's national turnover rather than the turnover on the relevant market.



## UNITED KINGDOM

### 1. Summary

The quantification of harm to competition raises a number of topical and challenging issues for courts and competition agencies in the UK, both in relation to damages actions before the courts (including the specialist Competition Appeal Tribunal (the Tribunal) and the ordinary courts) and public enforcement by competition authorities such as the Office of Fair Trading (OFT).

This paper deals with selected issues for consideration identified in the Secretariat's call for contributions. In particular it discusses the role of quantification of harm in damage actions in private enforcement before the UK courts, including the Tribunal (section II), as well identifying the OFT's experience in integrating economics into its practices for the purpose of prioritising its competition interventions and then evaluating the impact of those interventions (section III).

### 2. Damages actions before the UK courts

#### 2.1 Introduction

Under the Competition Act 1998 (the Act) the Tribunal has jurisdiction to hear follow on claims for damages and other monetary claims pursuant to a finding of infringement under the Act or under the Treaty on the Functioning of the European Union (TFEU) by the OFT, one of the UK concurrent regulators or the European Commission. Follow on claims may also be heard in the Chancery Division of the High Court in England and Wales, the Court of Session and the sheriff court in Scotland and the High Court in Northern Ireland.<sup>1</sup> In follow on claims, the claimant can rely on the authority's findings of infringement and fact and in most cases need only prove that he suffered loss as a result of that infringement. The Tribunal's jurisdiction is increasing apace but is still relatively limited.

Claimants can also bring standalone actions in the ordinary courts (i.e. the UK courts excluding the Tribunal) where the alleged breach of competition law is not already the subject of an infringement decision by one of the relevant authorities. In this type of action the claimant will have to prove to the court that the breach of competition law occurred and that he suffered loss as a result of that breach. The majority of claims considered by the ordinary courts start out as standalone actions, although on occasions an infringement decision by one of the relevant authorities will follow, with the effect that the stand alone action becomes a follow on action.

#### 2.2 UK courts' consideration of issues relating to quantification

Issues relating to quantification have been considered in a number of UK court cases, including the following.

In January of this year in *Enron Coal Services (In Liquidation) v English Welsh & Scottish Railway* the UK Court of Appeal dismissed an appeal against the Tribunal's judgment dismissing the first claim to

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<sup>1</sup> Hereafter these courts together with the Tribunal are referred to as the "UK courts".

go to trial.<sup>2</sup> The Court of Appeal has provided guidance on when a competition authority may be taken to have made findings of fact and when those findings may be binding on the Tribunal and the courts. This judgment may prove significant for the quantification of damages insofar as an authority chooses to estimate the increase in market price arising from an infringement of the competition rules.

There has yet to be an award of final damages in the UK owing in part to the fact that a large number of cases are settled (although interim damages were awarded on one occasion in *Healthcare At Home v Genzyme*<sup>3</sup>).<sup>4</sup> Matters such as the passing on defence or the appropriate methodology for quantifying damages are very likely to arise in future litigation and, in all likelihood, will be contentious.

The issue of quantum has been considered by the High Court in *Crehan v Inntrepreneur Pub Co* and *Arkin v Borchard Lines*.

*Crehan*<sup>5</sup> will be well known not least as it included a reference to the European Court of Justice on the ability of a party to a contract to sue a co-contractor for damages.<sup>6</sup> On quantum the High Court said that, had the agreements in question infringed Article 81 EU (now Article 101 TFEU), Mr Crehan would have been entitled to a loss of profits from the date of the failure of the business up until the time of the judgment. On appeal the Court of Appeal, finding that the tying agreements had in fact infringed Article 81, ruled that the High Court's approach was incorrect as it involved the calculation of the hypothetical profits of a hypothetical business. Instead the Court of Appeal applied the standard measure for damages under English tort law, that being "the sum of money which will put the party who has been injured, or has suffered, in the same position as he would have been in if he had not sustained the wrong." The correct basis for damages was therefore the loss assessed at the date of the failure of the business, which equated to the dates on which Mr Crehan gave up his leases to the pubs under the tying agreements. The damages were quantified as the value of the unexpired terms of the leases had they been free of the tie, as well as the lost profits to the dates his business had ceased. The House of Lords in turn overruled the Court of Appeal and found that the tying agreements did not infringe Article 81. It therefore did not consider the issue of quantum and withdrew the award of damages.

In *Arkin v Borchard Lines*<sup>7</sup> Mr Arkin brought an action against a number of shipping companies who were members of two liner conferences seeking damages for losses suffered as a result of an infringement of Article 82 EU (now Article 102 TFEU) and in the alternative Article 81. The judge rejected each of Mr Arkin's claims on the basis that he had failed to prove an infringement or causation. However, on quantum, he observed that

*[t]he correct test is, in my judgment, simply to ask what, as a matter of commonsense is the amount of the loss which has been directly caused to [the claimant's shipping company] by the actual level of rates and the use of fighting ships and rumour spreading by the Conferences. In order to prove such loss the Claimant might show that for the whole or part of the relevant period it was reasonable for BCL to go on trading with an increasing loss which would not otherwise have been suffered if rates had not dropped since 18 April 1991 as much as they did.*

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<sup>2</sup> 19 January 2011; <http://www.bailii.org/ew/cases/EWCA/Civ/2011/2.html>

<sup>3</sup> Case number 1060/5/706 (15 November 2006); [http://www.catribunal.org.uk/files/JdG\(IR\)1060Hcare151106.pdf](http://www.catribunal.org.uk/files/JdG(IR)1060Hcare151106.pdf)

<sup>4</sup> The Court of Appeal did make an award of damages in *Crehan* (see below) but this was overturned by the House of Lords on appeal and no damages were awarded.

<sup>5</sup> [2003] EWHC 1510; <http://www.bailii.org/ew/cases/EWHC/Ch/2003/1510.html>

<sup>6</sup> Case C-453/99 Courage v Crehan [2001] ECR I-6297

<sup>7</sup> [2003] EWHC 687; <http://www.bailii.org/ew/cases/EWHC/Comm/2003/687.html>

Finally, it is worth noting the methodology for quantifying damages proposed by the claimants' expert in *Devenish Nutrition v Sanofi-Aventis SA (France)*.<sup>8</sup> This was one of the damages actions arising out of the European Commission's *Vitamins* cartel decision. In that case it was held that restitutionary damages are not available for antitrust infringements in England and Wales and that exemplary damages are not available where a penalty has already been imposed by a relevant authority. On measuring quantum the High Court summarised the methodology of the claimant's expert as follows:

- Determine or estimate the actual prices charged by the cartel for each period;
- Estimate the price (known as the "but for price") which would have been charged if there had been no cartel;
- Subtract the "but for price" from the actual price, thus giving the amount of the overcharge;
- Determine or estimate the quantity of vitamins purchased by each claimant;
- Estimate the proportion of the overcharge absorbed by upstream undertakings, and hence the proportion of the overcharge passed down to the claimant;
- Estimate the proportion of the overcharge passed down in turn by the claimant to downstream undertakings;
- Estimate the proportion of the overcharge absorbed by the claimant;
- Multiply the overcharge absorbed by the claimant and the quantity of vitamins purchased.

The court noted that the result of taking these steps will be the amount of profit lost by the claimant and that this might need to be adjusted (for example, by allowing for the incidence of taxation) to arrive at the net amount of compensation required to put the claimant in the position in which it would have been if there had been no cartel. The claimant's expert emphasised some of the difficulties of making these estimations and calculations (these include the fact that historic paperwork may be lost or destroyed, the counterfactual nature of the exercise and the complexity of the calculations).

The court nevertheless recognised that the methodology appeared to be typical in antitrust cases and was consistent with the Commission Staff Working Paper annexed to the European Commission's Green Paper on Damages Actions for Breach of the EC Antitrust Rules.<sup>9</sup> It also recognised that the "lost going concern value" was the measure favoured by the Court of Appeal in *Crehan*.

### **3. Assessing the impact of the OFT's competition work**

#### **3.1 *Prioritisation and the impact of interventions generally***

The OFT's mission is to make markets work well for UK consumers. This occurs when businesses compete vigorously and fairly to win customers' business. This usually happens without any need for intervention and the OFT only intervenes, for example through competition enforcement action, where it

<sup>8</sup> [2007] EWHC 2394; <http://www.bailii.org/ew/cases/EWHC/Ch/2007/2394.html>; paragraph 19. Of course the European Court of Justice has addressed the measure of damages in *Manfredi* (Cases C-295/04 etc, [2006] ECR I-6619, at paragraphs 95-100.

<sup>9</sup> Paragraph 21 of the judgment identifies the relevant paragraphs (126 and 127) of the Commission's Green Paper that explain the "but for" test.

can improve the way in which markets work. It focuses its efforts and resources on deterring and influencing behaviour that poses the greatest threat to consumer welfare and intervenes in order to protect consumer welfare and, in the process, drive higher productivity growth. It recognises the need to avoid imposing unnecessary burdens on business.

To make the best use of its resources in terms of real outcomes for UK consumers, the OFT needs to ensure that it makes appropriate decisions about which projects and programmes of work it undertakes under all of areas of its responsibility. To this end the OFT has published Principles by which it prioritises its work.<sup>10</sup>

Among these Principles, the OFT looks at the likely impact of interventions and what would be the likely direct and indirect effects on consumer welfare in the market or sector where the intervention takes place. Consumer welfare includes better value for consumers in terms of price, quality, range and service, both static and dynamic and may also include non-financial detriment (the usually in the case of consumer interventions) such as the avoidance of physical harm or emotional distress. Direct effect on consumer welfare will most likely arise from an OFT action that leads to preventing or terminating activity that would have negatively affected consumers for some time into the future.

### 3.2 *Estimating and evaluating impact of interventions*

The OFT has a dedicated Evaluation team that aims to evaluate whether the OFT is delivering its objectives and if it does so cost-effectively and, by doing so, also helps to prioritise, conduct, and follow up OFT work to ensure its impact is maximised.

The team estimates and evaluates the impact of OFT interventions in a variety of ways.

Before the intervention takes place, the Evaluation team advises project teams on the development of ex ante<sup>11</sup> impact estimation plans and associated impact estimates. All project teams are advised to develop, as early as the project's prioritisation stage, 'impact estimation plans' that outline what impact the project will have, if successful; the sequence of events that are due to take place in order to correct the harm identified in the theory of harm; the observable key indicators of success; and an action plan setting out what to monitor, how and when. These impact estimation plans are updated as the project progresses and as more information becomes available. At project completion, typically, an ex ante impact in terms of direct financial benefits to consumers is estimated (in addition to any qualitative (wider) benefits).

Following up on interventions, the Evaluation team conducts ex post monitoring of impact and in depth evaluations of past interventions. In addition to obtaining more up-to-date and detailed information on the impact of the intervention, by monitoring success indicators identified in the impact estimation plans and/or undertaking in depth evaluations, the OFT is able to test the impact estimated (and underlying assumptions applied) ex ante. In-depth evaluations of specific interventions require more resources and are therefore undertaken only for a small subset of projects.

Further details on estimating the direct financial benefits to consumers, as well as well as the methods to estimate the impact of OFT work in competition enforcement and merger control (section 4), ex post evaluations of discrete projects (including the example of the OFT's actions in the construction sector) (section 5) and conducting research into the wider benefits of intervention (section 6) follow below.

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<sup>10</sup> OFT Prioritisation Principles (OFT953, October 2008)

<sup>11</sup> The impact is ex ante in the sense that the full impact of our intervention is not yet observable.

## 4. Estimating the direct financial benefits to consumers

### 4.1 Positive Impact estimation

On the basis the work outlined above, the OFT publishes annual average estimates of the direct financial benefits to consumers from its work in the areas of competition law enforcement and merger control, as well as in consumer protection enforcement and market investigations.<sup>12</sup> The annual estimates rely on project specific estimates or evaluations or, alternatively, on rules of thumb based on economic literature and best practice. The methodologies and assumptions applied are subject to external review.

The OFT's goal is to 'make markets work well for consumers' and its (direct) impact target,<sup>13</sup> published annually in its Positive Impact notes, focuses on the direct financial benefits to consumers. An independent review of the OFT's methods carried out by Professor Stephen Davies<sup>14</sup> confirmed that this is an appropriate measure as any alternative total welfare standard would require dynamic analysis that would not be feasible, especially within the context of a comprehensive impact estimation programme.<sup>15</sup>

The OFT's annual Positive Impact estimates therefore only include the direct impact of its work on consumers. Many of the beneficial outcomes of the work are not quantifiable, for example, any psychological detriment averted by the OFT's actions, deterrence effect of its competition enforcement work and impact of increased competition on productivity.

The Consumer Price Index is used to take account of inflation and future consumer savings are discounted by a Social Time Preference Rate of 3.5 per cent.<sup>16</sup>

To avoid any chance of prejudicing its penalty-setting process, and also as consumers receive no direct benefits from the penalties imposed, the OFT does not offset penalties against its costs or include them as part of its benefits. It records financial penalties recovered separately and does not include redress benefits from private actions in its consumer savings estimates.

The OFT's estimates are based on the best information available at the time. Where evidence is less robust, the underlying assumptions used to estimate impact are very conservative. Any ex ante estimates are revised upwards or downwards if necessary as the OFT gathers more information through monitoring impact or conducting ex post evaluations.

<sup>12</sup> OFT's Positive Impact notes are available on the OFT website. <http://www.of.gov.uk/OFTwork/publications/publication-categories/reports/Evaluating/>

<sup>13</sup> The OFT has a performance target to deliver direct financial benefits to consumers of at least five times that of its cost to the taxpayer (referred to as the 5:1 target).

<sup>14</sup> For more information, see 'A review of OFT's impact estimation methods', by S. Davies, January 2010, OFT1164. [http://www.of.gov.uk/shared\\_of/reports/Evaluating-OFTs-work/of1164.pdf](http://www.of.gov.uk/shared_of/reports/Evaluating-OFTs-work/of1164.pdf)

<sup>15</sup> Given the challenges associated with the quantification of dynamic impacts and their absence from this analysis, a methodology based on total welfare would be misleading as static total welfare would not provide a fair reflection of the value of the work. See paragraph 6.5, page 37 of 'A Review of OFT's Impact Estimation methods', S. Davies, OFT1164, January 2010, available on the OFT website [http://www.of.gov.uk/shared\\_of/reports/Evaluating-OFTs-work/of1164.pdf](http://www.of.gov.uk/shared_of/reports/Evaluating-OFTs-work/of1164.pdf)

<sup>16</sup> The Social Time Preference Rate is defined by the UK Treasury as "the rate at which society values the present compared to the future". The rate of 3.5 per cent. is endorsed by the UK Treasury. See 'The Green Book: Appraisal and Evaluation in Central Government', HMT. Available from: [http://www.hm-treasury.gov.uk/d/green\\_book\\_complete.pdf](http://www.hm-treasury.gov.uk/d/green_book_complete.pdf)

It takes as given that all interventions not overturned on appeal are warranted. Should an appeal overturn an OFT or Competition Commission (CC) decision, the impact estimates will be reviewed accordingly in the subsequent year.

Described briefly below are the specific methods used to estimate the impact of OFT work in the areas of competition enforcement and merger control.

#### **4.2 *Estimating impact of OFT competition enforcement work***

The direct impact of OFT's competition enforcement interventions is to stop anti-competitive actions, resulting in (measurable) consumer savings. In addition, they may deter future anti-competitive conduct and/or establish legal precedent and regulatory stability and transparency. For the purposes of impact estimation, however, the OFT focuses on the direct financial benefit to consumers from its competition enforcement interventions.

To estimate the likely impact of its interventions, the OFT relies on a combination of: i) case team knowledge and judgment and ii) rules of thumb based on academic research and international best practice.

It estimates consumer savings for those cartel offences, anti-competitive agreements and abuse of dominance cases where an infringement decision has been issued against the undertakings concerned, one or more individuals have been convicted of the cartel offence, or where all the parties in a case have admitted their involvement in the infringement. In the latter case, only a portion of the total benefit is imputed and the rest will be imputed once the infringement decision has been issued or, where there is an ongoing parallel criminal investigation, once all investigations have been completed.<sup>17</sup>

The methodology involves three assumptions:

- future cartel duration prevented: in the absence of case specific information from the case team, it is assumed that if the OFT had not intervened, anti-competitive practice would have lasted for 6 years following inception. This assumption is consistent with standard international practice and also provides a useful benchmark for case teams.
- affected turnover: this is assumed to be only the turnover of the infringing parties. This is conservative, to the extent that a high cartel price allows competing outsiders to raise their own price up towards the cartel's price.
- extent of the avoided price-rise: this is estimated, if possible, during the investigation. Where not, a conservative 15 per cent is assumed.<sup>18</sup>

The impact is estimated by first multiplying the affected turnover by the price rise to get an estimate of annual impact. The future consumer savings is estimated by multiplying the annual impact by the future cartel duration, adjusting to take account of the social discount rate.

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<sup>17</sup> The OFT does not claim any benefits from criminal investigations where the court rules against it. This approach does not impact on the total benefits estimated for a particular case but has an effect on how benefits are allocated across years.

<sup>18</sup> Recent academic evidence on cartels overcharges finds median overcharges of 17-30 per cent. See paragraph 5.24, page 26 of 'A Review of OFT's impact estimation methods', S. Davies, January 2010, OFT1164. [http://www.of.gov.uk/shared\\_of/reports/Evaluating-OFTs-work/oft1164.pdf](http://www.of.gov.uk/shared_of/reports/Evaluating-OFTs-work/oft1164.pdf)

### 4.3 *Estimating impact of OFT's merger control work*

Potentially harmful merger situations might lead to lower competition, harming consumers in several ways, including higher prices, lower quality, less choice and longer term effects such as reduced incentives for innovation. The most measurable of these are price effects, which the OFT uses as an indicator of potential consumer harm in estimating the impact of its merger control work.

The OFT is the first stage of a two stage merger regime. Under the Enterprise Act 2002, it has the duty (first phase) to review merger situations and refer to the CC (second phase) any cases where there is a realistic prospect of a substantial lessening of competition (SLC) in UK markets. The OFT has the power to accept Undertakings in Lieu (of a reference to the CC) (UIL) from the merging parties if these are deemed to address potential concerns highlighted in the course of its investigations.

For all mergers in which there was an 'intervention' (in other words, UILs were agreed with the OFT or the merger was abandoned upon referral to the CC), an economic model is used to simulate how prices, demand, and market share might have changed if, in the absence of an intervention, the merger had gone ahead as originally envisaged. There are four key issues for consideration:

- The simulation model is chosen, as appropriate, from three candidates (depending on data availability and whether the merger relates to homogeneous or differentiated products). For vertical mergers, simulation is done for each stage separately.
- The model is calibrated using low, medium and high assumed values of the industry elasticity (which is a key input in the model) and uses the medium as the chosen point estimate.
- Savings are assumed to last for two years – thereafter, market correction (for example, entry) is assumed to wipe out any anti-competitive consequences.
- 'Off model' adjustments may also be necessary to accommodate any properties of the merger or market not picked up by the models.

Where simulation is not appropriate for the case, it is assumed that the consumer savings as a proportion of turnover are equal to the mean of the lower bound of that ratio across all simulated mergers over the previous three financial years.

The impact of the merger is estimated by considering two effects:

- price effect: following a merger which is deemed to lead to an SLC, it is likely that the market price will increase. Those people who continue to buy products at the inflated price suffer a 'price effect', which is a direct financial loss.
- deadweight effect: a number of consumers will stop buying the good because of the increased price. These consumers lose the benefit that they would have gained from purchasing the good at the pre-merger price.

The two-phase merger regime requires further adjustments to the impact estimation method:

- Allowance for CC involvement: recognising that UK merger control is a two stage process, 20 per cent of the savings from UILs and abandoned mergers are attributed to CC, while 20 per cent of the savings from the CC's interventions are attributed to OFT. The latter are calculated by the CC.

- To account for uncertainty, estimates for UILs and abandoned mergers are scaled down to reflect the fact that the CC only blocks or modifies a proportion of mergers referred to it by the OFT.

## 5. Ex post evaluations of discrete projects

The OFT has a public commitment to evaluate at least two interventions annually (one of which should be a market study). Its programme of independent evaluations covers a wide range of interventions including its work in the areas of competition enforcement (for example its evaluation of the impact of the OFT's investigation into bid rigging in the construction industry – on which further below), market studies (for example evaluation of the 2003 OFT market study into retail pharmacy market in the UK) and consumer protection (evaluation of six consumer enforcement cases).

These evaluations typically present a monetised estimate of the impact of the OFT intervention, suggest ways in which the delivery of the intervention might have been improved to maximise impact, highlight whether further action might be required, outcomes that could be further improved and help identify areas for new intervention. An example of the key findings of a recent evaluation of OFT's competition work is given below.<sup>19</sup>

### 5.1 *Example: evaluation of the impact of OFT actions in the construction sector*

In 2010 the OFT published an independent evaluation, conducted by Europe Economics (partnering with GfK NOP), into the impact of the OFT competition enforcement activities in the construction sector.<sup>20</sup> The research revealed significant improvements in awareness and understanding of competition law and changes in business behaviour in the sector.

The research, based on surveys of construction contractors and procurers, was conducted in two phases. Results from the first phase, conducted before the Statement of Objections in April 2008 against 112 construction firms, were compared with those from the second phase of the research, conducted after the OFT's infringement decision to impose penalties on 103 construction firms for cover pricing activities.

The evaluation highlighted a number of positive developments:

- Three-quarters of contractors were aware of the OFT's recent decision on bid rigging. In 2008, less than a third were aware of earlier infringement decisions.
- Three-quarters of contractors were aware of financial penalties being applicable for cover-pricing, compared to less than half in 2008.
- Nine in ten construction firms recognised cover pricing to be a serious breach of competition law with associated penalties.
- Forty per cent of procurers surveyed introduced a new mechanism in the preceding two years to detect or prevent anticompetitive practices.

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<sup>19</sup> All of the OFT's ex post evaluations are available on its website: <http://www.offt.gov.uk/OFTwork/research/evaluation/Evaluation-completed>

<sup>20</sup> 'Evaluation of the impact of OFT's investigation into bid rigging in the construction industry' OFT1240, June 2010. <http://www.offt.gov.uk/OFTwork/publications/publication-categories/reports/Evaluating/oft1240>

In addition, the research provided insights into a number of issues of relevance to recent enforcement action and further OFT work. It illustrated the important role of media reports (trade press, television and radio coverage) as sources of information about the OFT actions and decisions. Trade associations also appeared as more prominent sources of information on competition issues than in 2008. The results from the research will prove useful in ensuring that the OFT enforcement work continues to deliver high impact outcomes.

## **6. Conducting research into the wider benefits of intervention**

Finally, as well as the insights provided by ex-ante impact estimation and ex-post monitoring and evaluation, the OFT assesses the impact on influencing business practice through deterrence. In 2007 it commissioned research into the deterrent effect of its competition work.<sup>21</sup> In addition, a number of its ex-post evaluations also provide insight into deterrence and drivers of compliance for specific cases/markets (e.g. the cartel enforcement in the construction sector). The OFT also assesses the dynamic/wider benefits of competition, including the impact on consumer confidence, innovation or productivity (see, for instance, its 2007 report on the links between competition and productivity).<sup>22</sup>

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<sup>21</sup> OFT (2007), 'The deterrence effect of competition enforcement by the OFT: a report prepared for the OFT by Deloitte'. OFT (962)

<sup>22</sup> See 'Productivity and Competition' OFT 887, January 2007.  
<http://www.of.gov.uk/OFTwork/publications/publication-categories/reports/Economic-research/oft887>



## UNITED STATES

This paper responds to the Chairman’s invitation for written submissions. It discusses the role of quantification of harm in public and private enforcement of the U.S. antitrust laws, standing requirements for private plaintiffs, including causation and indirect injury issues, the types of injury that are compensable under U.S. law, methods for quantifying damages that have been used in U.S. courts, the pass-on defense, data availability issues, and the integration of economics into the legal process. It concludes with some views on the general experience of the Antitrust Division of the U.S. Department of Justice (“Division”) and Federal Trade Commission (“FTC”) (collectively “the agencies”) in this area.

### 1. Role of quantification of harm to competition in public and private enforcement

To establish a violation of U.S. antitrust law, the plaintiff—whether the government or a private party—must show actual or threatened harm to the competitive process. Quantification is not required. To recover damages from an antitrust violation in federal court litigation, a plaintiff must quantify its injury, but damages actions are nearly always private, so the U.S. competition agencies normally are not required to quantify effects on competition as a part of enforcing the antitrust laws.<sup>1</sup>

In measuring overall agency performance (rather than in an enforcement context), however, the agencies do estimate savings to U.S. consumers from their antitrust enforcement. In connection with cartel enforcement, the Division estimates consumer savings as 10% of the annual U.S. sales in the relevant market, unless the cartel had a duration of less than a year, in which case the estimate is 10% of sales over the life of the cartel.<sup>2</sup> The 10% figure is a conservative estimate of the average price effect of cartels.<sup>3</sup> For horizontal merger enforcement, the agencies’ estimate is generated by multiplying the annual U.S. sales in the relevant market by a prediction of the likely price increase the merger would have caused. For a relatively small number of mergers, such a prediction is made in the course of the investigation, but for a substantial majority of mergers, the prediction is made using a simple model of oligopoly and driven

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<sup>1</sup> The U.S. Department of Justice does some quantification of injury from cartel activity in determining fines. A provision of U.S. criminal law occasionally relied upon in cartel cases provides that “[i]f any person derives pecuniary gain from the offense, or if the offense results in pecuniary loss to a person other than the defendant, the defendant may be fined not more than the greater of twice the gross gain or twice the gross loss.” See 18 U.S.C. § 3571(d). To avoid the complication of estimating gains or losses in each case, the base corporate fine for a criminal antitrust violation is set at 20% of the affected volume of commerce. See 1 U.S. SENTENCING COMMISSION, FEDERAL SENTENCING GUIDELINES MANUAL § 2R1.1(d)(1) (2010). The use of 20% was explained by the United States Sentencing Commission on the basis that the estimated average gain was about 10% of the volume of commerce, and the corresponding loss to victims was greater than the gain to the violators. See *id.* Application Note 2. The Guidelines favor requiring restitution, but the private damages actions discussed below compensate those injured by antitrust violations. Restitution, however, is a condition of acceptance into the Antitrust Division’s leniency program. See Antitrust Division, U.S. Department of Justice, Corporate Leniency Policy A.5 (Aug. 10, 1993), available at <http://www.justice.gov/atr/public/guidelines/0091.pdf>.

<sup>2</sup> Occasionally, the estimate is instead based on publicly available information about the actual price effect of a particular cartel.

<sup>3</sup> See, e.g., John M. Connor, *Price-Fixing Overcharges: Legal and Economic Evidence*, in 22 RESEARCH IN LAW AND ECONOMICS 59 (John B. Kirkwood, ed. 2007).

largely by market shares. For all other enforcement, the estimate used is 1% of the annual sales in the relevant market, unless the investigation itself generates a more precise estimate.

In the course of investigations of proposed mergers, the U.S. competition agencies often develop indications of likely harm, much as the consumer savings estimates are generated, and far more precise estimates sometimes are developed using the detailed evidence obtained in an investigation. In some cases, especially involving horizontal mergers, quantitative predictions of likely price effects are generated. This can be done using models of competitive interaction calibrated to fit the particular industry under investigation. It can also be done on the basis of an econometric analysis of the relationship between market structure and prices. In cases involving horizontal mergers, the U.S. competition agencies also quantify likely efficiencies (based on submissions of the merging parties) and assess whether they are of a type and magnitude such that they would prevent a net increase in price.

In the course of investigating a consummated merger – and such investigations are relatively uncommon -- the U.S. competition agencies sometimes conduct detailed statistical analyses of the effects the merger has had on prices.<sup>4</sup>

## 2. Standing to recover damages in private litigation

U.S. law provides that “any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue” in federal court and “recover threefold the damages by him sustained, and the costs of suit, including a reasonable attorney’s fee.”<sup>5</sup> Another provision of U.S. antitrust law, referred to as the “statute of limitations,” bars a damages action “unless commenced within four years after the cause of action accrued.”<sup>6</sup> A cause of action might accrue immediately at the time of the violation,<sup>7</sup> but a cause of action has not yet accrued if the plaintiff’s damages remain speculative because the market impact of the violation cannot yet be determined.<sup>8</sup> In addition, the four-year limitations

<sup>4</sup> See, e.g., Deborah Haas-Wilson & Christopher Garmon, *Two Hospital Mergers on Chicago’s North Shore: A Retrospective Study*, INTERNATIONAL JOURNAL OF THE ECONOMICS OF BUSINESS (forthcoming).

<sup>5</sup> This provision is in section 4 of the Clayton Act, 15 U.S.C. § 15, which replaced an almost identical provision contained in section 7 of the 1890 Sherman Act, 26 Stat. 210 (1890). The phrase “business or property” has been interpreted to include all “commercial interests or enterprises.” *Hawaii v. Standard Oil Co. of California*, 405 U.S. 251, 264 (1972). Final consumers also can suffer injury to their “business or property.” *Reiter v. Sonotone Corp.*, 442 U.S. 330 (1979).

<sup>6</sup> 15 U.S.C. § 15b. This statute of limitations is unrelated to the five-year statute of limitations applicable in criminal cartel cases. 18 U.S.C. § 3282.

<sup>7</sup> For example, a cause of action for injury from an allegedly unlawful merger normally accrues on the date of the merger. See *Midwestern Machinery, Inc. v. Northwest Airlines, Inc.*, 392 F.3d 265, 269–76 (8th Cir. 2004); *Concord Boat Corp. v. Brunswick Corp.*, 207 F.3d 1039, 1050–53 (8th Cir. 2000).

<sup>8</sup> See *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 339 (1971) (“[R]efusal to award future profits as too speculative is equivalent to holding that no cause of action has yet accrued for any but those damages already suffered. In these instances, the cause of action for future damages, if they ever occur, will accrue only on the date they are suffered; thereafter the plaintiff may sue to recover them at any time within four years from the date they were inflicted.”). Damages often are awarded on the basis of “predicted as distinct from realised losses due to the defendant’s misconduct,” and a plaintiff is not permitted to wait and see how things work out in the marketplace. See *Brunswick Corp. v. Reigel Textile Corp.*, 752 F.2d 261, 271 (7th Cir. 1984). See generally Herbert J. Hovenkamp, *A Primer on Antitrust Damages*, at 24-27, University of Iowa Legal Studies Research Paper (Oct. 1, 2010), available at <http://ssrn.com/abstract=1685919>, for a discussion of the accuracy required by the courts for measurement of damages.

period does not begin to run if the defendant's concealment efforts prevent discovery of the violation.<sup>9</sup> Finally, additional acts in furtherance of the violation can restart the four-year limitations period.<sup>10</sup>

As the Supreme Court observed in 1983 in *Associated General Contractors*: "A literal reading of the statute is broad enough to encompass every harm that can be attributed directly or indirectly to the consequences of an antitrust violation."<sup>11</sup> The Court, however, concluded that Congress' intent in enacting the statute was to import "well recognised principles of the common law," including those relating to damages actions.<sup>12</sup> The Court likened "the struggle of federal judges to articulate a precise test to determine whether a party injured by an antitrust violation may recover treble damages" to "the struggle of common-law judges to articulate a precise definition of the concept of 'proximate cause.'"<sup>13</sup> After noting that "the infinite variety of claims that may arise make it virtually impossible to announce a black-letter rule that will dictate the result in every case,"<sup>14</sup> the Court articulated and applied considerations that had been found important in prior cases. In determining whether a particular damages claim is within the scope of the law, lower courts continue to take guidance from this discussion.<sup>15</sup>

One consideration the Court cited was "the nature of the plaintiff's alleged injury."<sup>16</sup> The Court indicated that a key issue is "whether a claim rests at bottom on some abstract conception or speculative measure of harm."<sup>17</sup> Such claims present substantial doubt about whether the plaintiff actually suffered a pecuniary injury compensable under the antitrust laws and about the ability of the legal system to verify and quantify the injury.

A second consideration was "the chain of causation between the . . . injury and the alleged restraint," in particular "the directness or indirectness of the asserted injury."<sup>18</sup> The Court questioned granting a damages remedy for indirect injuries if there is "an identifiable class of persons whose self-interest would normally motivate them to vindicate the public interest in antitrust enforcement."<sup>19</sup> The Court also

<sup>9</sup> See, e.g., *In re Copper Antitrust Litigation*, 436 F.3d 782, 791 (7th Cir. 2006); *Pinney Dock and Transport Co. v. Penn Central Corp.*, 838 F.2d 1445, 1465–80 (6d Cir. 1988). For a discussion of the extensive case law on the subject, see 1 ABA SECTION OF ANTITRUST LAW, *ANTITRUST LAW DEVELOPMENTS* 865–72 (6th ed. 2007); 2 PHILLIP E. AREEDA ET AL., *ANTITRUST LAW* ¶ 320e, at 318–23 (3d ed. 2007). To take advantage of this doctrine of "fraudulent concealment" a plaintiff must show it "neither knew nor, in the exercise of due diligence, could reasonably have known of the offense." *Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 195 (1997).

<sup>10</sup> A new independent act, and not merely a reaffirmation of a previous act, is required to restart the limitations period. See, e.g., *Varner v. Peterson Farms*, 371 F.3d 1011, 1019 (8th Cir. 2004); *DXS, Inc. v. Siemens Medical Systems, Inc.*, 100 F.3d 462, 467–68 (6th Cir. 1996); *Pace Industries, Inc. v. Three Phoenix Co.*, 813 F.2d 234, 237–39 (9th Cir. 1987).

<sup>11</sup> *Associated General Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519, 529 (1983).

<sup>12</sup> *Id.* at 531–33.

<sup>13</sup> *Id.* at 535–36.

<sup>14</sup> *Id.* at 536.

<sup>15</sup> What follows adopts the organisation of 2A PHILLIP E. AREEDA ET AL., *ANTITRUST LAW* ¶ 335d, at 66–70 (3d ed. 2007).

<sup>16</sup> *Associated General Contractors*, 459 U.S. at 538.

<sup>17</sup> *Id.* at 543 (quoting *Blue Shield of Virginia v. McCready*, 457 U.S. 465, 475 n.11 (1982)).

<sup>18</sup> *Id.* at 540.

<sup>19</sup> *Id.* at 542.

observed that the “strong interest . . . in keeping the scope of complex antitrust trials within judicially manageable limits” militates against entertaining claims based on indirect injuries, as they present “either the risk of duplicate recoveries on the one hand, or the danger of complex apportionment of damages on the other.”<sup>20</sup>

The Court noted two of its prior decisions avoiding complexities with damages claims involving alleged overcharges. In *Hanover Shoe*, the Court held that direct purchasers that paid overcharges as a consequence of the defendants’ antitrust violation could recover the entire overcharge, even if some had been passed on to the plaintiffs’ customers.<sup>21</sup> In *Illinois Brick*, the Court held that indirect purchasers could not recover overcharges passed on to them by the direct purchasers.<sup>22</sup>

The Court also referred to decisions limiting the permissible scope of damages claims in cases not involving alleged overcharges.<sup>23</sup> These decisions hold that antitrust law does not permit the recovery of damages for injuries that are remote from the antitrust violation. The remoteness doctrine bars a claim for damages not proximately caused by the alleged antitrust violation, in the specific sense that the injury complained of is derivative from that of another party closer to the violation. The doctrine bars, for example, damages claims by a company’s employees, shareholders, and suppliers for injuries derived from injury to the company, even if the latter injury was directly caused by conduct violating the antitrust laws.<sup>24</sup>

The third consideration the Supreme Court cited was the plaintiff’s marketplace relationship to the defendants and, consequently, whether the plaintiff “would be served or disserved by enhanced competition in the market.”<sup>25</sup> The Court reaffirmed its *Brunswick* decision, which articulated the concept of *antitrust injury* as a prerequisite for maintaining an action for damages under the antitrust laws.<sup>26</sup> The plaintiff in that case alleged that the defendant’s acquisition of the plaintiff’s competitor violated the antitrust laws and was awarded damages based on the profits it would have earned had the acquired competitor shut its doors rather than been kept open by the defendant. The Supreme Court unanimously set aside the damage award on the basis that the plaintiff was not injured “by reason of anything forbidden in the antitrust laws,” as the statute requires.<sup>27</sup> The Court held that plaintiffs in antitrust damages actions “must prove more than injury causally linked to” an antitrust violation; they must “prove *antitrust injury*, which is to say injury of a type the antitrust laws were intended to prevent and that flows from that which

<sup>20</sup> *Id.* at 543–44. In the most recent consideration of these issues by the Court, three Justices opined that an antitrust plaintiff lacked standing to sue for damages when “there is only an indirect relationship between the defendant’s alleged misconduct and the plaintiff’s asserted injury.” *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 416–17 (2004) (Stevens, J., concurring). The remaining Justices found it unnecessary to address the plaintiff’s standing. *See id.* at 416 n.5.

<sup>21</sup> *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968).

<sup>22</sup> *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977). Damages claims can be filed under both federal and state law, and many of the states permit indirect purchasers to recover damages even though they cannot under federal law.

<sup>23</sup> *Associated General Contractors*, 459 U.S. at 533–34 (citing *Southern Pacific Co. v. Darnell-Taenzer Lumber Co.*, 245 U.S. 531, 533 (1918); and *Loeb v. Eastman Kodak Co.*, 183 F. 704, 709 (3d Cir. 1910)).

<sup>24</sup> *See* 2A PHILLIP E. AREEDA ET AL., *ANTITRUST LAW* ¶¶ 350, 352–53, at 233–48, 253–68 (3d ed. 2007).

<sup>25</sup> *Associated General Contractors*, 459 U.S. at 538–39.

<sup>26</sup> *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977).

<sup>27</sup> *Id.* at 488.

makes the defendants' acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation."<sup>28</sup>

The antitrust injury requirement is quite important in private antitrust litigation. Defendants frequently seek dismissal of antitrust suits on the basis that the plaintiff failed to plead injury not only to itself but also to competition, and such motions commonly are granted.<sup>29</sup> In *Atlantic Richfield*, the Supreme Court rejected the argument that antitrust injury can be presumed, or need not be shown, when per se illegal conduct by the defendant directly injures the plaintiff.<sup>30</sup> The plaintiff was an independent gasoline retailer that competed with gas stations owned by the defendant and with stations franchised by the defendant. The defendant allegedly cut wholesale prices and forced the pass through of the price cut in its franchised stations through a per se illegal maximum resale price maintenance agreement.<sup>31</sup> The Court concluded that the plaintiff was seeking to recover for losses from intensified competition and that such losses do not constitute antitrust injury.<sup>32</sup> The Court observed that injury from the low prices charged by a competitor is antitrust injury only if those prices are predatory.<sup>33</sup>

### 3. Compensable injuries

More than a century ago, the first private U.S. damages action associated with cartel activity resulted in damages for overcharges.<sup>34</sup> The amount of damages was determined by multiplying the quantity the plaintiff purchased by the "estimated difference between the just and fair market price of the goods and the price actually paid."<sup>35</sup> The "general principle that the victim of an overcharge is damaged within the meaning of [the antitrust laws] to the extent of that overcharge"<sup>36</sup> is now firmly ingrained in U.S. antitrust law.

This general principle has profound implications that distinguish the legal construct of overcharge damages from the economic effects of antitrust violations. The differences are clear in the important scenario of a cartel selling to manufacturers that then sell to final consumers. The manufacturers might be able to sue for lost profits, but in practice, they always sue for overcharges, and the manufacturers' overcharge damages differ in fundamental ways from their lost profits.

<sup>28</sup> *Id.* at 489. Subsequently, the Court confirmed that a "showing of antitrust injury is necessary" to maintain an antitrust damages claim. *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 110 n.5 (1986). The same decision held that the antitrust injury requirement also applies when only an injunction is sought.

<sup>29</sup> Recent cases in which the dismissal was affirmed on appeal include: *Warrior Sports, Inc. v. NCAA*, 623 F.3d 281, 286 (6th Cir. 2010); *Race Tires America, Inc. v. Hoosier Racing Tire Corp.*, 614 F.3d 57, 83–84 (3d Cir. 2010); *Jebaco, Inc. v. Harrah's Operating Co., Inc.*, 587 F.3d 314, 318–22 (5th Cir. 2009); *NicSand, Inc. v. 3M Co.*, 507 F.3d 442, 450–59 (6th Cir. 2007) (en banc).

<sup>30</sup> *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328 (1990).

<sup>31</sup> At the time, the arrangement was per se illegal pursuant to *Albrecht v. Herald Co.*, 390 U.S. 145 (1968). The *Albrecht* decision was later overruled by the Court in *State Oil Co. v. Khan*, 522 U.S. 3 (1997).

<sup>32</sup> *Atlantic Richfield*, 495 U.S. 336–38.

<sup>33</sup> *Id.* at 339–41.

<sup>34</sup> *City of Atlanta v. Chattanooga Foundry & Pipe Works*, 101 F. 900 (C.C.E.D. Tenn. 1900), *aff'd*, 203 U.S. 390 (1906). In the case of a buyers' cartel, the action would be for underpayments rather than overcharges, and such damages actions certainly are permitted under U.S. law.

<sup>35</sup> *City of Atlanta*, 101 F. at 901.

<sup>36</sup> *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481, 491 (1968).

A host of factors determine the extent to which the cartel overcharge is passed on by the manufacturers, but as a matter of law, they suffer the full overcharge injury and recover the full overcharge damages.<sup>37</sup> Many of the same factors determine the extent to which the manufacturers lose profits on output no longer sold because their prices go up, but as a matter of law, no damage recovery is permitted for input purchases not made. The Supreme Court recognised that economic modeling makes possible, at least in theory, an accounting for all the relevant factors, but the Court perceived substantial difficulty in “measuring the relevant elasticities” and was unwilling to make the “drastic simplifications” economic modeling could require.<sup>38</sup> The Court also concluded that “the longstanding policy of encouraging vigorous private enforcement of the antitrust laws” was advanced by simplifying damages litigation and concentrating the recovery in the direct purchasers.<sup>39</sup>

An issue not entirely settled is whether “umbrella” damage claims are permitted in private litigation. Such claims arise, for example, when not all competitors in a market participate in a cartel. Non-participants can be expected to raise price under the umbrella of the cartel, and the customers of the non-participants accordingly are injured. The non-participants are not liable for damages, as they did not violate the antitrust laws, but claims could be made against cartel participants by all customers of the non-participants. Several decisions rejected such claims,<sup>40</sup> but other decisions are to the contrary.<sup>41</sup>

In exclusionary conduct cases (and potentially some other cases), damages claims seek lost profits. A firm driven from the market by exclusionary conduct is entitled to recover a reasonable estimate of the entire stream of profits it otherwise would have earned, including future profits. The firm must demonstrate “injury in fact,” i.e., that it suffered injury, and the applicable standard of proof is that generally used in civil cases.<sup>42</sup> A plaintiff need not show that its injury was due solely to the alleged antitrust violation, but rather only that the antitrust violation was a material cause of the injury.<sup>43</sup> Courts describe the standard of proof for “injury in fact” as more rigorous than that for the amount of damages.<sup>44</sup> A plaintiff can be denied recovery if it is unable to “disaggregate” the damages by separating the impact of the practices found to violate the antitrust laws from the impacts of lawful competition and the plaintiff’s own mismanagement or misfortune.<sup>45</sup>

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<sup>37</sup> *Id.* at 494.

<sup>38</sup> *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 742 (1977).

<sup>39</sup> *Id.* at 745–46.

<sup>40</sup> *E.g.*, *Mid-West Paper Products Co. v. Continental Group, Inc.*, 596 F.2d 573, 583–87 (3d Cir. 1979); *In re Folding Carton Antitrust Litigation*, 88 F.R.D. 211, 218–220 (N.D. Ill. 1980).

<sup>41</sup> *E.g.*, *In re Beef Industry Antitrust Litigation*, 600 F.2d 1148, 1166 n.24 (5th Cir. 1979); *In re Uranium Antitrust Litigation*, 552 F. Supp. 517, 523–26 (N.D. Ill. 1982).

<sup>42</sup> *See Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 264–65 (1946) (“[T]he jury could conclude as a matter of just and reasonable inference from the proof of defendants’ wrongful acts and their tendency to injure plaintiffs’ business, and from the evidence of the decline in prices, profits and values, not shown to be attributable to other causes, that defendants’ wrongful acts had caused damage to the plaintiffs.”)

<sup>43</sup> *See Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 114 n.9 (1969) (“It is enough that the illegality is shown to be a material cause of the injury; a plaintiff need not exhaust all possible alternative sources of injury in fulfilling his burden of proving compensable injury . . .”). An antitrust plaintiff has a duty to “mitigate” the damages by taking prudent steps to limit the impact of the defendant’s unlawful conduct. *See, e.g.*, *Pierce v. Ramsey Winch Co.*, 753 F.2d 416, 436 (5th Cir. 1985); *Litton Systems, Inc. v. AT&T Co.*, 700 F.2d 785, 820 n.47 (2d Cir. 1983).

<sup>44</sup> *See J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557, 565–67 (1981).

<sup>45</sup> *See, e.g.*, *Image Technical Services, Inc. v. Eastman Kodak Co.*, 125 F.3d 1195, 1224 (9th Cir. 1997);

#### 4. Methods for quantifying damages

Proof of damages in private litigation entails a comparison of the plaintiff's actual situation to what its situation would have been but for the unlawful conduct. The plaintiff's experts thus construct a but-for world to the extent required to make the relevant comparison. Little is required under U.S. antitrust law when the injury complained of is an overcharge—only estimating the but-for price. For example, in cartel cases the issue is what the defendants would have charged during the cartel period had they not engaged in cartel activity. Litigants are free to estimate the but-for price in any defensible manner they choose.

That estimate can be made in many ways, but most methods used in antitrust damages cases in the United States are forms of before-and-after comparison. Such a comparison could be as simple as comparing the average price paid by the plaintiffs during the cartel activity to the average price they paid before it began or after it ended. But prices are affected by many factors relating to conditions of demand and supply, so a comparison that simple likely would be rejected by a court for failing to account for any such factors.<sup>46</sup> To account for such factors, experts typically employ econometric methods.<sup>47</sup>

An example relates to a cartel in the supply of frozen perch filets to the U.S. Department of Defense.<sup>48</sup> Purchasing was done through auctions conducted roughly once a week, and a cartel among bidders allocated particular weeks to particular suppliers. To estimate the effect of the cartel on prices paid, the winning bid data were compiled from Defense Department data for the period of the conspiracy and for a year after it ended. To control for the effects of supply and demand conditions, data on fresh perch filets was compiled from public sources. Winning bid prices for frozen perch were then regressed on contemporaneous and lagged prices for fresh perch. Estimation of the cartel's effect was done in two ways. One way estimated a predictive regression equation with data from the cartel period and then forecast prices during the post-cartel period. The other way estimated a predictive regression equation with data for the post-cartel period, then “backcast” prices during the cartel period. Both methods found price effects from the cartel of roughly 20%.

If the product in question is simultaneously sold in different locations under both cartel and non-cartel conditions, a “difference-in-differences” estimate can be made by combining the information from price movements over time with the information from price differences across locations.<sup>49</sup> This has been done to estimate the price effects of consummated mergers.<sup>50</sup>

In one notable private damages litigation—involving the lysine cartel—neither of the opposing experts employed a before-and-after analysis. The plaintiffs' expert argued that, but for the cartel, the price would have been equal to marginal cost, and hence predicted the but-for price by estimating marginal

City of Vernon v. Southern California Edison Co., 955 F.2d 1361, 1371–73 (9th Cir. 1992); Farley Transportation Co. v. Santa Fe Trail Transportation Co., 786 F.2d 1342, 1352 (9th Cir. 1985).

<sup>46</sup> See the discussion below on the admissibility of expert opinions.

<sup>47</sup> For detailed, but not excessively technical discussions, see ABA SECTION OF ANTITRUST LAW, PROVING ANTITRUST DAMAGES 130–74, 180–216 (2d ed. 2010); 2A PHILLIP E. AREEDA ET AL., ANTITRUST LAW ¶¶ 394–95, at 354–400 (3d ed. 2007); PETER DAVIS & ELIANA GARCÉS, QUANTITATIVE TECHNIQUES FOR COMPETITION AND ANTITRUST ANALYSIS 354–59 (2010).

<sup>48</sup> See Luke M. Froeb, Robert A. Koyak & Gregory J. Werden, *What is the Effect of Bid-Rigging on Prices?*, 42 ECONOMICS LETTERS 419 (1993).

<sup>49</sup> See ABA SECTION OF ANTITRUST LAW, *supra* note 49, at 174–76.

<sup>50</sup> See, e.g., Christopher T. Taylor & Daniel S. Hosken, *The Economic Effects of the Marathon-Ashland Joint Venture: The Importance of Industry Supply Shocks and Vertical Market Structure*, 55 JOURNAL OF INDUSTRIAL ECONOMICS 1467 (2007).

cost.<sup>51</sup> The defendants' expert argued that the but-for price would have been well in excess of marginal cost and predicted the but-for price using a standard model of oligopoly.<sup>52</sup> Not surprisingly, the estimates differed substantially. Because the case was settled, we cannot know how a jury would have resolved the dispute.

Overcharge damages are sought in many private antitrust cases other than cartel cases, and can be estimated in similar ways in most such cases. However, some antitrust damage actions seek damages of a very different sort, as when the plaintiff alleges that the defendant's unlawful exclusionary conduct forced it out of business or otherwise unlawfully deprived it of profits. As the Supreme Court has observed, "[t]he vagaries of the marketplace usually deny us sure knowledge of what plaintiff's situation would have been in the absence of the defendant's antitrust violation."<sup>53</sup> Thus, the Court has instructed the lower courts to "observe the practical limits of the burden of proof which may be demanded of a treble-damage plaintiff who seeks recovery for injuries from a partial or total exclusion from a market; damage issues in these cases are rarely susceptible of the kind of concrete, detailed proof of injury which is available in other contexts."<sup>54</sup>

Damages litigation involving exclusionary conduct has produced little guidance on how lost profits should be estimated. The few cases litigated to judgment are nearly always tried to a jury, which does not produce any commentary on its assessment of damages. Damage awards in these cases have been appealed, but the decisions in those appeals have not articulated limiting principles. One observation from the litigated cases is that plaintiffs typically do not use econometrics or economic modeling to estimate lost profits damages,<sup>55</sup> but rather rely on financial analysis to project what their profits would have been.<sup>56</sup> Such projections can depend a great deal on assumptions regarding future marketplace success of the plaintiffs.

## 5. Pass-on defense

The pass-on defense has not been a significant issue in federal litigation in the United States for the last half century. In 1968 the Supreme Court almost entirely precluded this defense.<sup>57</sup> The case concerned

<sup>51</sup> John M. Connor, "Our Customers Are Our Enemies": *The Lysine Cartel of 1992–1995*, 18 REVIEW OF INDUSTRIAL ORGANISATION 5 (2001).

<sup>52</sup> Lawrence J. White, *Lysine and Price Fixing: How Long? How Severe?*, 18 REVIEW OF INDUSTRIAL ORGANISATION 23 (2001). For more on the use of models of competitive interaction to estimate but-for prices, see DAVIS & GARCÉS, *supra* note 49, at 353, 364–68.

<sup>53</sup> *J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557, 566 (1981).

<sup>54</sup> *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 123 (1969).

<sup>55</sup> Econometrics was used, however, in one leading case. See *Conwood Co., L.P. v. United States Tobacco Co.*, 290 F.3d 768, 780 (6th Cir. 2002). The damage analysis employed by the plaintiff is discussed in detail and criticised by David H. Kaye, *The Dynamics of Daubert: Methodology, Conclusions, and Fit in Statistical and Econometric Studies*, 87 VIRGINIA LAW REVIEW 1933, 1988–2013 (2001); Motion for Leave to File Brief and Brief of Washington Legal Foundation, Stephen E. Fienberg, Franklin M. Fisher, Daniel L. Mcfadden, and Daniel L. Rubinfeld as *Amici Curiae* in Support of Petitioners, *United States Tobacco v. Conwood Co., L.P.* (No. 02-603), available at [http://www.law.berkeley.edu/faculty/rubinfeldd/Profile/publications/rubinfeld\\_Daubert-Amicus%20Brief.pdf](http://www.law.berkeley.edu/faculty/rubinfeldd/Profile/publications/rubinfeld_Daubert-Amicus%20Brief.pdf).

<sup>56</sup> This analysis is described by ABA SECTION OF ANTITRUST LAW, *supra* note 49, at 89–124; Herbert J. Hovenkamp, *A Primer on Antitrust Damages* at 41–50, 52–56, University of Iowa Legal Studies Research Paper (Oct. 1, 2010), available at <http://ssrn.com/abstract=1685919>.

<sup>57</sup> *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968).

overcharges associated with unlawful monopolisation of machinery used to make shoes. The defendant argued that the plaintiff, which manufactured shoes using the machines, suffered no injury because the overcharge had been passed on through higher prices for shoes. The Supreme Court found exceedingly unlikely the prospect that a plaintiff paying an overcharge would suffer no injury at all, and the Court concluded that analysing pass-on would substantially complicate litigation. Consequently, as a general rule, the Court precluded a pass-on defense.

The Court entertained a possible exception to this rule in cases in which circumstances make it “easy to prove” the plaintiff “has not been damaged.” The Court suggested that an exception might be made if the direct purchaser sold under a “pre-existing ‘cost-plus’ contract.” In a subsequent case, however, the Court rejected making exceptions to the general rule for special cases, including a proposed exception when a regulated public utility passes on 100% of the overcharge.<sup>58</sup> The Court’s reasoning in part was that total and immediate pass on is far from assured, so cases involving regulated utilities would involve the complexities it had sought to avoid. The Court again suggested an exception if the direct purchaser sold under a “pre-existing cost-plus contract.”<sup>59</sup>

## 6. Data availability

The data used in damages cases comes from a variety of sources. The plaintiffs normally have data relating to their purchases, and they have access to various public sources. In addition, they can obtain any relevant data and documents in the possession of the defendants. So far as the U.S. competition agencies are aware, unavailability of data has not been a significant bar to damages recovery. One reason is that significant uncertainty as to the amount of the damages does not stand in the way of recovery: reasonable approximations are sufficient.<sup>60</sup> Long ago, the Supreme Court held that, “while the damages may not be determined by mere speculation or guess, it will be enough if the evidence show the extent of the damages as a matter of just and reasonable inference, although the result be only approximate. The wrongdoer is not entitled to complain that they cannot be measured with the exactness and precision ...”<sup>61</sup>

## 7. Integration of economics into the legal process

In antitrust damages litigation, both plaintiffs and defendants offer the opinions of experts, usually economists, who analyse the data and documents. The admissibility of expert opinions is subject to challenge under rules of evidence. Challenges to expert testimony in antitrust cases are common, and many have been successful.<sup>62</sup> Opinions on damages have been excluded because of serious defects in the underlying methodology and because of an apparent absence of any analytic basis for the opinion.<sup>63</sup> In one

<sup>58</sup> Kansas v. Utilicorp United Inc., 497 U.S. 199 (1990).

<sup>59</sup> *Id.* at 218.

<sup>60</sup> See Bigelow v. RKO Radio Pictures, Inc., 327 U.S. 251, 264 (1946) (“[T]he jury may make a just and reasonable estimate of the damage based on relevant data, and render its verdict accordingly. . . . Any other rule would enable the wrongdoer to profit by his wrongdoing at the expense of his victim.”).

<sup>61</sup> Story Parchment Co. v. Patterson Parchment Paper Co., 282 U.S. 555, 563 (1931).

<sup>62</sup> See generally Gregory J. Werden, *The Admissibility of Expert Testimony*, in ABA SECTION OF ANTITRUST LAW, 1 ISSUES IN COMPETITION LAW AND POLICY 801 (W. Dale Collins ed., 2008).

<sup>63</sup> See, e.g., *Craftsmen Limousine, Inc. v. Ford Motor Co.*, 363 F.3d 761, 776–77 (8th Cir. 2004); *Blue Dane Simmental Corp. v. American Simmental Association*, 178 F.3d 1035, 1040–41 (8th Cir. 1999); *Freeland v. AT&T Corp.*, 238 F.R.D. 130, 143–49 (S.D.N.Y. 2006).

important case, the court of appeals set aside a large damage award on the basis that the expert testimony on which it was based was “not grounded in the economic reality” of the industry.<sup>64</sup>

## **8. General experience**

In sum, no quantification of harm is needed to prove an antitrust violation under U.S. law. To recover damages, however, a plaintiff must quantify the injury suffered, and the courts have developed rules relating to standing, causation, timeliness (statute of limitations), types of injury that are compensable, and methods of proving injury. Economic experts are actively involved in the litigation of damages, and rules governing the admissibility of expert opinions ensure that only reasonably reliable methods are employed. Although the government can be a plaintiff in a damages action, the vast majority of such cases in the United States involve private parties, and these cases are very common and often successful. Between 1990 and 2007, plaintiffs recovered more than \$18 billion in damages.<sup>65</sup>

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<sup>64</sup> See *Concord Boat Corp. v. Brunswick Corp.*, 207 F.3d 1039, 1055–57, 1063 (8th Cir. 2000). The expert’s model attributed to the challenged conduct all sales made by the defendant in excess of half of total market sales, even though the defendant made three-quarters of market sales before undertaking the challenged conduct.

<sup>65</sup> See Robert H. Lande & Joshua P. Davis, *Benefits from Private Enforcement: An Analysis of Forty Cases*, 42 UNIVERSITY OF SAN FRANCISCO LAW REVIEW 879, 891–93 (2008).

## EUROPEAN UNION

### 1. Introduction

As suggested by the OECD's Competition Committee, this paper addresses the topic "Quantification of Harm to Competition" from two different perspectives. On the one hand, some consideration of the harmful effects of anti-competitive practices on competition is often relevant when the European Commission (hereafter, the "Commission") enforces the EU competition rules, including in merger control (see Part II on public enforcement). On the other hand, the harmful consequences of infringements of the EU competition rules will require quantification when consumers or undertakings bring claims for compensation before the courts of the EU Member States (see Part III on private enforcement).

Intrinsic differences exist when considering the harmful effects of competition infringements in the context of public enforcement or in the context of private enforcement. In its public enforcement activities, the Commission focuses on the likely overall effects of anti-competitive practices on competition in the market and ultimately on the welfare of consumers; there is no requirement under EU competition law to quantify in public enforcement the magnitude of these effects, neither in aggregate nor individually. In contrast, in private enforcement the focus is not on appreciating the harm to competition and consumers in general, but rather on specific types of harm suffered by the individual claimants who seek compensation; quantifying such specific harm lies at the heart of private actions for damages.

### 2. Consideration of harmful effects by the Commission (Public enforcement)

The central objective of both antitrust enforcement (section 1 below) and merger control (section 2 below) by the Commission is to maintain an effective competitive process on the market as a means of enhancing consumer welfare and of ensuring an efficient allocation of resources.<sup>1</sup> The prevention of consumer harm is thus at the focus of all enforcement activity by the Commission, including in the setting of priorities. Under EU competition law, the harmful effects of a conduct on competition and ultimately consumers can in some instances be presumed to exist, while in other situations the Commission is called upon to more specifically investigate and appreciate these effects. EU competition law does not require the Commission to estimate the precise or approximate quantum of consumer harm, although the Commission may choose to mention in its decisions illustrations of such harm. With a view to supporting its competition advocacy, the Commission, moreover, occasionally establishes broad estimates of the harm prevented through its enforcement actions (section 3 below).

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<sup>1</sup> See for antitrust and mergers respectively *e.g.* para. 13 of the Commission Guidelines on the application of Article 81(3) [now Article 101(3)] of the Treaty, OJ C 101, 27.4.2004, p. 97 (hereafter "Article 101(3) Guidelines"), as well as para. 5, 6 and 1 of the Commission Guidance on the Commission's enforcement priorities in applying Article 82 [now Article 102] of the EC Treaty to abusive exclusionary conduct by dominant undertakings, OJ C 45, 24.2.2009, p. 7 (hereafter "Guidance on Article 102 Enforcement Priorities"), and para. 8 of the Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, OJ C 31, 5.2.2004 p.5 (hereafter "Horizontal Merger Guidelines").

## 2.1 Articles 101 & 102 TFEU

When the Commission enforces Articles 101 and 102 TFEU<sup>2</sup> (hereafter, the “EU antitrust rules”), the issue of considering the actual or likely effects of anti-competitive conduct and their size can arise primarily in the context of finding an infringement and, more indirectly, in the context of setting fines.

### 2.1.1 Finding infringements of Article 101 or 102 TFEU

Article 101(1) TFEU distinguishes between agreements that have a restriction of competition as their object and those agreements that have a restriction of competition as their effect. This distinction arises from the fact that certain forms of collusion between undertakings can be regarded, by their very nature, as being harmful to the proper functioning of normal competition.<sup>3</sup>

Once it has been established that an agreement has as its *object* the restriction of competition, and the negative effects can thus be presumed, there is no need to take account of its concrete effects for the purpose of applying Article 101(1),<sup>4</sup> let alone to quantify these effects. This presumption is based on the serious nature of restrictions by object such as price fixing and market sharing, and on experience showing that restrictions of competition by object are likely to produce negative effects on the market and to jeopardise the objectives pursued by the EU competition rules.<sup>5</sup> Where the Commission in cases of restrictions by object, nonetheless, included in its decision illustrations of their harmful effects on the market, the General Court (formerly the Court of First Instance) found these illustrations and alleged inconsistencies therein not to be legally relevant for the finding of an infringement of Article 101 TFEU.<sup>6</sup>

Should the analysis of the agreement reveal that it is not restrictive of competition by object, its actual or likely *effects* need to be considered. An agreement will be caught by the prohibition of Article 101(1) only if it is shown that actual or potential competition is prevented, restricted or distorted to an appreciable extent.<sup>7</sup> The effects of an agreement on competition have to be assessed not only from a legal point of view, but also by taking into account the specific economic context in which the agreement operates.<sup>8</sup> When analysing the restrictive effects of an agreement, the Commission normally assesses, *inter alia*, the nature of the products, the level of competition existing between the parties and the level of competition

<sup>2</sup> Treaty on the Functioning of the European Union, entered into force on 1 December 2009. Articles 81 and 82 of the EC Treaty have thus become Articles 101 and 102 respectively of the TFEU.

<sup>3</sup> See e.g. Case T-450/05, *Automobiles Peugeot SA, Peugeot Nederland NV v Commission*, [2009] ECR II-2533, para. 45; Case C-209/07 *Beef Industry Development Society and Barry Brothers v Commission*, [2008] ECR I-08637 para. 17.

<sup>4</sup> Case T-450/05, *Peugeot* (*supra* footnote 0), para. 257; Case C-105/04 P *Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied v Commission*, [2006] ECR I-8725, para. 136; Case C-407/04 *Dalmine v Commission* [2007] ECR I-829, para. 84; Case T-322/01 *Roquette Frères v Commission* [2006] ECR II-3137, para. 201.

<sup>5</sup> See para. 21 Article 101(3) Guidelines.

<sup>6</sup> See e.g. Case T-450/05, *Peugeot* (*supra* footnote 0), 257, 258.

<sup>7</sup> See e.g. Case C-209/07 *Beef Industry* (*supra* footnote 0), para. 15; Case T-450/05, *Peugeot* (*supra* footnote 0), para. 43

<sup>8</sup> C-552/03 P *Unilever Bestfoods* (formerly *Van den Bergh Foods*) *v Commission*, [2006] ECR I-9091, para. 53-54.

exerted by third parties, the market position of buyers, the existence of potential competitors and the level of entry barriers.<sup>9</sup> As summarised by the General Court, the

*examination required [...] consists essentially in taking account of the impact of the agreement on existing and potential competition [...] and the competition situation in the absence of the agreement.*<sup>10</sup>

What needs to be shown in order to find an infringement is that the agreement affects or is likely to affect to an appreciable extent competition on the market, as it would have existed without the agreement (i.e. the likely counterfactual situation).<sup>11</sup> Although such restriction of competition can sometimes be ascertained by showing that an agreement led, for example, to price increases, Article 101(1) TFEU does not require enforcers to demonstrate or to quantify the magnitude of such consequences.

In case an agreement has as its object or effect the restriction of competition within the meaning of Article 101(1) TFEU, parties can submit evidence under the four criteria listed in Article 101(3) TFEU that their agreement brings, or is likely to bring efficiencies that outweigh the negative effects of the restriction of competition. Where such submission is made, the Commission will, within the framework of Article 101(3) TFEU, assess the positive aspects of a restriction in light of the likely negative impact on competition.<sup>12</sup>

In its enforcement of Article 102 TFEU, the Commission equally focuses on the prevention of consumer harm. The Court of Justice has, regarding the application of Article 102 TFEU, consistently stated since its judgment in *Hoffmann-La Roche* that a consideration of the effects of the infringing action on the market is part of the concept of abuse itself.<sup>13</sup>

It follows furthermore from the case-law of the Court of Justice that a finding of an infringement does not require that an *actual* effect of the infringing action can already be detected; it is sufficient

*to demonstrate that the abusive conduct of the undertaking in a dominant position tends to restrict competition, or, in other words, that the conduct is capable of having, or likely to have, such an effect.*<sup>14</sup>

<sup>9</sup> See para. 21 Article 101(3) Guidelines.

<sup>10</sup> See Case T-328/03 *O2 (Germany) v Commission*, [2006] ECR II-1231, para. 71, referring to the judgments Case C-234/89 *Delimitis* [1991] ECR I-935, para. 21 and Case 56-65 *Société Technique Minière (L.T.M.) v Maschinenbau Ulm GmbH (M.B.U.)*, [1966] ECR 235, para. 249-250. “Agreement” in this context refers to both, where relevant, the entire agreement and its individual clauses.

<sup>11</sup> See para. 17 *et seq.* Article 101(3) Guidelines.

<sup>12</sup> See para. 11, 32 *et seq.* Article 101(3) Guidelines

<sup>13</sup> The Court defines the concept of an abuse as follows: “The concept of an abuse is an objective concept relating to the behaviour of an undertaking in a dominant position which is such as to influence the structure of the market where, as a result of the very presence of the undertaking in question, the degree of competition is weakened and which, through recourse to methods different from those which condition normal competition in products or services on the basis of transactions of commercial operators, *has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition.*” [emphasis added], see Case 85/76 *Hoffmann-La Roche v Commission* [1979] ECR 46, para. 91. Also the Treaty itself, namely through two of the examples of abusive behaviour explicitly mentioned, makes specific reference to the effects of such actions on the market, see Article 102(2) lit. (b) (“the prejudice of consumers”) and lit. (c) (“a competitive disadvantage”).

<sup>14</sup> Case T-219/99 *British Airways v Commission*, [2003] ECR II-5917, para. 293.

Also, the Court of Justice has further clarified, for different types of abusive behaviour, what kinds of effects have to be demonstrated as being likely to be caused by the behaviour in question. In the case of predatory pricing, for instance, the Court of Justice has recently ruled that prove of recoupment – which could legitimately be regarded as the harmful effect for consumers that is the rationale why this behaviour is considered as abusive – does not have to be actually demonstrated for the finding of an infringement<sup>15</sup> (once it has been shown that a certain conduct is predatory, and thus likely to foreclose a competitor to the detriment of consumers<sup>16</sup>). In another recent case concerning margin squeeze, the Court of Justice emphasised that a certain practice of a dominant undertaking was abusive to the extent that

*it has an exclusionary effect on competitors who are at least as efficient as the dominant undertaking itself by squeezing their margins and is capable of making market entry more difficult or impossible for those competitors, and thus of strengthening its dominant position on that market to the detriment of consumers' interests.*<sup>17</sup>

A nuanced view – both as to the likelihood of effects of the behaviour in questions as well as to the nature of such effects – thus emerges from the case-law of the Court of Justice. It must be stressed that there is in no case a legal requirement to precisely determine the magnitude of the effects in question; the quantification of harm (in the actual sense of the word) is not a prerequisite for finding an infringement of Article 102 TFEU. Against this background, it is not surprising that in a recent judgment the Court of Justice has ruled that errors which the Commission might have committed in determining the actual effects of the infringing action would not affect the legality of the decision, as assessing the actual effects is not legally required for the finding of an infringement (once it is shown that a conduct of a dominant company is capable of having anti-competitive effects).<sup>18</sup>

In its Communication on enforcement priorities for the application of Article 102 TFEU in cases of exclusionary conduct, the Commission states that it will focus on such infringements which are most harmful to consumers. On this basis, the Commission intends to pursue infringements which are likely to lead to anticompetitive foreclosure harmful to consumers.<sup>19</sup> Whilst the Commission is not required to demonstrate actual harm to consumers or to measure the magnitude of the likely harm to consumers, it may nonetheless in specific cases choose to include in its decisions quantitative estimates of effects on consumers, in particular in the context of balancing the likely harm against likely efficiencies<sup>20</sup> of a certain conduct.

### 2.1.2 *Setting of fines*

Under EU law, the Commission's fines imposed for infringements of Articles 101 and 102 TFEU are designed to punish the unlawful acts of the undertakings concerned and to deter both the undertaking fined

<sup>15</sup> Case C-202/07 P *France Télécom SA v Commission*, [2009] ECR I-02369, para. 110.

<sup>16</sup> On the notion of predatory conduct, see para. 63 *et seq.* Guidance on Article 102 Enforcement Priorities (the dominant undertaking has to deliberately incur losses or forego profits in the short term, so as to foreclose or be likely to foreclose one or more of its actual or potential competitors with a view to strengthening or maintaining its market power, thereby causing consumer harm).

<sup>17</sup> Case C-280/08 P, *Deutsche Telekom AG v Commission of the European Communities*, [2010] ECR I-0000 (not yet reported), para. 253.

<sup>18</sup> T-155/06 *Tomra Systems ASA and Others v Commission*, [2010] ECR II-0000 (not yet reported, appeal pending), para. 286- 290.

<sup>19</sup> Para. 5 and 6 Guidance on Article 102 Enforcement Priorities.

<sup>20</sup> On the Commission's assessment of likely efficiencies in the context of Article 102 TFEU, see para. 28 *et seq.* Guidance on Article 102 Enforcement Priorities.

and market operators generally from future infringements of the antitrust rules.<sup>21</sup> These two considerations underlay the Commission's 2006 Fining Guidelines, which set forth the Commission's methodology for setting fines.<sup>22</sup> Punishment only concerns the individual company concerned, whereas (general) deterrence applies to a large number of companies in different markets. Regarding deterrence, it is established economic theory that fines should exceed the company's illegal profits (overcharges) gained from the infringement during the period of its participation in order to achieve a deterrent effect and, ideally, also consider the probability of detection as perceived *ex ante* by the infringer.

A number of studies have evaluated the harm and illegal gains caused by antitrust infringements (in particular cartels) and the probability of detection. However, it is difficult in practice for a competition authority to estimate in a given case the magnitude of illegal gains and the overall economic harm caused by an infringement, and— even more difficult — the (subjective) probability of detection. Apart from the complexities involved in such exercise, the Commission does not have on its files, and would face great difficulties in obtaining, sufficient evidence to assess the economic harm and illicit gains in a manner that meets the stringent evidentiary standards in public antitrust proceedings. In particular, in cases of infringements of Article 101 “by object” which make up the large majority of fines cases at EU level, the Commission is not called upon to specifically investigate the effects of the infringement.<sup>23</sup> It has therefore usually no information on the magnitude of such effects, especially not on the illicit gains achieved by the infringers. Making fines dependent on the estimation of the quantum of the illicit gains from a particular antitrust infringement would require a significant change in the focus of the Commission’s investigations, would have considerable resource implications and may, in view of the mentioned evidentiary standards, in practice raise the threshold for public enforcement (with the risk of lowering the level of enforcement), especially for hardcore cartels.

In these circumstances and in view of the purposes of antitrust fines under EU law, Article 23(3) of Regulation governing the enforcement of EU antitrust law does not require the Commission, for the purposes of setting fines, to quantify the harm and the gains resulting from infringements, but to consider their “gravity” and the “duration”. With a view to achieving sufficient deterrence of its fines, the Commission's fining methodology uses a number of *proxies* that provide an indication of the possible economic impact of the infringement.

One benchmark for the economic importance of an infringement (also for infringers) and the relative weight of an undertaking in the infringement is the value of sales that was generated by the company in question during the period of the infringement with the product or service to which the infringement relates.<sup>24</sup> The EU Courts have repeatedly approved the Commission’s fining methodology and, *inter alia*, stated that

*sales affected by an infringement “constitute an objective criterion which gives a proper measure of the harm which the offending conduct represents for normal competition and it is therefore a good indicator of the capacity of each undertaking to cause damage.”*<sup>25</sup>

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<sup>21</sup> Case C-289/04 P *Showa Denko v Commission* [2006] ECR I-5859, para. 16.

<sup>22</sup> Para. 4 of the Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003, OJ C 210, 1.9.2006, p. 2 (hereafter “2006 Fining Guidelines”).

<sup>23</sup> See paragraphs 0 *et seq.* above.

<sup>24</sup> Para.6 of the 2006 Fining Guidelines.

<sup>25</sup> See, e.g., Case T-448/05 *Oxley Threads v Commission*, [2010] ECR II-0000 (not yet reported), para. 68.

Against this background, the starting point of the Commission's fine calculation under the 2006 Fining Guidelines is the determination of the relevant value of sales generated by the respective companies during their period of participation in the infringement.<sup>26</sup> Depending on the gravity of the infringement, the Commission applies a percentage of up to 30% with respect to the value of sales so determined, depending on a number of different factors. These factors to a certain degree constitute proxies for the general level of harm that may typically be caused by such infringement in view of its particular characteristics.<sup>27</sup>

The most important element in this regard is in practice the nature of the infringement. Certain types of infringements, in particular horizontal cartels, will by their very nature generally cause greater harm to the economy and consumers than other infringements, e.g., vertical agreements. The 2006 Fining Guidelines therefore provide that for the most harmful restrictions such as horizontal price-fixing, market-sharing and output-limitations the percentage will be set “*at the higher end of the scale*”.<sup>28</sup> The Commission's practice to date has been to consider a “starting percentage” of 15% for cartels which broadly coincides with the level of overcharge that studies have found to result on average from cartels.<sup>29</sup> For types of infringements other than cartels this percentage may be lower<sup>30</sup> but it is not excluded that, e.g., for a very harmful abuse by a super dominant company, the percentage may even be higher.

The 2006 Fining Guidelines, on a non-exhaustive basis, list three additional elements to determine the gravity (“harmfulness”) of the infringement. According to the Guidelines, the gravity percentage is determined by (i) the combined market share of the parties, (ii) the geographic scope of the infringement and (iii) whether or not an infringement has been implemented. The presence and weight of one or several of these elements can lead to a further increase of the percentage for gravity (up to 30%). The underlying rationale for each of these elements is that their presence increases the effectiveness of the infringement and hence the harm caused, and the gains obtained, through the infringement.<sup>31</sup>

Therefore, while the Commission does not estimate the actual quantum of effects caused by an infringement to calculate fines, there exist two main elements in the Commission's fine calculation method that operate as broad proxies to roughly gauge, with a view to achieving deterrence, the level of harm caused (and the illicit gains obtained) by infringers: (i) the sales affected by the infringement during the relevant period as an indicator for the possible economic impact of the infringement; and (ii) the specific features of the infringement and the infringers’ market position to assess its “harmfulness” (gravity).

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<sup>26</sup> Normally, the value of sales is determined by multiplying the company's affected sales during the last year of its participation with the number of years of participation (see para. 13 of the 2006 Fining Guidelines).

<sup>27</sup> This amount, where applicable together with the additional amount in para. 25 of the 2006 Fining Guidelines (an amount of between 15% and 25% of the value of sales, not multiplied by the number of years), constitutes the so-called basic amount. The basic amount can be increased or lowered in view of aggravating or attenuating circumstances. The Commission's fines are capped at 10% of the undertaking's annual turnover.

<sup>28</sup> Para. 23 of the 2006 Fining Guidelines.

<sup>29</sup> For an overview of such studies see, e.g., Oxera / Komninos *et al.*, Quantifying antitrust damages. Towards non-binding guidance for courts. Study prepared for the European Commission, pages 88 *et seq.*, available at [http://ec.europa.eu/competition/antitrust/actionsdamages/quantification\\_study.pdf](http://ec.europa.eu/competition/antitrust/actionsdamages/quantification_study.pdf).

<sup>30</sup> In the Intel abuse case, the percentage for gravity was 5% (Commission Decision of 13 May 2009 Case COMP/37990 – Intel).

<sup>31</sup> The higher the market share of the parties, the more effective the infringement will be and the more harm it will cause. Similarly, the wider the geographic coverage, the more effective and harmful an infringement will be which also applies if an infringement is implemented in a particularly effective manner (e.g., through monitoring systems and/or sanctioning mechanisms).

Finally, it should be noted that the 2006 Fining Guidelines provide for the possibility to increase the fine in order to exceed the amount of gains improperly made as a result of the infringement where it is possible to estimate that amount.<sup>32</sup> The Commission has to date not yet made use of this provision which further illustrates the difficulties in assessing the illicit gains in individual cases.

## 2.2 *Mergers*

The objective of preventing consumer harm is also at the heart of the Commission's scrutiny of mergers. With the adoption of the revised test for intervention in the recast Merger Regulation in 2004,<sup>33</sup> the Commission confirmed a gradual shift of its merger control towards a more “effects-based approach” which is better calibrated to take into account likely consumer harm. Under this test, mergers cannot be approved where they are likely to lead to a significant impediment to effective competition (“SIEC”).<sup>34</sup> As the General Court has emphasised, the SIEC test requires the Commission to undertake a prospective analysis and to examine

*how the notified concentration could change the factors which determine the state of competition on a given market in order to assess whether it would give rise to a serious impediment to effective competition.*<sup>35</sup>

The Commission's analysis under this test focuses not solely on market structures, but in particular on likely market outcomes in terms of price increases and, where relevant, efficiencies. Price increases can be used as a shorthand for the various ways in which a merger may result in competitive harm including, apart from price increases, reduced consumer choice and innovation.

When assessing whether a merger is likely to cause a SIEC, the Commission compares the competitive conditions that would result from the notified merger with the conditions that would have prevailed without the merger (i.e. a counterfactual analysis). In doing so the Commission will examine various chains of cause and effect with a view to ascertaining which of them is the most likely.<sup>36</sup>

The factors considered in this forward looking analysis differ depending on the nature of the harm examined (i.e. whether unilateral or coordinated effects as regards horizontal mergers, on the one hand, and vertical or conglomerate effects for non-horizontal mergers on the other). However, common factors to consider for any merger are generally structural factors such as market shares and concentration levels and their increment, and more importantly, dynamic market characteristics such as entry/expansion or repositioning barriers for actual or potential competitors as well as the possible reaction of customers to post-merger price increases.<sup>37</sup>

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<sup>32</sup> Para. 31 of the 2006 Fining Guidelines.

<sup>33</sup> Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings, OJ L 24, 29.01.2004, p. 1.

<sup>34</sup> Article 2(2) of Regulation No 139/2004.

<sup>35</sup> Case T-342/07 *Ryanair Holdings plc v Commission*, [2010] ECR-II 0000 (not yet reported), para. 44, 27.

<sup>36</sup> Cases C-12/03 P *Commission v Tetra Laval BV*, [2005] ECR I-00987; C-413/06 P *Bertelsmann AG and Sony Corporation of America v Independent Music Publishers and Labels Association (Impala)*, [2008] ECR I-04951.

<sup>37</sup> For more details, refer to the Horizontal Merger Guidelines and the Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings, OJ C 265, 18.10.2008, p. 6.

On the basis of such factors the Commission will assess whether an impediment to competition and a resulting price increase can be expected using both qualitative (e.g. internal documents, market reports, third party documents etc.) and, as an additional support, quantitative evidence (e.g. econometric studies or models). In fact, an empirical analysis aimed at quantifying the likely price increases resulting from a merger can be a useful complement to other qualitative and quantitative evidence gathered during the market investigation.

Thus, the Commission may choose to include quantitative estimates in its analysis as supplementary evidence where appropriate and where available data allows it do so.<sup>38</sup> This may, in particular, be relevant in the context of assessing substantiated efficiency claims by the merging parties. To meet the legal test of the Merger Regulation, the Commission is, however, not required to always estimate the likely price increases or other forms of likely consumer harm, let alone to quantify the magnitude of the full precise harm (if any) likely to flow from individual mergers.<sup>39</sup> Whether the Commission will have recourse to quantitative analysis in addition to other evidence on the file will depend on the specifics of the given case, *inter alia* in view of availability of data and the burden both on the enforcement agency and the parties.

### 2.3 *Ex-post evaluation: indicators of harm prevented by the Commission's enforcement actions*

The harm prevented through its enforcement actions has been considered by the Commission's Directorate-General for Competition ("DG Competition") in the context of its competition advocacy. In an internal report of 2009, DG Competition established from an analysis of a range of its cartel cases broad estimates on the observable consumer benefits resulting from the Commission's intervention in these cases.<sup>40</sup> A similar work was carried out in 2010 for a range of merger cases. DG Competition's Annual Management Plan and Annual Report in 2011 will benchmark the observable consumer benefits from cartel and merger cases of 2010 on the basis of the methodology established in these internal reports.

Regarding cartels, the approach followed to broadly estimate the observable consumer benefits from stopping a cartel (prevented harm) consists in multiplying the increased price brought about by the cartel (called the "overcharge") by the value of the affected products or markets and then by the likely duration of the cartel had it remained undetected. A 10% average overcharge is assumed, with a sensitivity analysis of 5% to 15%. This is conservative when compared to the findings of recent empirical literature which report considerably higher median price overcharges for cartels.<sup>41</sup> In order to estimate what the likely duration of the cartel would have been had it continued undetected, a case-by-case analysis of the in-house files was carried out. This analysis focussed on the particular circumstances of each case and an assessment of important quantitative indicators, including the specific market conditions, the ease of reaching and renewing cartel agreements as well as the potential reactions of outsiders (such as new entrants). The estimates obtained are also conservative because volume effects and other consumer benefits, such as innovation, quality, choice, and availability are not taken into account. Moreover, the assumptions

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<sup>38</sup> See, for example, the price simulations that were carried out in some recent cases decided by the Commission, e.g. M. 5658 *Unilever / SaraLee Body Care*. In addition, in M.4439 *Ryanair / AerLingus* the price effect of the competitive constraint exerted by the parties on each other was examined. Such exercise is not equivalent to simulating the price effect of the merger, but is a tool that can usefully complement the other available evidence on the likely price impact of the merger. See also the discussion in DG Competition's paper submitted for the OECD Competition Committee's Roundtable (15 February 2010) on Economic Evidence in Merger Analysis.

<sup>39</sup> See, most recently, the Commission's decision in case M.5830 – *Olympic / Aegean*.

<sup>40</sup> Referred to in the speech by Commissioner Kroes at International Bar Association conference "Private and public enforcement of EU competition law – 5 years on", Brussels, 12 March 2009.

<sup>41</sup> Compare to the results of the studies referred to in footnote 29 *supra*.

concerning the likely duration of the cartels are made prudently to establish a lower limit rather than to estimate the most likely values.

Regarding mergers, the approach followed to broadly estimate observable consumer benefits from the Commission's intervention in the form of a prohibition or a clearance with remedies of mergers consisted in predicting the change in consumer surplus. The method used was to calculate the sum of the "price effect" and the "deadweight effect", both multiplied by the length of the period the market would need to self-correct the distortion of competition, i.e. by new entry or expansion of competitors. Therefore, the prevention of anticompetitive effects such as the negative impacts on innovation and choice, even though some cases are largely predicated on non-price effects, especially effects on innovation, are not taken into account. The estimation of the avoided likely price increase is based on an *ex-ante* merger simulation methodology, which predicts post-merger prices using information about pre-merger market conditions, while building on simplified assumptions about the behaviour of firms and consumers. The estimation of the length of the period each product market would take to self-correct was based on a case-by-case assessment of the likelihood of either a new entrant or the expansion of existing competitors in these markets.

The purpose of these considerations of prevented (observable) consumer harm is merely to obtain, primarily for advocacy purposes, broad estimates, and certainly not a more precise estimate of the harm prevented. It is important to bear in mind the simplifying and conservative assumptions and limitations of the approaches used both in relations to cartels and mergers.

### **3. Estimation of harm by national courts in actions for damages (private enforcement)**

Whilst quantification of the actual harm resulting from EU competition law infringements does not play a significant role in the public enforcement activities of the Commission, it is central to actions for damages brought by those who suffered harm through such infringement. The estimation of the *individual* harm suffered is in fact an essential element when adjudicating claims for damages brought by individuals (consumers and undertaking) seeking compensation for that harm. The Commission is not itself involved in the assessment of such harm. The Commission has, however, considered the issue in more detail when examining possible measures to overcome the obstacles that victims of antitrust law infringements encounter when seeking to obtain compensation.<sup>42</sup>

In the following sections, DG Competition recalls some important elements of the legal framework for antitrust damages actions in EU Member States (section 1) and describes insights it gained, when preparing non-binding guidance to national courts and parties (section 2), regarding methods and techniques relevant, in a European context, to estimate the harm caused by infringements of the EU antitrust rules (section 3).

#### **3.1 *Legal framework for antitrust damages actions in Europe: EU law guarantee of the right to damages***

Those who have suffered harm through an infringement of the EU antitrust rules (Articles 101 and 102 TFEU) have a right to compensation that is guaranteed by primary EU law, as the Court of Justice

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See White Paper on damages actions for breach of the EC antitrust rules COM(2008) 165final – with annexed Commission Staff Working Paper, SEC(2008) 404 (hereafter "2008 White Paper" and "Staff Working Paper"). Specifically on the issue of quantifying the harm suffered by victims of such breaches, DG Competition in 2009 commissioned a study by external experts (see *supra* footnote 29) and in 2010 organised a workshop with external economists to discuss issues concerning quantification of harm in actions for damages, see <http://ec.europa.eu/competition/antitrust/actionsdamages/index.html>

repeatedly emphasised.<sup>43</sup> In practice, however, many of those injured find it very difficult to obtain any compensation for the harm suffered; and most of those who have breached the law thus retain their illicit gains. In a White Paper of April 2008, the Commission identified a range of legal and procedural obstacles to such actions and proposed measures to ensure that victims of competition infringements in all Member States of the EU would have access to effective redress mechanisms.<sup>44</sup>

The Court of Justice emphasised that *any individual* can claim compensation for the harm suffered where there is a *causal relationship* between that harm and an agreement or practice prohibited by the EU competition rules.<sup>45</sup> It would therefore seem that, in principle, all types of market players (such as customers, competitors and suppliers of the infringing undertakings or end-consumers) that have suffered harm caused by the antitrust law infringement must be able to claim damages. For example, where all of the overcharge imposed by a cartel on its direct purchaser has been passed-on to the indirect purchaser, it can hardly be denied that this indirect purchaser has suffered a potentially very significant harm that stands in a causal relationship with the infringement. This is why the Commission in its 2008 White Paper has submitted that in view of the case law of the EU Courts one may not exclude, *a priori*, whole categories of injured persons, such as all indirect purchasers, from being able to claim damages.<sup>46</sup>

Compensation for the harm suffered means placing the injured party in the position it would have been had there been no infringement of Article 101 or 102 TFEU. Parties injured by the infringement of such directly effective EU rules therefore should have the full real value of their losses restored.<sup>47</sup> The entitlement to full compensation extends not only to the actual loss (*damnum emergens*) suffered, for instance the overcharge paid due to an anti-competitive price increase. It equally requires the compensation for loss of profit (*lucrum cessans*) suffered through the infringement;<sup>48</sup> and it encompasses also a right to interest from the time the damage occurred as an essential component of compensation for the real value of the loss suffered.<sup>49</sup>

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<sup>43</sup> Case C-453/99, *Courage and Crehan*, [2001] ECR I-6297, and Joined Cases C-295–298/04, *Manfredi*, [2006] ECR I-6619.

<sup>44</sup> 2008 White Paper and accompanying Staff Working Paper (*supra* footnote 42); see also the Commission’s 2005 Green Paper on actions for damages for infringements of the EU competition rules (COM(2005) 672 final).

<sup>45</sup> Joined Cases C-295-298/04, *Manfredi*, para. 63, and Case C-453/99, *Courage*, para. 26 (both *supra* footnote 43). Similar language (“any individual/undertaking”) was used by the Court of Justice in earlier cases, *e.g.* Case C-282/95 P *Guérin Automobiles v Commission*, [1997] ECR I-01503, para. 39.

<sup>46</sup> See 2008 White Paper (*supra* footnote 42), section 2.1. Whilst it is true that neither the *Courage* nor the *Manfredi* judgment directly concern damages claims by indirect purchasers and whilst national rules on causation (presumably including normative concepts) remain unaffected by the *acquis communautaire* regarding antitrust damages actions if they comply with the principles of effectiveness and equivalence, the open language employed by the Court of Justice in these two cases (“any individual”, “a causal relationship”) suggests that national law cannot categorically exclude from the right to damages entire groups of persons who actually suffered significant and possibly most of the harm caused by the infringement.

<sup>47</sup> Joined Cases C-295-298/04, *Manfredi*, para. 90, 95, and Case C-453/99, *Courage*, para. 26, 29 (both *supra* footnote 43). See, for instance, also Case C-271/91 *Marshall* [1993] ECR I-4367 para. 31, in the context of infringement of other directly effective rules of EU law.

<sup>48</sup> C-295–298/04, *Manfredi*, para. 95-96 and Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur and Factortame* [1996] ECR I-1029 para. 87.

<sup>49</sup> See Joined Cases C-295-298/04, *Manfredi* (*supra* footnote 43), para. 97 referring to Case C-271/91 *Marshall* (*supra* footnote 47), para. 31. See also 2008 White Paper (*supra* footnote 42), section 2.5, and the accompanying Staff Working Paper at para. 187.

These heads of damages cover the main two broad groups of typical effects of anticompetitive practices on the various market players: on the one hand, price effects (overcharge) for the direct customers of the infringer and possibly further down the supply chain, and, on the other hand, exclusionary effects for competitors, i.e. their exclusion from a market or reduction of their market share, ultimately to the detriment of consumers.<sup>50</sup>

Examples of infringements leading to overcharges for direct customers are price fixing, market sharing and output limitation cartels (Article 101 TFEU) and exploitative abuses of market dominance within the meaning of Article 102 TFEU. Such overcharges constitute an actual loss for the direct and possibly the indirect customers. They will, moreover, often lead to less demand and may therefore also entail a significant loss of profits for those customers who use the product or service concerned in their own commercial activities.

Examples of exclusionary practices vis-à-vis competitors include abuses of a dominant position e.g. through margin squeeze, predatory pricing or tying practices (Article 102 TFEU), or certain exclusivity or tying agreements between suppliers and distributors that infringe Article 101 TFEU. Exclusionary practices can lead to loss of profits for the competitors affected and, where their total or partial exclusion from the market is successful, customers will typically also suffer actual losses, because the infringer is likely, in particular, to raise prices.

To the extent that there are no EU rules governing damages actions for breaches of Article 101 or 102 TFEU, it is for the domestic legal system of each Member State to lay down the detailed rules governing the exercise of the right to compensation guaranteed by EU law. Such rules, however, must not render excessively difficult or practically impossible the exercise of rights conferred on individuals by EU law (principle of effectiveness) and they must not be less favourable than those governing damages actions for breaches of similar rights conferred by domestic law (principle of equivalence).<sup>51</sup>

### **3.2 The Commission's initiative to draw up non-binding guidance on quantification**

An important difficulty encountered by courts and parties in actions for damages relates to the appreciation of the quantum of the harm suffered. This quantification usually requires a comparison of the actual economic situation of claimants with the situation they would find themselves in had the infringement of the competition rules not occurred. In such hypothetical assessment of how market conditions and the interactions between market participants would have evolved without the infringement, competition law specific and complex economic and legal issues can arise. To assist national courts (especially non-specialised ones) and parties involved in antitrust damages actions in the EU Member States<sup>52</sup>, the Commission announced in its 2008 White Paper on antitrust damages actions the intention to draw up non-binding practical guidance for the quantification of harm in antitrust damages actions.<sup>53</sup>

<sup>50</sup> In addition, infringements of Articles 101 and 102 may also have other negative effects (e.g. decreases in quality, innovation, or choice) that can constitute, or result in, actual losses or loss of profits of consumers or undertakings.

<sup>51</sup> Case C-453/99, *Courage*, para. 29; Cases C-295-298/04, *Manfredi*, para. 62 (both *supra* footnote 43).

<sup>52</sup> Courts competent to adjudicate in antitrust damages actions often include, depending on the Member State, non-specialised civil and commercial courts.

<sup>53</sup> See section 2.5 of the 2008 White Paper (*supra* footnote 42) and the accompanying Staff Working Paper at para. 183, 196 *et seq.* The idea, put forward as option 19 of the Commission's 2005 Green Paper (see *supra* footnote 44), had met wide support, see the comments received on the Green Paper available at <http://ec.europa.eu/competition/antitrust/actionsdamages/documents.html#greenpaper>.

In preparation of this practical guidance, DG Competition is considering, *inter alia*, studies and submissions received from external economic and legal experts and stakeholders, and cases decided by the EU Courts and by courts of the EU Member States. DG Competition, in particular, commissioned from a group of external economic consultants and lawyers a study on the quantification of harm suffered by victims of antitrust infringements.<sup>54</sup> Following the publication of this study, DG Competition held in January 2010 a workshop with economist experts to discuss the quantification of antitrust harm in actions for damages.<sup>55</sup> Before publishing a practical guidance on quantification,<sup>56</sup> DG Competition intends to hold a comprehensive public consultation on the basis of a discussion paper. The following sections reflect some of DG Competition's initial insights and thinking on the matter.

The aim of the practical guidance would be to offer assistance to national courts and parties involved in actions for damages by making more widely available information relevant for the quantification of harm caused by infringements of the EU antitrust rules. DG Competition's plan is to provide an overview of the methods and techniques available to quantify harm caused by antitrust infringements and give practical illustrations of forms of harm and approaches to quantifying them.

The practical guidance would be of purely informative nature and not bind national courts or parties. It, therefore, would not alter the legal rules of the Member States governing actions for damages. It would simply be intended to provide information that can be used within the framework of the rules and practices of the legal system in the Member State concerned.

### 3.3 *General approach to quantifying harm in antitrust damages actions*

Courts and parties to actions for damages are in all cases confronted with the difficulty of comparing the actual position of the injured party with the position in which this party would have been but for the infringement ("but for-analysis"). As this hypothetical situation cannot be observed and measured, some form of estimation is always necessary to obtain a realistic counterfactual scenario to which the actual situation can be compared.

It is impossible to know with certainty how exactly a market would have evolved in the absence of the infringement of Article 101 or 102 of the Treaty. Prices, sales volumes, and profit margins depend on a range of factors and complex interactions between market participants that are not easily estimated. The estimation of the hypothetical non-infringement scenario will thus by definition rely on a number of assumptions. In practice, the unavailability or inaccessibility under applicable procedural rules of data will often add to this intrinsic uncertainty. For these reasons, quantification of harm in competition cases has, by its very nature, considerable limits to the degree of certainty and precision that can be expected in the assessment of damages: there is simply not one "true" value of the harm suffered that could be revealed in the civil proceedings of an action for damages. All that is possible are estimates relying on assumptions and approximations.

Applicable national legal rules and their interpretation should reflect these inherent limits in the quantification of harm in damages actions for breaches of Articles 101 and 102 of the Treaty in accordance

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<sup>54</sup> See *supra* footnote 29. For previous relevant external studies for the Commission on the topic see <http://ec.europa.eu/competition/antitrust/actionsdamages/index.html>

<sup>55</sup> The agenda of the workshop and written contributions submitted by participants can be found at [http://ec.europa.eu/competition/antitrust/actionsdamages/economist\\_workshop.html](http://ec.europa.eu/competition/antitrust/actionsdamages/economist_workshop.html).

<sup>56</sup> Envisaged in the European Commission's Work Programme for 2011, page 9 of the annex, available at [http://ec.europa.eu/atwork/programmes/docs/cwp2011\\_annex\\_en.pdf](http://ec.europa.eu/atwork/programmes/docs/cwp2011_annex_en.pdf).

with the EU law principle of effectiveness so that the exercise of the right to damages guaranteed by the Treaty is not made practically impossible or excessively difficult.

In the different systems of civil and commercial procedure in the EU Member States, various approaches exist to deal with such difficulties and the information asymmetry between the parties. Under the procedural tradition of the Member State, these approaches depend in particular on the degree to which the legal system (i) relies on *inter partes* disclosure and an adversarial dialogue between the parties and their experts, (ii) relies on court appointed experts, (iii) uses legal mechanisms such as shifts in the burden of proof once a certain set of facts has been established and (iv) grants judges the power to undertake a reasonable estimate of the damages quantum on the basis of available evidence.

### **3.4 *Methods and techniques to quantify harm and their application in civil proceedings in the EU Member States***

#### **3.4.1 *Overview of methods***

Different methods and techniques have been developed in economics and legal practice to quantify harm in antitrust damages actions. The most frequently used methods estimate what would have happened without the infringement by comparing the actual position of the injured party with time periods or markets that have not been affected by the infringement. Such comparator-based methods take either the data (prices, profit margins, sales volumes or other variables) observed on the same market at a time before and/or after the infringement, or on a different but sufficiently similar geographic or product market as an indication of what is likely to have happened on the affected market without the infringement. The implementation of these comparator-based methods can be refined by the use of econometric techniques, in particular regression analysis.

Other methods include simulation models. These estimate what would have occurred without the infringement by simulating the likely market outcome on the basis of economic models of competition, and in view of the main features of a market. The simulation model should be constructed in a way that it replicates the most significant drivers of supply (in particular, the competitive interactions between firms<sup>57</sup> and their cost structure) and demand conditions (in particular, the extent to which customers respond to price changes). Each model simulating market outcomes is an approximation of reality and depends on the right theoretical and often also factual assumptions regarding market characteristics and the likely behaviour of producers and customers. Moreover, the development of simulation models can be technically demanding and may require significant amounts of data that may not always be accessible.

A further approach to estimating the damages quantum is provided by the cost-based method,<sup>58</sup> which uses some measure of production costs per unit, and adds a mark-up for a profit that would have been

<sup>57</sup> The term ‘competitive interactions’ is used to indicate how competition between firms takes place, *e.g.* (but not limited to) Bertrand or Cournot competition, or how firms refrain from competing between each other (*e.g.* through collusive behaviour infringing competition rules). Markets on which price formation occurs through auctions or other bidding processes may also be conducive to modelling as interaction between competitors often follows fixed rules (prices or output quantities likely to result from an auction or other bidding process not affected by the infringement could, in particular, be estimated by oligopoly models that incorporate game theory to simulate the likely bidding behaviour of competitors in a non-infringement scenario).

<sup>58</sup> This method is also referred to as the ‘cost plus method’ or ‘bottom-up costing method’. It is mentioned, as a subsidiary approach in cases where comparator-based methods are not appropriate, by the *Bundesgerichtshof* (Federal Court of Justice, Germany), decision of 19 June 2007, case No KBR 12/07 (*Paper Wholesale Cartel*) (in the context of assessing, under the German legislation changed in 2005, the illicit gain by cartellists for the purpose of calculating a fine).

‘reasonable’ in the non-infringement scenario. The resulting estimate for a per unit non-infringement price can be compared to the per unit price actually charged by the infringing undertaking(s) to obtain an estimate of the overcharge. These steps can, in practice, require a range of difficult issues to be considered and strong assumptions to be made, and, in addition, they require data that may not always be accessible.

As comparator-based methods are, within the limited experience existing in Europe, by far the most widely used by courts and parties in the EU Member States, they are considered in some further detail in the following section (b). Section (c) will then set out certain considerations that would appear, in DG Competition’s view, relevant when making the choice which method and technique to apply in a given case.

### 3.4.2 *Comparator-based methods*

As mentioned above, comparator-based methods compare the price (or other parameters such as profits or sales volumes) in the infringement scenario with a non-infringement scenario that is established on the basis of data observed either (i) on the same market at a time before and/or after the infringement; or (ii) on a different but similar geographic market; or (iii) on a different but similar product market.

- Comparison over time

For the frequently used method of comparison over time (also referred to as the ‘before-after method’ or ‘benchmark method’)<sup>59</sup> there are, in principle, three different points of reference: one can, first, compare the actual situation during the period when the infringement produced effects with the situation on the same market before the infringement produced effects (comparison ‘before and during’). One can, second, also compare with data from the period when these effects had ceased (comparison ‘during and after’). Thirdly, the comparison can be made with data from both an unaffected pre- and post-infringement period (comparison ‘before, during and after’). Choosing among the reference periods will depend on the specifics of the case, including market characteristics and availability of data. It is highly unlikely to find any reference period where market circumstances exactly represent what would have happened in the infringement period had the infringement not occurred. It is therefore only possible to identify a *sufficiently similar* time period that allows the non-infringement scenario to be reasonably approximated. Factors to be considered in this context include possible uncertainties as to which time periods were actually affected by the infringement and which were not.

An advantage of all methods comparing, over time, data from the *same* geographic and product market is that market characteristics such as the degree of competition, market structure, costs and demand characteristics may be more comparable (except for the infringement) than in a comparison with different product or geographic markets. However, also in comparisons over time it happens that differences between the two data sets are due to reasons other than the infringement, especially where longer periods are considered. In such cases, it may be appropriate to apply econometric techniques to the data observed in the comparator period to account for differences with the infringement period<sup>60</sup> or to choose a different comparator period or a different method.

<sup>59</sup> See, for example, *Corte d’Appello di Milano*, decision of 11 July 2003, (*Bluvacanze*) and *Corte d’Appello di Milano*, decision of 3 February 2000, case No I, 308 (*Inaz Paghe v Associazione Nazionale Consulenti del Lavoro*) (in both cases, comparison before, during and after); *Landgericht Dortmund*, decision of 1 April 2004, case No 13 O 55/02 Kart (*Vitamins*) (during and after comparison); *Landesgericht für Zivilrechtssachen Graz*, decision of 17 August 2007, case No 17 R 91/07 p (*Driving school*) (accepting a comparison during and after).

<sup>60</sup> On such adjustments and, in particular, the possibility to use regression analysis, see paragraphs 0 *et seq.* below.

- Comparison with data from other geographic or product markets

The comparator-based methods that look at data (e.g. prices or sales volumes) observed either in a different geographic market<sup>61</sup> or in a different product market are also referred to as ‘yardstick method’ or ‘cross-sectional method’. These may be data observed across the entire comparator market or data observed in relation to certain market participants only. The more a geographic or product market is similar (except for the infringement effects) to the market affected by the infringement, the more it is likely to be suitable as a comparator market. This means, for example in a comparison across two geographic markets, that the products traded in the markets compared should be the same or, where this is not possible, sufficiently similar.

Also the competitive characteristics of the comparator market should be sufficiently similar to the characteristics of the affected market except for the infringement. The appropriate comparator market may well be a market that is not perfectly competitive. Some differences between markets can be mitigated by focussing on certain groups of market participants only. Where, for instance, the prices paid by one customer group (e.g. wholesalers) or the profits earned by one competitor company (e.g. a new entrant) in the comparator market are used as a reference, it is sufficient that the market position of this customer group or this competitor is comparable to that of the injured party on the infringement market.<sup>62</sup>

- Combining comparisons over time and across markets (‘difference in differences’)

Where sufficient data are available, it may be possible to combine comparisons over time and comparisons across different (geographic or product) markets. This approach is sometimes called the ‘difference in differences’ method because it looks at the development of the relevant economic variable (e.g. price) in the infringement market during a relevant period (difference over time) and compares it to the development of the same variable during the same time period on an unaffected comparator market (difference between markets). The comparison shows the difference between these two differences over time. This gives an estimate of the change in the variable produced by the infringement and excludes all other factors that affected both the infringement and the comparator market in the same way. The method can thus be a way to isolate the effects of the infringement from other effects such as increased raw material or energy costs.

- Techniques to implement comparator-based methods

Once a suitable comparator-based method for establishing a counterfactual scenario has been chosen, various techniques are available to implement the method in practice. These techniques differ mainly in the degree to which they rely on individual or average data (e.g. price observations), and in the degree to which the data observed in the comparator market or period are subjected to further adjustment. As a consequence, these techniques differ in the amount of data they require in order to be carried out.

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<sup>61</sup> See, for instance, *Cour d’Appel de Paris*, decision of 23 June 2003 (*Lescarcelle-De Memoris v OGF*); *Juzgado Mercantil numero 5 de Madrid*, decision of 11 November 2005, case No 85/2005 (*Conduit-Europe, S.A. v Telefónica de España S.A.*), confirmed by *Audiencia Provincial de Madrid*, decision of 25 May 2006, case No 73/2006.

<sup>62</sup> This may, however, not easily be the case if the overall characteristics on the comparator market are all too different from the infringement market.

The most straightforward technique to implement comparator-based methods is to take the data as they are observed in the unaffected period or market and compare them to the data affected by the infringement. For instance, a time-based comparison could compare the prices paid by customers of cartelists before and during the infringement,<sup>63</sup> possibly their respective averages.

At the other end of the spectrum, econometric techniques such as regression analysis<sup>64</sup> exist. Regression analysis uses statistical techniques to investigate patterns in the relationship between economic variables and to measure to what extent a certain variable of interest (e.g., the price for the cartelised product or the volumes sold by a company) is influenced by factors other than the infringement (e.g. influencing variables such as raw material costs, customer demand, product characteristics, the level of market concentration). All comparator-based methods are, in principle, capable of being implemented through regression analysis, provided that sufficient data observations are available.<sup>65</sup>

Regression analysis can thus be a way to identify and account for alternative causes for the observable difference between data sets obtained when applying comparator-based methods. Whilst undertaking a regression analysis will normally be a matter for economic experts, the Commission guidance would strive to provide judges with some basic explanations and illustrations on how regression analysis works and what it can achieve. Whether, at what stage of the proceedings and by which party regression analysis is likely to be applied before the courts of the EU Member States depends on the applicable legal requirements and on the circumstances of the case, especially the degree of similarity between the infringement and the comparator market or period and the availability of data under applicable procedural rules. DG Competition notes that, compared to civil antitrust litigation in the US, regression analysis is to date not often used in antitrust damages actions in the EU. Quite a number of courts in the EU Member States seem more often to apply legal mechanisms such as shifting the burden of proof once the claimant has demonstrated to have suffered some harm and has presented a reasonable estimate of that harm on the basis of straightforward implementations of comparator-based methods. Such estimates sometimes include simple adjustments to the value of observed data or a 'safety discount', i.e. a deduction from the observed data values of an amount sufficient to take account of uncertainties in a damages estimate.

### 3.4.3 Choice of methods and techniques

The above-mentioned methods and techniques can, in principle, provide useful services in relation to quantifying the different types of harm of the various infringements of the EU antitrust rules. In particular, the comparator-based methods do not only allow estimating the amount of illegal price overcharge in a price fixing cartel but, for example, allow also estimating the sales volume or the profit lost by a company suffering harm through an exclusionary abuse by a dominant competitor.

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<sup>63</sup> See, e.g., *Corte Suprema di Cassazione* (Italy), decision of 2 February 2007, case No 2305 (*Fondiarria SAI SpA v Nigriello*).

<sup>64</sup> Regression analysis uses statistical techniques to investigate patterns in the relationship between economic variables and to measure to what extent a certain variable of interest (e.g. price) is influenced by other variables that are not affected by the infringement (e.g. product characteristics, raw material costs, variations in customer demand, or market concentration).

<sup>65</sup> A sufficient number of data observations is, however, always required to apply statistical methods in a meaningful manner. Such sets of data observations could be obtained (in comparisons over time) from time series of observations, or (in comparisons at one point in time) from a range of comparator markets or from a range of firms or a range of transactions, or a combination of both (observations over time from a range of markets, firms or transactions).

It seems important to recall that in any event it is only possible to estimate, not to measure with certainty and full precision, what the hypothetical non-infringement scenario is likely to have looked like. There does not appear to be one method that could be singled out as the one that would in all cases be more appropriate than others. Each method has particular features, strengths and weaknesses that may make them more or less suitable to estimate the harm suffered in a given set of circumstances and a given legal system. In particular, the various methods differ in the degree to which they rely on data that are the outcome of actual market interactions or on assumptions based on economic theory and in the extent to which they control for factors other than the infringement that may have affected the claimant for damages. For instance, the strength of all comparator-based methods seems to lie in the fact that they use real-life data that are actually observed on a market.<sup>66</sup> This means, however, also that comparator-based methods rely on the premise that (i) the comparator market or period can be considered sufficiently representative of the likely non-infringement scenario, and that (ii) the difference between the infringement data and the data chosen as a comparator is due to the infringement. The Commission's practical guidance would strive to set out the particular features of different methods and techniques, including their strengths and weaknesses as well as data requirements so as to assist courts and parties in making informed choices.

As mentioned above, the choice of a method and technique, in a given case, appears to depend usually on a range of aspects, in particular the applicable legal rules and the factual circumstances of the case. These applicable rules may also provide that the court can rely on equitable considerations as a basis for its estimation of damages. Whether any and, if so, which of the methods and techniques mentioned above will be considered appropriate to use in a given case before the courts of the Member States depends on national law applied in accordance with the EU law principles of effectiveness and equivalence. Relevant considerations in this respect are likely to include whether a certain method or technique is practicable in the given case, whether it meets the standard of proof required under national law, whether sufficient data are available to the party charged with the burden of proof and whether the costs involved are proportionate to the value of the damages claim at stake. The costs relevant in this context are not only those incurred when the party bearing the burden of proof applies the method and technique, but also the costs for the other party to rebut its submissions and the costs to the judicial system when the court assesses the results produced by the method, possibly with the help of a court-appointed expert.

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<sup>66</sup> This aspect is emphasised, for instance, by the *Bundesgerichtshof* (Germany) in its judgment relating to the estimation of the illicit gain for the purpose of calculating a fine the *Paper Wholesale Cartel* (*supra* footnote 58).



## INDONESIA <sup>1</sup>

### 1. Introduction

Most of provisions in Indonesian competition law use rule of reason approach in concluding the existence for violation of the law. The measurement for the rule of reason will be the creation of monopolistic practices and unfair business competition. Unfair business competition defines by Article 1.6. as competition among businesses in conducting business activities for the production and or marketing of goods and or services in an unfair or unlawful or anti-competition manner. Based on the article, the quantification of harm to competition (as whole) may not be measured, so the competition agency may focus only on the specifications of unfair business competition and or damages occur as the result of competition violation.

It is well-acknowledged that every competition violation may lead to the loss of consumer and or business welfare. Therefore in some decisions, the commission often considers the economic losses as the result of reduced consumer welfare in calculating the administrative (financial) fine, as well as losses by other business actors inflicted by such violation to calculate the financial damages.

Determination of losses needed for some reasons, such to replace the losses suffered by rivals, harm to consumers or the public, and provide a deterrent effect against the businesses that violate. The legal basis for the determination of compensation by the Commission granted by Article 47 of the law, which states that the Commission has authorities to determine losses from the infringement of business actors. Compensation is defined as the compensation to be paid by the offender against losses incurred due to any anti-competitive behaviour. The definition of compensation can be distinguished to several categories. First is the nominal compensation, which is a form of compensation for a sum of money, although the actual losses could not be measured with money, or even no material losses. The second idea involves the indemnity (punitive damages), representing a large amount of damage exceeds the amount of actual loss and intended as a punishment for the business. The third meaning is the actual damage, which are the really suffered losses that can easily be calculated until the nominal value. The last one is the remedy meddling, a variation of techniques where the companies try to increase their right when the borrower disobey the contract and lessen or abolish the obligation when being sued by other parties within the contract.

In this regard, compensation may be determined by the Commission on the actual damages. Principle used similar to a damage valuation in civil law, where the burden of proof lied with the applicant. The Commission then will analyse the reliable or the possibility of such compensation on the basis of its appropriateness, fairness and decency. If it is true that there are losses, then the Commission will stipulate it in the decision. Total losses of these violations may be an accumulation of loss experience by the injured party.

In the context of the damage claim on competition case, the submission can only be made to the competition agency if it's indicated the existence of losses in the reported cases. This submission can only

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<sup>1</sup> Prepared by the Foreign Co-operation Division for the 2011 OECD Competition Committee Meeting. For any comments and inquiries, please contact [international@kppu.go.id](mailto:international@kppu.go.id).

be made to the district court (private action) and cannot be performed if the case is being handling by the Commission. This private action only can be made the Commission has decided this case and prove that this business is legally violate competition law.

The damage claim also could be made through the Commission. However, the complainants will loss their confidentiality treatment by doing so. Their identity will announced to the public during the examination (trial) as they prepare their own defense on the suffered losses.

Different things take place at the losses or harms of established by the Commission itself. The Law No. 5/1999 gives authority to the Commission to stipulate the existence of harms or damages. In this context, the Commission generally considers the economic consequences of such violations, for example, by calculating price increase as the result of such competition violation.

## **2. Calculation of damages**

In many cases, the Commission uses various methods for calculating damages for business breached the competition provisions. In one of the bid rigging case on the stocks divestiture (initial public offering), the competition harm is measured by the difference between the sales price at the auction and the normal price (fair price) on the basis of calculations made by the financial adviser. In the case of conspiracy in asset divestiture, the approach is very similar, which is based on the winning price with the prevailing market price at the same time. Approximate the market price in this case is derived from various sources, namely third-party studies, market price on the basis of information from relevant web sites, as well as the testimony of expert witnesses.

In the case of non-procurement cartel, the approach used in knowing the harms is quite similar, mainly in the form of indirect losses suffered by consumers. In the case of SMS (short message service) cartel, the Commission counted the consumer loss in several ways, namely (i) the opportunity loss by consumers to get lower SMS prices, (ii) the opportunity loss by consumers to use more SMS services at the same price, (iii) other intangible losses by the consumer, (iv) and consumers limited choice for alternatives during the period of cartel implementation.

At other cartel cases, the calculation is based on the actual price and imposed to the cartelists at the fair price during the cartel period. We believe this methodology is a common way used by other competition agencies.

The case of cross ownership by Temasek Group is an interesting case for the quantification of competition harms. Under complex finding and comprehensive economic approach, the Commission calculated consumer loss based on financial analysis resulting from the assumption on satisfied return on investment (ROE). The harm is calculated by the different of actual ROE and minimum ROE that could satisfied its stakeholders. The ROE used as the representative of excessive pricing by the company. Actual ROE which accounted between 45% and 55% during the violation period is concluded as an excessive attempted, due to lower fair ROE (20% to 35%). Based on the excessive ROE, the Commission estimated excess revenue enjoyed by the alleged parties and potential price reduction. It has been concluded that a fair 30% ROE, will result on potential price reduction of 21.32%; while for a fair 35% ROE, the potential price reduction will be 15%. These potential price reductions will be subtracted with actual revenue of the alleged parties, to apprehend the amount of excessive profit which may represents the consumer losses.

## **3. Calculation of financial fines**

In determining the amount of the fine, the Commission will take two steps. Firstly, the Commission will determine the basic amount of the fine. Secondly, the Commission will make an adjustment by increasing or reducing of such basic amount of the fine.

In determining the basic value of fine, the Commission uses the amount of the sales as its basic consideration. The sale value uses in this regards is the amount of sales/procurement of goods and services of the reported party at the concerned (relevant) market. In general, the sales will be calculated on the basis of the total sales in the year before the violation was committed. It is aimed at facilitating the estimation of the sales of the business actors involved in a violation when the data on its annual sales are not available. In a bid rigging case, determining the sales is not based on the calculation of the sales of the year prior to the violation was committed, but based on the price of the bid winner.

In the violation committed by a group of reported parties, the sales will be calculated by accumulating the total sales of the members of the group. As in determining the amount of the sales of the reported party, the KPPU will use the estimated value of sales which mostly reflects its actual sales. The amount of the sales will be determined before VAT or other taxes directly related to such sales. If the data furnished by the reported party is incomplete or unreliable, then the KPPU may determine his sales on the basis of such incomplete data and/or other relevant and factual information.

The basic value of the fine will relate to the proportion of the sales, depending on the degree of the violation, multiplied by the years of violations. Determining the degree of violation will be specifically done case by case for each type of violation, by considering all situations related to the case. To determine whether the proportion of the sales considered in the case shall be at the highest or lowest level of the scale, the Commission will consider some factors such: the size of the company; type of violation; combined market shares of the reported parties; geographic coverage of the violation, and violation having been committed or not.

Agreement on horizontal price fixing, market segmentation and production limitation which are entered into in confidential manner as well as bid rigging is the most serious violation in the business competition. Therefore, such agreement shall be subject to highest fine. In this regard, the proportion of sales to be calculated shall be the highest proportion in the above stated scale.

In order to consider the period of violations committed by each reported party, the above amount will be multiplied by the years of violations. A period of less than 6 months shall be calculated as a half year period, while the period of more than 6 months but less than a year shall be calculated as one year. If the sales of the reported parties in the violation are similar but not identical, the Commission may determine the same basic value of the fine for each reported party, while in determining the basic value, the Commission will use a rounding method.

Furthermore, in determining the amount of the fine, the Commission may consider circumstances which may lead to the increase or deduction of the basic value of the fine, on the basis of the comprehensive assessment, in consideration of all related aspects. These aspects will involve the repetition of violation, cooperation during the examination/investigation, and the role of reported parties (leader or follower) in the case. As the mitigating factors, the Commission also considers several factors such self termination of violation after the investigation; unintentional commitment; minimal involvement; cooperation during the investigation, and they willingness to change his attitudes in relation to the violation. Interestingly, the Commission on the basis of request by the reported party can consider the capability to pay of the reported party within certain social and economic context, specifically when the business will face bankruptcy as the result of imposed fine.

The Commission will give special attention to the requirement to assure that the fine will produce sufficient deterrent effect. Thus, it will improve the amount of the fine to be imposed to the reported party who has a turnover higher than the sales of goods and services in relation to such violations. The Commission will also consider the requirement to increase the amount of the fine with an objective to exceed the amount of the profits generated from the violation whose value may be calculated.

Nevertheless, all financial fines must not exceed those stipulated by law (IDR 25 million). However, there is no limit for any compensations or damages by law.

Over the past ten years, the Commission has imposed fines for IDR 950 billion and damages for IDR 920 billion to the businesses. Among which, the affirmed decision is accounted for IDR 182 billion, where the 10.5 billion of which was paid to the States account for competition violation.

#### **4. Obstacle in calculation of financial fines and damages**

The main obstacle in defining the competition harms or damages or fines is the market data and information which supported the stipulated harms. The actual calculation of fines and damages will require depth economic analysis supported by relevant data. In many cases, the Commission uses several reliable sources as its basic reference. For instance, in SMS cartel case, the Commission uses data obtained from the third party, such international research agency; sector regulator's study; and expert testimonies. As in bid rigging case (for example on the procurement of very large crude carrier/VLCC), the Commission used price indication from several sources such third party's report, market price from relevant website, and expert testimonies. The most reliable data by the Commission in defining the competition harms mostly secondary data obtained from the reported parties, witnesses, and routine report published by the businesses to the government and sector regulator. In the cross ownership case (Temasek Case), the Commission used financial data extracted from company's financial statement as the basic reference in determining the consumer losses. Basically, the most important part was, the Commission will always try to avoid the use of single source to assist their calculation of harms.

#### **5. Acceptance by the judiciary and business**

Indonesia experiences that the acceptance of judiciary on the economic evidences in valuating competition harms or damages is increased. The economic evidence has become new phenomenon as there is the need for new approaches consider by the judges at the objection level. Especially when faced by the lack of commission's authority in forcing the alleged parties to provide applicable data and information.

Currently, the Commission recorded that over 190 decisions by the Commission, 78 of which are objected to the District Court. The result is quite significant, where it showed that 43.6% of objected decisions were in favor of the Commission. At the Supreme Court level, the number is higher. We noted that over 59 appealed decisions to the Supreme Court, 52.5% of which were affirmed in the favor of the Commission. This shows that the judiciary acknowledged the Commission's approach on applied evidences, due process of law, and the correction order itself.

The affirmed decision can be executed through an order by obtained from the District Court. Some businesses are welcome at the order, as other might slower the payment process. It even sometime the business whom willing to comply with the fines and damages, try to negotiate the fines, while some tries to paid by instalments.

## RUSSIAN FEDERATION

In the explanatory part of the Resolution of the Constitutional Court of the Russian Federation of 24.06.2009 № 11-P with regard to case on verification of constitutionality of the Articles of the Federal Law № 135-FZ of 26.07.2006 “On Protection of Competition” (hereinafter referred to as the Law on protection of competition), related to the definition of the sequence and terms of transfer to the federal budget of the income gained as a result of violation of antimonopoly legislation, is explained the following:

Law on protection of competition entrusts the Federal Antimonopoly Authority with a power to issue instructions on transfer to the federal budget of the income gained as a result of violation of antimonopoly legislation. Non-fulfillment of this instruction in a due time can lead to the judicial compulsion of this economic entity to fulfill the instruction (point 6(e) part 1 Article 23 of the Law on protection of competition).

Such measure (under grounds and procedure for its application, as well as under its legal consequences) is a specific form of compulsion on the participants of the public relations protected by the antimonopoly legislation. It is meant to ensure balance of the public and private interests through seizure of the income gained by the economic entity as a result of abuses, and thus compensate expenses of the state related to elimination of negative social and economic consequences of violation of antimonopoly legislation that cannot be calculated.

Thus, quantification of harm to competition, i.e. expenses of the state related to elimination of negative social and economic consequences of violation of antimonopoly legislation, is not executed neither by competition authority, nor national courts, since this harm cannot be calculated in a monetary terms.

The FAS Russia reimburses damage to the state that occurred as a result of violation of competition legislation through collection of the income actually gained by the violator. Lost profit of state in this case is not estimated, as well as actual damage and lost profit of private persons is not estimated either.

Calculation of such income is made under general rules: only documentary proved income for the defined type of activity is taken into account. It should be documentary proved that the certain income is indeed gained as a result of the violation of competition legislation.

For example, in 2006 the FAS Russia admitted three Russian mobile operators (MTS, VypelCom and MegaFon) having conducted concerted actions on collection of 0,95 rubles/minute payments for the termination services from each other, and of 1,10 rubles/minute from other mobile operators. MTS and VypelCom admitted their guilt and established similar charges for their counteragents. MegaFon didn't admit violation, didn't conduct any actions aimed at elimination of violation, therefore the FAS Russia issued an instruction to MegaFon on transfer to the federal budget of the income gained as a result of violation of competition legislation.

Since violation was in establishing for a number of counteragents of price for termination service at 0,15 rubles/minute higher than the market price, the income was defined as a difference between the income actually gained from rendering termination services under price exceeding 0,95 rubles/minute and the income that could have been gained provided the same scope of services would have been rendered

under the price of 0,95 rubles/minute. Income was defined for all the counteragents who were rendered termination services on price higher than 0,95 rubles/minute.

The size of the income actually gained was confirmed by the acts of verification of traffic pass, by invoices and payment orders testifying about transfer of monetary funds.

With regard to quantification of harm to private persons, according to the point 5 of the Resolution of the Presidium of the High Arbitration Court of the Russian Federation of 30.06.2008 № 30 the FAS Russia is to take measures on termination of violation of antimonopoly legislation and on ensuring competition on the market. The FAS Russia is also to take measures on bringing violators of competition legislation to administrative liability and on collecting to the federal budget illegally gained profit by violators as a result of the infringement of competition legislation.

However, it should be taken into account that while terminating the violation of competition legislation the FAS Russia does not have a right within its competence to solve civil disputes of economic entities, in particular, it does not have powers to protect subjective civil rights of the aggrieved party through issuing an instruction to the violator on reimbursement of damage to his counteragent.

At the same time, since for the purposes of the Article 178 of the Criminal Code of the Russian Federation it is necessary to define whether damage to the private persons is large or extremely large, the FAS Russia should collect and accumulate all the information about the size of the damage. This information can be received by the FAS Russia through sending of the relevant requests to the economic entities. However, defining of the size of damage for all the aggrieved parties is not required for this purpose (also because it is not always possible to determine the whole group of such persons); presence of the documents and information confirming damage on sum exceeding 33 thousands US dollars (large damage) or 10 thousands US dollars (extremely large damage) is sufficient.

Defining of the accurate size of damage to private persons as a result of violation of competition legislation is done by courts (arbitration or regular courts) under the rules of the arbitration and civil procedural legislation in the form of action proceeding under the suits of the relevant private persons. At this, according to the point 21 of the same Resolution of the Higher Arbitration Court of the Russian Federation, any arbitration court considering the case under the suits of private persons should inform about that the FAS Russia to ensure the possibility of its participation in the proceeding. The procedural status of the FAS Russia shall be determined by the nature of the considered dispute. During the judicial proceeding the private person should prove the size of the damage and lost profit (with documentary proof), cause-effect relation between the violation of competition legislation and caused damage, taking into account that the violation of the competition legislation was proved by the FAS Russia.

In the practice of the Regional Offices of the FAS Russia there is a number of cases when they were acting as stakeholders (third parties) in judicial proceedings on disputes between economic entities related to violation of competition legislation with a demand to reimburse damage or lost profit. However the number of such cases is quite low in the general enforcement practice of the FAS Russia.

## BIAC

### 1. Introduction

The Business and Advisory Committee (BIAC) to the OECD appreciates the opportunity to submit these comments to the OECD Competition Committee for its Roundtable on The Quantification of Harm by National Courts and Competition Agencies. BIAC notes that the role of national competition agencies and courts with regard to the quantification of harm to competition has become increasingly topical and urgent.

Estimation of competitive harm is becoming progressively more important as increased attention – and criticism – is placed on the adequacy and reasonableness of sanctions imposed on companies by competition agencies and courts for having engaged in anticompetitive conduct. In this respect, a number of commentators maintain that, nowadays, in many cases, the magnitude of administrative fines is such that they have become disproportionate to the underlying content and harm caused and do not represent the optimal use of administrative tools for sanctioning and deterring firms from engaging in anticompetitive conduct. BIAC shares this general concern and particularly believes that insufficient attention is devoted to the relationship between the impact of antitrust violations and the sanctions imposed. While BIAC does not take the view that fines imposed for antitrust offenses are invariably excessively high and disproportionate, it does believe that there is a need to critically assess the relationship between offenses and sanctions and, where possible, provide for better and more fact-based economic underpinnings of sanctions. In BIAC's view credible enforcement requires a line to be drawn between deterrence and excessive punishment.

Optimal deterrence through financial penalties requires *inter alia* that account is taken of the commercial gains from the illegal conduct and, thus, the welfare losses caused by the conduct. For example, in the United States, quantification of harm for antitrust offenses is made pursuant to an economic assessment of the value of commerce impacted. Under the United States' Federal Sentencing Guidelines, criminal penalties for both individuals and companies are dependent upon the volume of commerce affected by the illegal conduct and of the acts of the individual or company involved in the wrongful conduct.<sup>1</sup> The calculation of the value commerce affected is subject to a finding of fact, and therefore depends upon a weighing of the evidence; there is a direct correlation between the harm caused by the illegal conduct and the penalty imposed. In general, an evidentiary assessment of the quantification of harm can involve economic analysis of the impacted commerce and is subject to a standard of scrutiny that requires analytical rigour in order to be admitted into evidence.<sup>2</sup> Thus, there is not only a rational relationship between the impact of the conduct and the severity of the remedy, but there is proportionality. Some may argue as to the level of sanctions imposed for various levels of harm – or indeed with the concept of penal sanctions for antitrust offenses – few would argue against the sense of establishing a connection between the harm caused and penalty imposed.

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<sup>1</sup> Federal Sentencing Guidelines Manual § 2R1.1 (2010). The Sentencing Guidelines are not mandatory for use by courts in the United States but are recommendations that a court may – and often does – take into consideration in issuing a criminal penalty.

<sup>2</sup> See *Daubert v. Merrell Dow Pharm.*, 509 U.S. 579 (1993).

BIAC therefore believes that a more rigorous quantification of harm can help to better structure sanctions and thereby contribute to a more efficient system of competition policy, whilst avoiding the charge of excessive punishment. BIAC notes with concern that in many cases competition agencies, when imposing financial penalties, are either not required at all to estimate or quantify the harm caused by the conduct at hand, or have excessive discretionary power to do so, and that, in any event, there appear to be wide divergences between competition agencies in terms of methodology and rigor. BIAC takes the position that more transparent and uniform approaches in this field are highly desirable. Establishing a closer link between the level of cartel fines on the one hand and the illegal gains and harm to society on the other hand also helps to ensure that sanctions are proportionate to the seriousness of the violation and are perceived as fair.

While the general concern regarding the appropriate level of fines in itself justifies a more accurate calculation of competitive harm, the existence of private follow-on actions underscores this need. Using the United States as an example, courts demand significant rigour in the proof of quantification of damages and will often require both factual and economic evidence of harm as a pre-condition to awarding damages.<sup>3</sup> The objective is not to set the bar too high for plaintiffs, but rather to ensure that due process is followed and that an award to plaintiffs is justified by the harm caused by the defendants' conduct.

A system of optimal deterrence is directly related to the total amount that firms are required to pay in the shape of administrative fines and private damages for having violated the antitrust rules. This is particularly relevant because (collective) private actions for antitrust damages are in many parts of the world either already commonplace, or are explicitly encouraged. Moreover, as the availability of private actions proliferates in countries around the world, the risk of duplicative recoveries also increases. For example, some countries permit a "pass-on" defence in private actions while others do not. This can result in recoveries for direct harm in one jurisdiction that are barred in another, and recoveries for indirect harm in the other jurisdiction that are barred in the first. In addition, some countries permit a right of contribution as between defendants while others do not. There is no means in international law for moderating between these diverse results and no mechanism by which private plaintiffs – or more accurately private plaintiffs lawyers – are disciplined in seeking an "optimal" amount of damage recovery. Every loophole of multi-jurisdictional law and procedure will be exploited to maximise recoveries.

BIAC is of the opinion that, as the prospect of successful private actions for anticompetitive conduct becomes more realistic, there is even more need to critically assess whether the combined "mix" of pecuniary sanctions optimally penalises companies from behaving anti-competitively. Given the risk of multiple recoveries and multiplied (doubled or trebled) damages, there is risk that such penalties can cause companies to exit the industry or become inefficient competitors saddled by significant debt or increased operating costs possibly for many years.

Moreover, a more robust quantification of harm, in particular by agencies at the time the antitrust violation is identified, may be an important factor in stimulating private follow-on litigation. While the quantification of competitive harm is aimed at identifying the overall loss to society (and is not, in itself, directly instructive in determining the actual damage suffered by specific classes of victims), the two analytical approaches are in many respects similar, whereby the identification of the "total" harm to society may be instructive as an upper bound for any subsequent private damages. As a result, the (early) quantification of harm (by antitrust agencies) may indirectly structure, streamline and facilitate private damage actions, especially where courts are ill-equipped to enter into the complex assessments that are necessary to reliably estimate societal harm and damages.

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<sup>3</sup> *Id.*

BIAC is in favour of more widely accepted and uniform methodologies for the calculation of competitive harm, as well as damages and believes that significant strides can be made in that field. However, it also appreciates that the calculation of competitive harm is highly fact-specific, often complex and dependent on multiple variables and must therefore be tailored to the case at hand.

BIAC believes that particularly in the field of price-fixing cartels progress can be made, particularly by more clearly identifying the various ranges of direct (overcharging) and indirect (pass-on and output) effects that may occur. On the other hand, BIAC is doubtful whether the methodologies developed to quantify harm in cartel matters can and should readily be transposed to unilateral conduct that is alleged to have raised prices, such as –in some jurisdictions- excessive pricing conduct, tying, bundling and other types of vertical restraints. The ways in which these practices cause competitive harm often differs significantly from the ways cartels tend to do so. In addition, the identification of competitive harm and damage suffered in non-cartel cases may be complicated by the existence of cost- and dynamic efficiencies. BIAC is of the view that where this might be the case, a full analysis of pro-and anti-competitive effects is in order.

It is a well-known fact that the stability of cartels, their functioning and their effectiveness tends to vary significantly and depend on the facts of the case. Moreover, each cartel displays unique characteristics. In this light, BIAC submits that any suggestions that cartels “typically” raise prices by certain percentages are misconceived. As a corollary, BIAC is strongly opposed against the use of any (rebuttable) presumptions of “average” overcharges in competition law.

## **2. General principles for quantifying cartel damages**

BIAC takes the general view that victims of antitrust infringements should, as a matter of principle, be able to claim full compensation for damage suffered. The starting point for quantification of damages is an assessment of the “but for” world assuming that defendants’ conduct had not occurred. In other words, damages should be quantified according to the degree to which the defendants’ conduct adversely impacted the price (or, in economic terms, quality adjusted price) of the goods sold. It requires the isolation of the effect of defendants’ conduct from all other effects on pricing.<sup>4</sup> It also requires an analysis of the consequential downstream effect of the overcharge and the injured party.

This implies that BIAC is not in principle opposed to the use of the pass-on defence. Indeed, in principle the party that pays the overcharge should be the one with standing to collect damages and defendants should not be made to pay damages to plaintiffs who did not in fact suffer the amount of damages claimed because it was able – and did in fact- pass on all or part of the overcharges to its customers. In the same vein, BIAC believes that the principle of “full compensation” militates in favour of allowing indirect purchaser claims. However, BIAC notes that the actual identification of which parties are affected by an antitrust violation and to what extent those parties are eligible for compensation requires sufficient analytical rigour to ensure that equitable goals are being achieved.

As noted, quantifying harm to competition, as well as calculating private damages is in many cases complex as it involves a reconstruction of the situation that would have existed “but for” the antitrust violation. This in turn often requires elaborate economic analysis. The starting point for this analysis is the identification of the price overcharge, i.e. the price actually charged during the time the cartel was in force minus the price that would have prevailed had the cartel not been in operation. While direct purchasers suffer damage in the shape of higher prices, they may pass on part of those elevated prices to their customers. When determining the damage suffered by direct purchasers, the extent of pass-on should

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<sup>4</sup> ABA SECTION OF ANTITRUST LAW, PROVING ANTITRUST DAMAGES: LEGAL AND ECONOMIC ISSUES 53 (2d ed. 2010).

therefore be subtracted from the prices charged to this group of purchasers. In BIAC's view, both elements are crucial in the determination of damage suffered by direct purchasers.

It is well-established that in addition to price effects, cartel arrangements may also lead to volume effects, i.e. lost sales. Typically, price rises imposed by a cartel will lead to a reduction of sales that would otherwise have taken place. BIAC is of the view that –provided they can be reliably calculated– the lost profits of direct purchasers associated with those lost sales should be taken into account when computing the damage of direct purchasers. Conversely, the deadweight loss, i.e. “lost” sales of end-consumers should not qualify as recoverable damage.

BIAC is in favour of a more explicit assessment by competition agencies of the impact of cartel offenses on prices and volumes when agencies reach infringement decisions. BIAC appreciates the intricacies involved in this (additional) task and submits that competition agencies are nonetheless best placed to do it. These more explicit assessments may be limited to specific aspects of the quantification of harm and or damage and could perhaps be phrased as preliminary findings. However, by its nature, this additional task would involve a study into the effectiveness of the alleged cartel and pass-on effects. Such a greater involvement of antitrust agencies at an early stage would, in BIAC's view, stimulate an early exchange of views on the evidence (and thereby partly lessen the “tragedy of information asymmetry” in private litigation cases and thus also streamline follow-on private damage actions. In addition, the insights gained may help to set fines at the “right” level and provide greater transparency and predictability, which may in turn lead to more efficient resolution of cases through settlement procedures. BIAC does not believe, however, that final decisions of competition agencies regarding the quantification of harm should be binding on courts. Indeed, BIAC believes that the parties concerned should be able to defend their case in this respect while availing themselves of the procedural safeguards applicable in court proceedings.

In practice, competition agencies may avail themselves of a number of methods to quantify cartel damages, including (i) (empirical) methods that are based on benchmark prices and (ii) simulation analysis and other methods that seek to construct the competitive “but-for” pricing. BIAC believes that particularly empirical methods (as opposed to methodologies that rely on “constructed” prices by means of simulation analysis and the like) can be instructive in assessing price overcharges and quantifying damages. Indeed, while the required regression analysis requires a high degree of analytical rigour, BIAC believes the accurate specification of (oligopolistic) market conduct in economic modelling is particularly challenging. Economic analyses centred around actual (benchmark) prices may be slightly less prone to flaws. In this light, BIAC expresses a preference for empirical methodologies to quantify harm and damage.

BIAC appreciates that competition agencies and courts may be faced with a trade-off between accuracy and practicality. BIAC favours an approach that prioritises the accurate identification of the effects of the anticompetitive conduct, even if this implies that the choice of the methodology involves significantly more analytical requirements in terms of the quality and quantity of the underlying data, analyses and resources. However, BIAC also acknowledges that 100% precision is unrealistic.

In light of the foregoing, BIAC is strongly opposed to the use of simple (rebuttable) presumptions about the average price effects of a particular cartel offense as a basis for the calculation of harm and damages. Indeed, such an approach does not correspond to the complexities involved in these types of calculations, is not justified in light of the severity of sanction, may put defendants in an unjustifiable vulnerable position and may have a negative impact on civil litigation.

The applicable legal standards of proof, as well as the distribution of proof, are factors that determine how well a system of antitrust policy functions. In civil actions in the U.S., the courts have repudiated methodologies which permit the finder of fact to engage in “speculation and guesswork” as to the amount of harm. Instead, the finder of fact must base its conclusions on a “just and reasonable estimate” of

damages.<sup>5</sup> The economic tests of these estimates are held to a higher standard which requires that the analysis utilise a methodology that is scientifically valid.<sup>6</sup> BIAC believes that a credible system of competition policy requires high standards to prove anticompetitive conduct, as well as rigorous standards to quantify damages. In this respect BIAC is not in favour of systems that allow courts to estimate the magnitude of harm at a lower standard once the existence of harm has been shown.

U.S. Courts have also begun to apply standards for quantification of harm at the class certification stage, which has become a significant battleground for determining the sufficiency of evidence in recent years. In the case *In re Hydrogen Peroxide Antitrust Litigation*, the 3<sup>rd</sup> Circuit, the court considered whether class certification was appropriate and, in doing so, examined whether the questions of law and fact common to class members predominated over questions related to individual class members.<sup>7</sup> The appellate court found that a “rigorous analysis” was required and found it necessary to examine the credibility of the economic testimony even at the certification stage. Courts have increasingly disfavoured the analysis of “average impact” in such cases and instead requiring a more robust analysis.<sup>8</sup>

### 3. Some methodological issues

BIAC does not express a preference for any particular methodology to quantify competitive harm and damages. However, it does believe that empirical tools may in many cases have distinct advantages. Causality between the challenged conduct and harm suffered is a key component in any methodology to quantify harm.

Defendants should have early access to methodologies and data that agencies use to quantify harm and damages and to be able to assess the relevance, reliability and consistency of economic analyses. As it is essential that the models used in a particular case adequately reflect the competitive interaction in the industry, antitrust procedures should allow for rigorously testing and calibrating the selected approach.

While the calculation of pass-on and output effects may complicate the calculation of damages, the quantification of those effects is a necessary component of the accurate quantification of harm. In contrast, BIAC a priori believes that cartel-members (and non-participating sellers) should not be held liable on the basis that non-participating companies have raised their prices under the protection of a “price- umbrella” created by the cartel.

The calculation of damages should be geared towards identifying the amounts of damage actually suffered. Benefits, interest rates, and taxes, as well as inflation, should be properly accounted for. In the (perhaps exceptional) case that the cartel results in certain incremental benefits for customers, like for instance lower transportation costs, those benefits should be factored in as well.

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<sup>5</sup> *Id.* at 55; *see also* *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U.S. 359, 379 (1927); *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 264 (1946); *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 563 (1931).

<sup>6</sup> *Daubert*, 509 U.S. at 597 (“General acceptance” is not a necessary precondition to the admissibility of scientific evidence under the Federal Rules of Evidence, but the Rules of Evidence -- especially Rule 702 - - do assign to the trial judge the task of ensuring that an expert’s testimony both rests on a reliable foundation and is relevant to the task at hand. Pertinent evidence based on scientifically valid principles will satisfy those demands.).

<sup>7</sup> 552 F3d 305, 319 (3d Cir. 2008).

<sup>8</sup> *Reed v. Advocate Health Care*, 2009 U.S. Dist. LEXIS 89576 (N.D. Ill. 2009).

BIAC is in favour of (further) developing and using best practices for the use of economic evidence for the quantification of harm and damages.

#### **4. Quantification of harm in non-cartel cases**

On a general level, the definition of the “but-for” world with a view to the quantification of competitive harm and causality between the conduct and harm may display conceptual similarities. For instance, in some cases of exploitative abuse similar techniques as in the case of cartels may be used to quantify harm and damages. However, in the vast majority of non-cartel cases this is not so. These types of non-cartel cases involve predatory pricing, unilateral non-price conduct such as bundling and tying and exclusive dealing (which may or may not involve dominant firms) and various other types of vertical restraints. In these cases, the quantification of harm is significantly more complex. In addition to the difficulties involved in distinguishing between efficient and non-efficient conduct, one complication is that in cases that involve customer- and input foreclosure, the conduct is targeted against competitors, while various categories of downstream customers in different markets may only be negatively affected in an indirect manner and in different time periods. Second, in many non-cartel cases, competitive harm only occurs in specific market structures, in particular in the presence of significant market power held by the firm at hand, while the conduct of that same company by definition changes the market structure. This phenomenon results in additional analytical challenges. Third, many cases involving non-cartel conduct not only bring about negative effects, but also result in (partly or wholly offsetting) efficiencies. For instance, resale price maintenance may simultaneously result in higher consumer prices and expansion of demand and, as a result, be pro-competitive. Obviously, the pro-competitive effects of this type of conduct must be adequately factored into the analysis of competitive harm.

In the light of the preceding paragraph, BIAC submits that harm allegedly inflicted upon consumers by dominant firms that are claimed to delay innovation because better products would have replaced the products of the dominant firm or would have at least competed with those products, had the dominant firm not engaged in the anticompetitive conduct, is particularly difficult to quantify. This is because the relevant counterfactual, the “but-for” reality, is even more difficult to construct as a result of the prospective nature of the analysis and the various types of innovation at stake. While innovation is a critical part of consumer welfare, competition agencies should not only apply significant rigour in finding anticompetitive conduct, but also be particularly cautious in finding and quantifying harm in these types of cases, especially when the dominant firm’s actions provide immediate consumer benefits. Claims of harm to innovation and quantifications thereof should be justified by particularly robust and credible theory and evidence.

## QUANTIFICATION OF HARM IN PRIVATE ANTITRUST ACTIONS IN THE UNITED STATES

*By Prof. Herbert Hovenkamp\**

### 1. Introduction

This paper briefly discussed the theory and the experience that United States courts and antitrust scholarship have encountered with respect to quantification of harm in antitrust cases. This treatment pertains to both the social cost of antitrust violations, and to the remedial damage mechanisms that United States antitrust law has developed.

In a typical year more than 90% of antitrust complaints filed in the United States are by private plaintiffs rather than the federal government.<sup>1</sup> Further, when the individual states in our federal system file their actions under federal antitrust law they are entitled to assert claims for damages as well.<sup>2</sup> The vast majority of private antitrust actions in the United States include a claim for damages. It is little wonder, because the private damages provision, §4 of the Clayton Act, grants trebled (threefold) damages, plus attorneys fees to prevailing plaintiffs. Section 4 of the Clayton Act provides in relevant part that:

*any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefore in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.*<sup>3</sup>

This section has been interpreted by the United States Supreme Court to permit lawsuits by ordinary consumers<sup>4</sup> as well as business firms, and to require proof of a violation plus causation in fact.<sup>5</sup> It expressly requires that compensation be measured by reference to the plaintiff's losses (damages "by him sustained") rather than by alternative measures that one might view as superior. Under the Seventh Amendment to the United States Constitution all damages actions such as these must go to a jury of laypersons if either party so requests, and the jury's job will be to interpret all admissible expert testimony and compute damages, subject only to judicial control for ignoring instructions or reaching irrational verdicts. Trebling is mandatory and jurors are not instructed about trebling, for fear that they will temper

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\* Ben V. & Dorothy Willie Professor of Law, University of Iowa, Iowa City, Iowa, USA. [Herbert-hovenkamp@uiowa.edu](mailto:Herbert-hovenkamp@uiowa.edu); 319-335-9079.

<sup>1</sup> See Sourcebook of Criminal Justice Statistics Online, available at <http://www.albany.edu/sourcebook/pdf/t5412006.pdf>. (last visited Jan. 25, 2011) The data, which go through 2006 show percentages of private actions from 1995-2006 ranging from 89% to 96%. The data do not include Federal Trade Commission challenges that never go into a district court.

<sup>2</sup> 15 U.S.C. §15c (2006).

<sup>3</sup> 15 U.S.C. §15 (2006).

<sup>4</sup> *Reiter v. Sonotone Corp.*, 442 U.S. 330 (1979).

<sup>5</sup> See 2A PHILLIP E. AREEDA AND HERBERT HOVENKAMP, ANTITRUST LAW ¶¶337-340 (3d ed. 2007 & Supp.).

their awards so as to reflect its consequences.<sup>6</sup> Of course, jurors are laypersons with various degrees of knowledge about the antitrust system, and certainly some of them may know about trebling.<sup>7</sup> Suffice it to say that the intervention of a jury does not serve to make damages outcomes in U.S. cases more rational.

## 2. Compensation vs. Deterrence

As noted above, the damages measure authorised by the Clayton Act is based purely on compensation, and Congress has never seriously considered changing it. As it turns out, compensation for losses is rarely the measure that is also sufficient to produce the optimal level of deterrence.

As a basic premise, damages measured with deterrence as a goal should seek to be large enough to deprive an antitrust violator of reasonably anticipated improperly obtained gains plus a little more, adjusted by the probability of detection and prosecution. For example, suppose a cartel sold 1 million units at a cartel overcharge of 10 € per unit, and thus earned total profits of 10 million € ignoring all costs of administering the cartel, internal inefficiencies resulting from misdirected output, and the like.<sup>8</sup> Because that 10 million € gain to cartel members is identical to the overcharge, optimal damages measured ex post would be 10 million € plus a small amount so that the conduct is unprofitable. However, suppose that only one in three cartels is detected and successfully prosecuted. In that case, considered ex ante, the correct rule would be treble damages. That is, the trebled overcharge is the correct rule assuming that the probability of detection is one in three. To generalise, the optimal damage award is the overcharge multiplied by the inverse of the probability of detection and successful prosecution.<sup>9</sup>

Some antitrust violations produce efficiencies, or cost savings, even as they injure competition. A good example is mergers, where costs savings can be significant but very difficult to prove. Another is practices such as tying, which may increase welfare just as they are unlawful.<sup>10</sup> Theoretically we might say that these are cases of incorrect application of antitrust rules. Be that as it may, however, damages must be quantified in any case where damages are deemed appropriate. In such cases the sum of the overcharge plus the monopoly “deadweight loss” is the correct measure to deter.<sup>11</sup> For example, suppose that a merger produces 3 million € in overcharges but 1 million € in efficiency gains. Assume that the price increase causes not only a 3 million € overcharge, but also a deadweight loss of 2 million € which results from customers who switch to an inferior product in response to the higher post-merger prices. We characterise this as a deadweight loss because the consumers lose by making an inferior choice, but the merger partners also lose because they earn nothing on unmade sales. In this case the optimal penalty is 3 (overcharge) + 2 (deadweight loss), or 5 million €. Because the merging partners earn 4 million € on the merger (3 million in overcharges and 1 million in efficiency savings) the merger is unprofitable and will be deterred.

<sup>6</sup> *HBE Leasing Corp. v. Frank*, 22 F.3d 41, 46 (2d Cir. 1994); *Heattransfer Corp. v. Volkswagenwerk, A.G.*, 553 F.2d 964, 989 (5<sup>th</sup> Cir. 1977).

<sup>7</sup> E.g., *Cape Cod Food Prods. V. Nat'l Cranberry Ass'n.*, 119 F.Supp. 900 (D.Mass. 1954) (jury instruction to disregard anything they think they might know about trebling)

<sup>8</sup> On the problems and costs of cartel administration, see HERBERT HOVENKAMP, *FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE*, §§4.1 – 4.3 (3d ed. 2011).

<sup>9</sup> See *id.*, §§ 17.2 – 17.3.

<sup>10</sup> Erik Hovenkamp & Herbert Hovenkamp, *Tying Arrangements and Antitrust Harm*, 52 ARIZ.L.REV. 924 (2010), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1443284](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1443284).

<sup>11</sup> See William M. Landes, *Optimal Sanctions for Antitrust Violations*, 50 U.CHI.L.REV. 652 (1983); Herbert Hovenkamp, *Treble Damages Reform*, 33 ANTITRUST BULL. 233 (1988).

Suppose, however, that the deadweight loss is only 500,000 € In that case the penalty of overcharge plus deadweight loss will be insufficient to deter the merger because the efficiency gains are greater than the deadweight loss imposed by the merger. Everything else is a pure wealth transfer. As a result, the merger will proceed, consistent with the proposition that it is socially beneficial even though it results in some consumer harm. If the principal concern of competition policy were stated as consumer welfare rather than general economic welfare<sup>12</sup> this would still be the correct measure. The consumers would still recover their losses, but the merger would go forward if the efficiency gains exceeded the deadweight loss.<sup>13</sup>

This optimal deterrence model is not even a close approximation of the reality of damage measures in the United States, and probably for good reason. Several observations about it are possible:

- Even in the case of a simple naked cartel producing no efficiency gains whatsoever, the overcharge measure produces optimal deterrence only if we have some way of knowing *ex ante* what the probability of detection and successful prosecution is. Trebled damages under United States law would be about right if the probability of cartel detection were .33. In all probability, however, the detection rate is not higher than .2, making a trebling multiplier too low.<sup>14</sup> In other cases such as mergers, however, the probability of detection is 100% because the merger is a public rather than a concealed act. In such cases trebled damages are probably excessive. In sum, trebling damages for all types of violations is not particularly rational, given the great differences in probability of detection.
- As soon as an antitrust violation has a significant possibility of producing efficiency gains the optimal penalty must include the deadweight loss, assuming that *deterrence of practices only to the extent they are inefficient* is the appropriate goal. However, measuring deadweight loss in a courtroom is extraordinarily difficult. Theoretically, one could get it by permitting consumers who substitute away from the overpriced product to have a damage action. For example, if in response to a price-increasing merger of two luxury car makers a consumer switched to a third seller's intermediate car, she could recover the loss in consumers' surplus she suffered as a result of the substitution. Such a system would be extremely hard to manage. United States law denies standing to such persons.<sup>15</sup>
- The optimal deterrence model moves even further away from reality when the plaintiff is a competitor rather than a consumer and the measure of damages is lost profits or lost opportunity to do business. Competitor losses depend on such things as the technology in an industry, the nature of the offense, whether the competitor was well established and driven out of business, whether its plant and equipment could be resold or had to be destroyed or sold for salvage,

<sup>12</sup> General welfare is concerned with the welfare of all persons affected, while consumer welfare is concerned only with the welfare of consumers, ignoring that of producers.

<sup>13</sup> See Herbert Hovenkamp, *Antitrust and the Costs of Movement*, \_\_\_ ANTITRUST LAW JOURNAL \_\_\_ (forthcoming, 2011), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1679849](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1679849).

<sup>14</sup> Michal S. Gal, *Free Movement of Judgments: Increasing Deterrence of International Cartels through Jurisdictional Reliance*, 51 VA.J.INT'L L. 57 (2010). The European Commission has estimated detection rates as in the range of 10 to 20 percent. See Commission Staff Working Paper accompanying the White Paper on Damages Actions for Breach of the EC Antitrust Rules, at 22, SEC (2008) 404 (Apr. 2, 2008), available at [http://ec.europa.eu/competition/antitrust/actionsdamages/files\\_white\\_paper/working\\_paper.pdf](http://ec.europa.eu/competition/antitrust/actionsdamages/files_white_paper/working_paper.pdf).

<sup>15</sup> *Montreal Trading, Inc. v. AMAX, Inc.*, 661 F.2d 864 (10th Cir. 1981), cert. denied, 455 U.S. 1001 (1982) (nonpurchaser who substituted away in response to price increase lacked standing to sue).

whether the competitor lost and will be entitled to recover future, unmade profits, to name a few. Once computed, this number could be either far greater or far smaller than the optimal amount of deterrence. For example, in a predatory pricing case that ruins a rival and results in a sustained period of higher prices, deterrence would be accomplished by capturing the net gains to the predator. This number has no quantifiable relationship to the value of the rival's lost business.

- The overcharge plus deadweight loss methodology does not pick up the true social cost of anticompetitive behavior to the extent that unlawful acts cause harm that is not reflected in product pricing and output decisions. Most notably, the social cost includes not only the monopoly deadweight lost but also any lost investment or productivity by actual or potential rivals. For example, suppose a dominant firm files an improper patent infringement suit in order to retain its monopoly position. The social cost is not only the effects resulting from extension of the dominant firm's monopoly but also the rival's lost investment plus the value of any superior technology that might be deterred or prevented by the anticompetitive act.<sup>16</sup>

### 3. Overcharge injuries and passing-on

An intuitively stronger relationship exists between optimal deterrence and compensation that is based on an overcharge, as opposed to compensation based on the lost profits of excluded rivals. Overcharge measures are injuries that are suffered by consumers, both direct and indirect. Theoretically they are superior for achieving optimal deterrence regardless of the identity of the plaintiff. As a result, one might conceive of a system in which the plaintiff was an excluded rival (challenging predatory pricing, improper enforcement of IPRs, etc) but the damages were based on the overcharge. In effect, rivals would be suing but they would be collecting someone else's damages, namely those suffered by consumers. In any event, the U.S. Clayton Act would not permit such a measure and it seems to conflict with a basic tort premise that injured plaintiffs are entitled to their own damages.

The most interesting issues respecting overcharge damages are (1) methodologies of measurement, and (2) passing on problems.

#### 3.1 Methodologies of measurement

In United States antitrust law the most common methods of measurement seek to compare the market in which the violation occurred with some alternative market (in space, time, or product) that was free of the antitrust violation. For example, the so-called "yardstick" method compares prices, performance, or some other index of harm in the violation market with the same variable in some alternative, or "yardstick" market that is assumed to be performing competitively. To illustrate, if liquor sellers in one Texas city are engaged in price fixing, one might measure damages by comparing prices in this city during the cartel period with prices in a reasonably similar city where price fixing is assumed not to be occurring.<sup>17</sup> By contrast, the "before and after" method looks exclusively at the violation market, but tries to compare prices, output, or some other index from the period prior to or subsequent to the violation period (or preferably both). For example, if a cartel formed July 1, 2007 and dissolved July 1, 2010, one might

<sup>16</sup> See HOVENKAMP, FEDERAL ANTITRUST POLICY, *supra*, § 1.3d (4<sup>th</sup> ed. 2011); CHRISTINA BOHANNAN AND HERBERT HOVENKAMP, CREATION WITHOUT RESTRAINT: PROMOTING LIBERTY AND RIVALRY IN INNOVATION, chs. 2-3 (N.Y. & London: Oxford Univ. Press, 2011, forthcoming).

<sup>17</sup> E.g. *Greenhaw v. Lubbock County Beverage Assn.*, 721 F.2d 1019 (5<sup>th</sup> Cir. 1983) (employing yardstick method). On use of the methodology by experts, see 2A PHILLIP E. AREEDA, HERBERT HOVENKAMP, ROGER D. BLAIR, AND CHRISTINE PIETTE DURRANCE, ANTITRUST LAW ¶395 (3d ed. 2007).

compare prices during the cartel period with prices immediately before the cartel was formed or immediately after it fell apart.<sup>18</sup>

Both methods have become technically quite demanding and typically require the use of an expert trained in the use of statistics. Even in the hands of a qualified expert, both suffer from severe limitations depending on the circumstances. For example, two yardstick markets are not likely to have entirely identical cost structures, wage rates, and the like. As a result, adjustments will have to be made. Further, often a cartel operates to “stabilise” prices without really increasing prevailing prices; as a result, the before and after method might understate harm. In addition, exogenous factors such as mergers, changes in technology, the overall health of the economy can all affect these measures. Over the years economists and statisticians have developed control techniques to deal with these problems or others, but no one believes that the methodologies provide more than a rough approximation of reality.

### 3.2 *Passing on problems*

Most but not all cartels sell to various intermediaries rather than end users. Further, the price-fixed product is often only one component of a finished product, and the effect of the fix may pass down through a distribution chain in complex ways. For example, in the infamous vitamin cartel case the product whose price was fixed was vitamins administered to cattle and other livestock.<sup>19</sup> Depending on the particular vitamin and the market situation, these price-fixed vitamins could be sold to a distributor who resold them in the same form to a feed mill. The feed mill then mixed the vitamins into cattle feed which it sold perhaps to a second level distributor and then to a dealer. Farmers then purchased the feed containing the cartelised vitamins. The effect was to increase farmers’ costs and thus they charged more for the beef or milk that they produced. This beef or milk was then sold to distributors or retail grocers, who then sold them to consumers. Very likely these price fixed vitamins passed through a half dozen or more intermediaries before the higher price came to rest with end users. The degree of pass-on depends on a variety of factors, including whether the proportions of the price-fixed product can be varied and whether the priced fixed good is a fixed cost or variable cost item in an intermediary’s operations.

Not all distribution chains are this complex. When passing on occurs, however, it is likely that most of the overcharge is passed on, while some smaller amount is retained by each person in the distribution chain. For example, a large grocer might routinely follow a formula in which it adds 10% to the wholesale price that it pays when selling the product at retail. Indeed, in this particular case the intermediary actually makes *more* money on the marked up product. For example, if the noncartel wholesale price was 30 € the retail price would be 33€. However, if the cartel increases the wholesale price to 40 € the retail price would be 44€ and the retailer would earn a profit of 4€ rather than 3€. More generally, the impact of the price increase is to reduce sales, and ordinarily an intermediary responds to reduced demand by reducing its markup (although high fixed costs may prevent this). So about the best general conclusion one can draw is that intermediaries typically absorb some relatively small portion of the overcharge, sometimes ranging down to zero, while the larger portion of the overcharge rests with customers.

Note also that there are some severe qualifiers to this general observation. Most significantly, if the cartel and the intermediary operate in different size markets passing on may be impossible. For example, suppose that a local cartel of gasoline retailers fixes prices, something they can do because gasoline is

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<sup>18</sup> Id., ¶395.

<sup>19</sup> *F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155 (2004). For some of the problems, see Hans W. Friederiszick and Lars-Hendrik Roller, *Quantification of Harm in Damages Actions for Antitrust Infringements: Insights from German Cartel Cases*, 6 J.COMPETITION L. & ECON. 595 (2010); Victor P. Goldberg, *The Empagran Exception: Between Illinois Brick and a Hard Place*, 2009 COLUMBIA L.REV. 785 (2009).

costly to transport. The price fixed gasoline is then sold to farmers who grow wheat and sell it in a worldwide market. In this case the farmers will very likely absorb the entire loss that results from the price fix because they are purchasing in a cartelised market but reselling in a competitive market. So nothing will be passed on. A similar result can occur when the cartelised good is a fixed cost to the intermediary. For example, the construction brick that was the subject of price-fixing in the *Illinois Brick* case would be a variable cost to the price-fixers and to contractors who used the brick in construction projects, but it would be a fixed cost item to a factory owner who built a durable production facility with the brick. Fixed costs are typically not passed on at all, or else they are accounted for only indirectly in ways that have little to do with actual incremental costs. For example, it is very difficult to say how an overcharge in bricks used to build a commercial bakery would show up in the way that the baker priced its bread.

In sum, not only are passing on problems very complex, they are also quite specific to the situation. In some cases everything is passed on. In other cases nothing is.

Today United States antitrust law on this issue is in a turbulent state. In the *Illinois Brick* decision, now 35 years old, the Supreme Court held that under federal antitrust law direct purchasers are entitled to obtain the entire overcharge as damages, without any reduction for damages that were passed on rather than absorbed.<sup>20</sup> As a consequence, indirect purchasers were not entitled to obtain anything, except in a few narrowly defined circumstances.<sup>21</sup> In subsequent years, however, the Supreme Court also permitted state antitrust laws to deviate by recognising indirect purchaser claims.<sup>22</sup> As of now roughly half of the states, including very large ones such as California, recognise indirect purchaser claims. This has created a very cumbersome situation in which these claims must be coordinated and the possibility of excessive damages must be recognised.<sup>23</sup>

The *Illinois Brick* rule was based on two premises, both of which today seem quite questionable. The first premise was that the need to measure passing on by using incidence and shifting theory, as typically involved in tax policy, made quantification of pass on extraordinarily difficult. The second was that concentrating all of the damages into a single level rather than having damages sliced up into numerous pieces would increase incentives to enforce.<sup>24</sup>

On the first premise, technical measurement of passing on of a fee, tax or overcharge depends on the elasticity of supply and demand faced by each individual intermediary. These methodologies can provide useful information about how a tax, such as a sales tax or VAT, is passed on from one business to another in a distribution chain. However, this theory is very difficult to use in litigation. But the prevailing methodologies used in antitrust litigation, the aforementioned “yardstick” and “before and after” methods,

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<sup>20</sup> *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977). See also *Kansas & Missouri v. Utilicorp United, Inc.*, 497 U.S. 199 (1990) (applying indirect purchaser rule to public utility that passed on entire monopoly overcharge).

<sup>21</sup> These are spelled out in 3A AREEDA & HOVENKAMP, ANTITRUST LAW ¶346.

<sup>22</sup> *California v. ARC America Corp.*, 490 U.S. 93 (1989).

<sup>23</sup> Most recently, see *Clayworth v. Pfizer, Inc.*, 49 Cal.4<sup>th</sup> 758, 233 P.3d 1066 (Cal. 2010), a California Supreme Court decision holding that the direct purchaser’s recovery should not be reduced by the amount it passed on, at least in circumstances where the absent indirect purchasers no longer had the right to sue.

<sup>24</sup> See William Landes & Richard A. Posner, *Should Indirect Purchasers Have Standing to Sue Under the Antitrust Laws? An Economic Analysis of the Rule of Illinois Brick*, 46 U. CHI. L. REV. 602 (1979); William Landes & Richard A. Posner, *The Economics of Passing On: A Reply to Harris and Sullivan*, 128 U. PA. L. REV. 1274, 1275-1276 (1980); Jeffrey Harris & Lawrence A. Sullivan, *Passing on the Monopoly Overcharge: A Comprehensive Policy Analysis*, 128 U. PA. L. REV. 269 (1979).

do not necessarily require computation of these elasticities at all, but simply comparative observations of pricing in two different markets or two different time periods.<sup>25</sup>

On the second premise, while it is true that the indirect purchaser rule concentrates the entire damages action in the direct purchaser, the first purchaser often has a business relationship with the defendant that makes it an unlikely plaintiff. Indirect purchasers rarely face such concerns. Further, the availability of class actions or, in some cases, assignment, can serve to mitigate coordination problems by concentrating numerous damage claims into a single suitor.<sup>26</sup>

Clearly, however, the system currently in place in the United States, in which direct purchaser claims are lodged mainly in the federal courts under federal law, and indirect purchaser claims are brought under state law, is cumbersome and irrational. A better system would consolidate all purchasers who are injured into a single forum and proceeding for purposes of allocating damages. In sum, any solution to the pass on problem should be “comprehensive,” in the sense that it forces all injured parties and the defendant(s) into a common proceeding.

The following more fundamental conclusions can also be drawn:

- When the purchaser from a cartel or unlawful monopolist is an intermediary the “overcharge” is rarely the correct measure of that purchaser’s lost. As noted previously, in the typical situation intermediaries pass on most or sometimes even all of the overcharge. The real source of injury to intermediaries is lost sales volume. For example, an intermediary that routinely uses formula markups will typically pass on the entire overcharge, but because the cartel restricts output it will experience a loss in sales volume. Its real injury in such cases consists of lost profits from these unmade sales. The end user, by contrast, absorbs the full brunt of the overcharge because it has nothing to pass on. Even in this case the “overcharge” is not the full measure of the end user’s harm. End users are also injured because they purchase fewer units of the cartelised good and may substitute to a good that they would have regarded as inferior if the market had been competitive.
- A propos of this, a superior method of assessing compensation in a cartel case with multi-layer distribution would be (1) the passed on overcharge to the end user consumer; and (2) lost profits to each intermediary in the distribution chain. The latter measure would include both absorption of loss on markup and also losses resulting from reduced volume.

To illustrate: prior to the cartel a retailer intermediary took a markup of 10 € per unit and sold 1000 units. During the cartel period the retailer responded to increased pressure by cutting its markup to 9 € and selling 800 units. Its damage in that case would be 1 € per unit on the 800 units that it sold, plus lost profits on the 200 unsold units. This would consist primarily of gross margins on the unsold units, less selling expenses.

#### **4. Conclusion**

United States antitrust law has developed a rich and full record of experience with private antitrust remedies. In the process it has also made serious mistakes that should be avoided. Some of these mistakes are the consequence of a federal system that often forces division of private enforcement prerogatives among different jurisdictions that use inconsistent approaches. Others are simple mistakes of conception or measurement that are often difficult to reverse once they have been established. This makes United States experience a fruitful ground for study.

<sup>25</sup> See 3A AREEDA AND HOVENKAMP, ANTITRUST LAW, ¶346k.

<sup>26</sup> See *id.*, ¶331 (class actions), ¶362 (assignment).



## SUMMARY OF DISCUSSION

*By the Secretariat*

The Chairman began by introducing the three panel members: Dr. Hans Friederiszick, professor at the European School of Management and Technology and Director of the School of Competition Analysis in Berlin; Judge Ivan Verougstraete of the Belgian Supreme Court and President of the Belgian *Cour de Cassation*; and Judge Joachim Bornkamm of the Federal Supreme Court of Germany. The Chairman underlined how important it is for economists and competition policy authorities to appreciate the constraints under which judges have to act, and to frame the debate in ways that make it useful for them.

The Chairman then outlined the following points for the roundtable discussion:

- Different countries have different legal systems so their courts' ability to quantify harm varies. This is especially the case for the civil courts;
- Economists largely agree on the methods to use when quantifying harm even if they do not always agree on the results;
- The role of competition authorities in judicial proceedings differs widely across jurisdictions. Some help the judge assess the degree of harm, some must justify the sanction in proportion to the harm suffered, and some have no direct link with the courts;
- There are sharp differences in views about if and how competition authorities should approach the quantification of harm and to what extent estimates could be used in subsequent civil court hearings or calculations of sanctions;
- Competition authorities can in principle give guidance to courts because the authorities are experienced with the economics of the cases;
- Finally, can settlement be an alternative to litigation and costly attempts to quantify harm in court? It is striking that economists can sharply disagree with each other in court cases, yet easily agree in the context of a settlement.

The Chairman invited Dr. Friederiszick to give a general overview.

### **1. An economist's view: Professor Friederiszick on quantifying harm to competition**

#### ***1.1 Economic effects: overcharge, pass-on and output***

Taking a cartel as a typical example of harm to competition, the immediate impact is the higher price charged to the cartel's immediate customers. The price hike multiplied by the volume sold gives the overcharge, the central item in any damage calculation destined for court or administrative proceedings. The direct customers may be able to pass on at least part of the higher prices to their own customers, and so on down the line, so the damage they suffer is less than the overcharge. This is the "pass-on" defence for the defendants.

But even if there is pass-on at this level, there will be at least one customer downstream who will pay higher prices and hence lower quantities will be produced, which is the output effect. Economists agree that one should take the overcharge, subtract pass-on and add the output effect when estimating harm in a theoretical context. In a legal context, the question is how practical it is to take these into account. Does one need short-cuts? Within Europe, there is great legal diversity as to whether the pass-on effect or the output effect should be taken into account. The European Commission has guidelines that attempt to increase harmonisation across jurisdictions.

While the direct customer benefits from pass-on, the indirect customers suffer damage, and in the end, the pass-on effect washes out. From a total welfare perspective, even the overcharge effect washes out, and the harm is measured by the output effect, the lost volume of production and its utility. Professor Friederiszick said that the output effect should be taken into account in private damage cases.

## *1.2 Calculating compensation*

In private damages cases, the methods used to calculate compensation typically entail constructing a counterfactual: what would have happened without the conduct, as estimated by a before and after approach or a cost-based approach. In all cases, controlling for other factors will increase the complexity of the calculations.

From an academic perspective, using a method that accurately estimates the true damages due to the conduct with a sufficiently high probability of success is important. But in a legal perspective, practical issues, such as whether the methods used are verifiable, transparent and can be obtained within a reasonable timeframe and with reasonable resources, are also important. For example, there is agreement between lawyers and economists that economic evidence of collusion is not by itself sufficient. Typically, a lower burden of proof is required to show harm or causality, and even lower in quantifying the damages. Thus it is important to take into account when looking at the overcharge estimation under what legal standards they were made, and give different weights to them depending on those standards. Data requirements differ according to methodology, but the complexity of the particular industrial setup and knowledge of firm rivalry may outweigh the data factor, so there is no generally superior methodology, although there is a consensus of what type of methodology might work best in a specific environment. For example, German courts have ruled that price-related comparator-based methods are more robust than cost-based approaches.

Another important issue is strategic behaviour by the parties concerned, especially in private damage cases, where large sums of money are at stake. Firms will want to choose a method that optimises their interests. They may also want to delay the disclosure of information. Information asymmetry exists: cartels know by how much they have increased prices because of the cartel, while their direct customers know how much they have passed on. Strict and clear disclosure rules can help, but are costly, especially to a competitor who might well be innocent. This is especially important in exclusionary conduct cases.

Some of the solutions to the trade-offs include rebuttable presumptions, obligations to submit data, agreements on a methodology before the results are known, the use of court experts, and specific ways for economists to communicate with each other, for example the pre-talks system in the UK without lawyers present.

Regarding presumptions, experience shows that the average overcharge is found to be 10%-20% in most cases, but with findings ranging from zero to 70%. Economists agree that the standard presumption is a beginning, but cannot be the end. The presumptions have to be brought closer to the actual case.

## 2. A legal view: Judge Bornkamm on assessing damages

Judge Bornkamm said that in civil cases, infringement will already have been established via administrative proceedings brought by a competition policy authority. In Germany, such findings are binding on the civil courts even if the infringement has been established by a competition authority in another European country.

As in any tort action, monetary compensation should put the victim back where they would have been without the infringement. If damage cannot be precisely measured, the judges in Germany must estimate a minimum charge. It is assumed, unless the defendant can prove the contrary, that a horizontal agreement will result in higher prices, and price information may be obtained by looking at other regional markets, other product markets, before and after, etc. The judges in German courts may also take into account the profits arising from the infringement when assessing damages and the plaintiff can request payment of the interest on damages.

As regards the rebuttable presumption that the overcharge has been passed on, as proposed by the European Commission, Judge Bornkamm felt that this would lead to a multiplication of damages if there were several layers of indirect customers, and that the presumption is very difficult to rebut. Strict application of the burden of proof is therefore preferable.

Civil law jurisdictions use court experts whereas common law jurisdictions use party experts, though this difference is not clear-cut. In civil-law Germany, court experts are rarely heard, while party experts are permitted, although of course their findings are not evidence, just part of the submissions of the parties. Too great a reliance on the findings of court experts is in any case to be avoided, as it can lead to delegating judgments to a non-judge.

A delegate from the US said that the court appointed expert could be required to read his or her opinion to the judge in front of the parties and be asked questions by the parties. Court appointed experts could also question the party economists to find weaknesses or strengths in their positions. Transparency is very important for procedural fairness.

In Judge Bornkamm's experience, judges often decide on quantification of harm without requesting an expert opinion. An example was the Deutsche Telecom offer of free internet access for moderate volumes for its landline clients. Despite the Bundeskartellamt ruling that there was no infringement, the court decided that since competitors' sales had fallen, there was a clear case of harm and no further proof was necessary. If parties contest the decision of the Bundeskartellamt, or that of any other competition authority, they will engage private experts.

## 3. General discussion: the different legal systems

### 3.1 *The US system*

The Chairman called upon the US to explain some points made in its written submission indicating that the burden of proof in US cases seems to be lighter than in civil law cases elsewhere and that the US approach is perhaps more pragmatic.

A delegate from the US explained that in the 120 years since the passage of the Sherman Act, the Supreme Court has acted to ensure that private enforcement is practical and workable by promulgating simple rules, especially for cartel cases, even if the result is less accuracy. For example, in cartel cases, the direct customer can recover the full overcharge even if there has been pass-through, while an indirect customer cannot claim damages even if there has been pass-through. Another aspect is a concern with turning ordinary commercial disputes into antitrust actions, since successful antitrust actions result in triple

damages. On the other hand, abuse of dominance or monopolisation cases are harder to treat from a conceptual point of view, and the Court has been concerned that the plaintiff in exclusion cases will typically be a competitor, not a customer, so they have incentives to bring cases even if there was no harm to competition.

In the US system, a private plaintiff must establish that there was some anticompetitive act or conduct and that it resulted in an antitrust injury to that plaintiff. Quantifying the damages is left to the economic and accounting experts to perform on the basis of a counterfactual that is compared with the actual market outcome.

The delegate referred to the US Supreme Court's 1977 *Illinois Brick* ruling that indirect customers could not recover damages in federal antitrust actions. In that case, the Court changed its mind three times during its deliberations because of the great uncertainty involved. However, the last time the Supreme Court actually faced the measurement of damages was in the mid-1960s, so there could be an opportunity for re-examining some of these doctrines. Given the massive amount of subsequent literature and discussions about measurement, it may be that the Court would now be receptive to rethinking this rule.

### 3.2 *European systems*

The Chairman then invited Greece to explain its system, in which victims of violations apparently encounter procedural difficulties.

A delegate from Greece explained that a civil antitrust action needs to establish illegal conduct, prejudice, harm and causation. Causation implies an illegal conduct as a necessary condition and at the same time a material cause for the harm. Fault must also be demonstrated. To assess damages, a comparison is made between the anticompetitive situation and the hypothetical competition situation. Typically, actual harm and lost profits could be compensated, but the test for lost profits is very demanding and compensation must be for actual harm. The courts have more leeway in compensating for non-pecuniary harm, or moral harm. Proving harm from an overcharge is possible, but proving causation arising from volume effects or deadweight losses is much more difficult, as it is also for victims harmed by less innovation. Victims of exclusionary conduct may find it easier to be compensated.

The Chairman called on Judge Bornkamm to react to the US presentation.

Judge Bornkamm found it fascinating that the Supreme Court leaned only on policy arguments, not damages or tort law, when ruling out claims by indirect purchasers. The Court felt that if claims by indirect customers had standing, the profit would stay with the infringer. But there is a danger that the direct purchasers, who may have close relations with the infringer, will not take a case to the courts, so there will be no claim for damages at all. Judge Bornkamm was in favour of the American system and felt that it could be adopted in Germany after more legal discussion. But policy considerations may come in when it is a case of mitigating circumstances or benefits. He felt that for European countries, indirect purchasers should not be barred from claiming damages.

The Chairman then invited Judge Verougstraete to give his views on the civil law approach to damages.

Judge Verougstraete compared the common law and civil law systems regarding civil claims for victims of anticompetitive practices. The US approach seemed to be successful, he said, whereas private enforcement in Europe seems not to work, although civil law and common law are not so very different. There is no real difference in considering the fault. In some European jurisdictions, a finding of fault by a competition authority is binding on judges, in others not, but even in those latter jurisdictions it would be considered as evidence of fault. The main difference is that discovery systems are unknown in continental

Europe, so parties need not disclose everything in their files. He agreed with Judge Bornkamm that experts do not make much difference. Judges listen first to the experts of the parties and it is important that they understand them, but they also turn to a court expert. A very bad tendency in Europe is for judges just to copy the advice of the court expert. As regards the passing-on defence, although it may be a good one for policy reasons, it might not be accepted in all countries.

Other differences with US law include the treble damages awarded to successful plaintiffs there. This does not exist in Europe and that reduces the incentive to sue. Out-of-court settlements are also resorted to much more frequently in the US and the UK, although their use is increasing even in European countries, which were quite opposed to them previously. A further difference is the review of the decision. When the plaintiff proposes a special method for assessing damages, and the judge makes a reasonable approach, giving minimum damages, or something that is not completely irrational, the civil courts will not review that decision in Europe. That should encourage proceedings, but nevertheless, the number of cases administered remains quite low.

In summary, Judge Verougstraete found it hard to explain the differences in outcomes between the US and Europe. One aspect is that in Europe, some countries do not have specialised courts. Tort cases will go before non-specialised courts, and it is important that the judges there understand the methods used to calculate damages and make some economic reasoning after listening to the court expert. But such courts do not seem to be eager to hear such cases and lawyers have no major incentives to sue.

#### **4. General discussion: the different roles of the competition authorities in assessing damages**

##### **4.1 *Examples of actual practices***

The Chairman noted that there is a wide diversity across countries regarding what the competition authorities must do when assessing damages and to what extent they contribute to assessing damages suffered by private parties. He called upon Indonesia to explain the practice there, in which the Authority is actively involved in assessing private damages rather than only assessing the harm to overall competition.

A delegate from Indonesia explained that Article 47 of their competition law gives the Competition Commission the power to determine losses due to infringements as well as the compensation to be paid by the offender. Types of compensation include: nominal, which is a sum of money even though actual losses could not be measured; punitive, a large amount of damages intended as a punishment; and actual, based on the real loss. Different methods are used to calculate damages. For example, in a bid-rigging case on an initial public offering, the harm is the difference between the auction price and that calculated by a financial advisor, and a similar estimate is used in cases of conspiracy and divestiture, with the competitive market price derived from various sources. For non-procurement cartel cases, harm is calculated on the basis of losses to consumers. For other cartel cases, the method used is that employed by other competition authorities, namely the difference between the cartel price and a fair price during the cartel period.

A particularly interesting case was the cross-ownership by the Temasek group, where the Commission calculated the loss to consumers by comparing the actual rate of return on investment (ROI) by the company, between 45% and 55% during the violation period, and a fair ROI of 20% to 35% that would have satisfied the stakeholders. The related price difference was also calculated and this will be used by the Commission to calculate consumer losses and the level of the fine. Previous-year sales are used to estimate the level of sales that could have been achieved in the absence of the violation. In bid-rigging cases, sales are based on the price of the bid-winner and the total sales of the group concerned. Fines are calculated according to economic analysis and relevant data, but cannot exceed 25 billion rupiah or 10% of the turnover during the year in question.

Judge Bornkamm observed that the reason the Indonesian Competition Commission is involved in calculating private damages and making decisions is because of the hesitation there by injured parties to use civil litigation, although this would be feasible.

The Chairman noted that competition authorities intervene in different ways regarding civil damages and asked Hungary to explain its approach, given that the Hungarian competition authority (the GvH) has the power to enforce civil law claims of consumers.

A delegate from Hungary said that this provision is relatively new and has not yet been applied. The GvH may file a public action enforcing civil claims provided certain conditions are met. First, there must have been an infringement of the competition Act; second, the infringement must concern large groups of consumers, the exact identity of whom might not be known; third, the GvH must start a competition supervision proceeding, which is a kind of follow-on public action; and fourth, the claim must be based on uniform legal grounds and the amounts claimed must also be uniform.

The delegate added that this new provision was created because previously, the public action had to be filed within one year of the infringement being committed. But the existence of an infringement did not usually come to light within this deadline. Since this provision is new, they have not yet decided how damages would actually be calculated.

The Chairman then asked Japan to describe its experience with the provision of the Antimonopoly Act that enables courts to ask the competition authority (JFTC) for an opinion on the amount of damages in follow-on cases.

A delegate from Japan said that until July 2009, it was mandatory for the courts to ask the JFTC for its opinion on the amount of damages in order to reduce the burden of proof on plaintiffs. It subsequently became optional, but remains customary.

The Chairman found the Japanese experience interesting because in some countries, the competition authorities argue that it is not possible to assess overcharges and they therefore do not do so. He asked Spain to describe their recent experience in this area, where -- unusually for a European authority -- the CNC can and does intervene.

A delegate from Spain said that this possibility to intervene is comparatively recent, and that while a good test of its usefulness is whether the courts agree with the CNC's assessment, so far there have been only three cases in which the courts have sought the CNC's opinion, and only one of which has been finalised. In that case, the decision explicitly mentioned that the CNC's advice was correct and had been followed. The Spanish Competition Act allows courts to ask the CNC to give non-binding advice in private actions. The CNC's submissions are brief and confined to assessing whether the claimant's submission shows an infringement, has proved damages, and demonstrates a relation between conduct and damages.

#### **4.2 *Judicial views on the appropriate role of the competition authorities***

The Chairman asked the two judges to give their views on the issue of competition authorities being involved in court proceedings as neutral analysts.

Judge Verougstraete felt that with respect to procedures, it would be difficult for such an authority to be involved. There may be a conflict of interest, so an amicus curiae position could be a bit difficult, they would have to show why they should be admitted, and it is unlikely that they would be. Organising such an intervention also poses problems. The Belgian Cour de Cassation is empowered to ask the European Commission for advice, but the one time that happened, the Commission said it would be the last one. The authority might not have the resources to be able to intervene in every case, and in some countries the

authority is legally a Minister, which could pose political problems. Finally, the authority would compute an overcharge from a global viewpoint, not from the point of view of the plaintiff or defendant. Thus it would be very difficult for the competition authorities to act with the courts. Even though the competition authorities have the facts, they would implicitly support the position of the plaintiff or the defendant and not be totally objective.

Conversely, Judge Bornkamm felt that the idea did make some sense. The *amicus curiae* idea had worked well in Germany for 50 years now in civil cases. The Bundeskartellamt does not intervene at every stage, but does so at the highest level in the Supreme Court, coming in with legal arguments, not with facts. There is another aspect. Some cases involve large total damage to competition, but trivial damages for a large number of individual consumers, who would not be motivated to bring an action. The Bundeskartellamt can organise a kind of settlement by which the violators pay damages and the proceedings are quashed.

## **5. General discussion: should competition authorities intervene in court proceedings?**

### **5.1 *The views of the authorities***

The Chairman then invited competition authorities in countries that do not intervene in civil proceedings to explain why not, and why some do not even estimate harm. The written contributions show that some say it is too complicated, some say that they do estimate harm, but in ways that are used for advocacy purposes, and some estimate harm only in a qualitative way. France's submission quoted a case in which the output effect was estimated only qualitatively because they did not have the elements that would permit a precise quantitative calculation. But if that is so, then *a fortiori*, the parties will have even less ability, and thus it would be impossible to measure and award damages.

A delegate from France explained that the case referred to in their submission concerned an agreement between the three largest temporary employment agencies not to pass on to their clients the benefit of the government's decision to reduce certain charges. Given the uncertainties surrounding estimates of the price elasticity of demand for unskilled labour, and the degree of substitutability of one kind of labour for another in France's rather rigid labour market, the authority proposed a prudent, partially qualitative, estimate of a loss of salary income through lower hiring of between €10 million and €20 million.

As regards calculation of damages, the delegate said that neither the law nor jurisprudence requires such calculations. Nevertheless, the competition authority does make such calculations when the data are available, for example in cartel cases, and they do not use rules of thumb. Such calculations represent one element in estimating the amount of sanctions to impose, which may be intended to be dissuasive or punitive, rather than simply compensating for damage. In this respect, it is less important for a competition authority than for parties in a civil court case to have precise estimates of damage.

The Chairman was not convinced by an argument put forward by some countries that if competition authorities focus on deterrence and punishment, they do not need to quantify harm and therefore do not do so. Insofar as authorities provide such elements in their decisions, it makes life easier for the parties in any subsequent civil case, and this itself can be a deterrent. He invited Sweden to comment on their predicament that the competition authority has to go to court to sanction violators, and they have to show that there has been an effect, but might not have the required information.

A delegate from Sweden said that in one cartel case, the defendants argued, on the basis of two reports by economic experts, that the cartel had no effect on price. This was somewhat surprising, since there was indeed a cartel, which is forbidden *per se*. The authority was unable to look at the data used, but

in any case, the court said it did not take into account the findings of the economic experts because they lacked reliability. In another case where data was not made available to the authority, the court ruled that the empirical analysis gave some support to the claim that the cartel had no effect on prices, but that this had no impact on the court's assessment.

The Chairman noted that there are countries where the competition authorities not only do not estimate harm, but have no intention of doing so because it is complicated and difficult. Italy is an example, where the law does not require the competition authority to assess harm and the courts in civil cases do not use competition economists, but rather other types of economists, or accountants.

A delegate from Italy said that it would be useful for the competition authority to provide quantitative estimates of harm in private enforcement cases. This does not happen in Italy even though the law does not prevent it, but this might change. More and more cases are being brought to the Italian civil courts even where the competition authority has not been involved in a prior public action. The Italian courts do not have specialised economic experts because the law says that experts of the courts must be chosen from members of certified professions for which a public registry is available, and there is no such registry for economists. Finally, at a time when promoting competition is viewed with some scepticism and competition itself is seen as part of the problem, quantifying the effects of cases handled by the authority would help to promote the benefits of competition and make the competition authority more accountable.

The Chairman invited Greece to explain why the competition authority there never quantifies the harm of anticompetitive practices.

A delegate from Greece responded that it is important to define what is meant by harm. There is harm to competition as seen by the authority, but in court cases, the harm is to specific consumers, competitors and intermediaries. In a recent follow-on case by a direct customer, the court had read a report saying that the cartel had harmed consumers, and concluded that there had been pass-on. In the case of exclusionary conduct, the anticompetitive effect is the fact that a competitor exits the market, or does not enter, and the authority will stop there. Quantifying the damage and harm from such conduct is something else, and it may not be reasonable for the authority to spend its resources trying to quantify the specific harm suffered by a specific competitor.

The Chairman noted that Germany's submission stated that a reason for not considering quantity effects was that fines may become less of a deterrent if the quantity effect leads to lower fines. He invited the German delegation to explain that statement, and also why the courts in the paper wholesale cartel case mentioned in the submission had selected one particular method for estimating damages.

A delegate from Germany noted that until the law was changed in 2005, the sanctions imposed in public cartel and abuse cases had to be calculated on the basis of the extra turnover - not profit - and fines could be imposed at up to three times this amount, so the extra turnover had to be calculated as precisely as possible. Estimation of extra turnover is based on the price effect and the volume effect. Cases that involved infringements before 2005 must still follow this approach. But no matter how carefully they were calculated, the Bundeskartellamt found it very difficult to estimate fines that would be accepted in the end by the Higher Regional Court and the Supreme Court because of the courts' very stringent requirements with respect to the counterfactual on the price effect. This is why the Bundeskartellamt found that having to calculate extra turnover can make effective cartel prosecution much more difficult, especially when incorporating quantity effects then leads to a reduction in fines. With regard to the output effect, standard economic theory says that if prices are raised, volumes sold will fall to an extent that depends on the elasticity of demand. However, higher extra profit due to higher cartel prices does not automatically also imply higher extra turnover. Depending on elasticity of demand, turnover can, and in many cases will, decline even though cartelists realise extra profit due to higher prices. In fact, in one case, the Higher

Regional Court followed an expert opinion that sales would have been lower due to the higher prices and therefore that the fine should be lower. The Bundeskartellamt felt that the fact that sales would be lower due to higher cartel prices should not be taken into account to the benefit of the cartel members. Since 2005, fines are based on company turnover, as elsewhere in the EU.

The Chairman noted that the Chilean submission referred to several cases where the theory of harm was not obvious, leading to difficulties in the civil hearings in assessing damages.

A delegate from Chile explained that their experience so far in private damage actions has been limited to exclusionary abuses, where harm to competition and private injury are hard to identify. The 2003 Competition Act created the Competition Tribunal and also introduced a provision on private damages, intended to speed up private proceedings. It gave the Tribunal an important role, ensuring that their findings on fact and on law cannot be neglected in civil procedures. Hence only the existence of injury, causation and the amount of damages will be discussed there, but no cases so far have given the civil judges a clear theory of harm to be used in rulings on private damages.

In an exclusionary conduct case, an economist for the defendants in a follow-on private case argued that there was no evidence that prices had been below costs and hence the market remained contestable and competitive. The judge dismissed the argument on the basis of financial and non-financial evidence, holding that the exit of a competitor during this period proved causation. In a predatory pricing case, the Tribunal had decided for acquittal, based on lack of harm to competition, but the Supreme Court overturned the decision on formalistic grounds without referring to the theory of harm.

## 5.2 *The panellists' views*

The Chairman invited Judges Bornkamm and Verougstraete to give their views on how competition authorities could facilitate the debate in civil courts when assessing the damage to a party from a violation.

Judge Bornkamm said that an *amicus curiae* role could be useful, in which the authority just explains the methodology, to guide the court on the economic issues. He was unconvinced that the authorities should go further than they need in administrative proceedings. It is for the civil courts to decide if there has been a specific harm. Even when the authority's finding of an infringement is binding on them, their calculations of specific harms are not. The competition authorities should not use their manpower to investigate non-crucial questions if they do not know what use the courts will make of them.

Judge Verougstraete said that courts needed competition authorities more for facts than for guidance on the law. It was therefore helpful to have rebuttable presumptions, and it would be desirable to change the legal system so as to be able to work with rebuttable presumptions as a starting point in civil litigation, where the burden of proof falls on both parties. In most EU countries, judges have wide discretion, and as long as their decisions are reasonable, they will be upheld. He understood that competition authorities cannot be forced to act in proceedings, are not allowed to hand over any information in their files and are not supposed to take sides in civil litigation, but they could provide some factual information, as well as guidelines. The European Commission could also give some sound advice on paper on the issue of facts, even though they cannot be forced to intervene in national proceedings, as they have immunity.

The Chairman then invited Dr Friederiszick to take the floor.

From a practitioner's viewpoint, Dr Friederiszick said that after reviewing many cartel cases, he agreed it is notoriously difficult to robustly identify the overcharge and cartel effects. He was therefore reluctant to require competition authorities to provide reliable estimates of overcharges. But they could be invited to put forward in their decisions the issues that the court or parties' experts would need to look at when carrying out their robust empirical estimates. The competition authorities need to become more

aware of how much attention the courts give to quotes about duration of an infringement, and issues of market definition and functioning when making quantitative calculations of private overcharge damages.

## **6. The role of simple rules in calculating harm**

The Chairman turned to competition authorities that do not want to go too deeply in making estimates of harm to competition, but that believe it is nevertheless useful. They are increasingly interested in using simple techniques. He wanted to know why they find it interesting and whether rough estimates could be used as rebuttable presumptions of harm, or minimum presumptions of harm.

A delegate from the Slovak Republic said that there were two main reasons for this new approach. The main one was the desire to introduce a more economic approach in antitrust cases, not only to calculate harm, but also to support other aspects of cases using economic analysis if possible. Parties often request precise calculations – they try to avoid sanctions, arguing that if there is no precise estimate, there is no case. There was also a reason for trying to calculate harm in a specific case of abuse of dominance in the wholesale gasoline and oil market. Harm was calculated as the direct damage to the direct customers. The reviewing court annulled the competition authority's decision, requesting the authority to analyse the gains made by the dominant undertaking. Fortunately, the authority had enough data to do a regression analysis.

The Chairman then noted that the UK submission was very positive about quantifying damages for a number of reasons, including prioritising their work. He invited the UK to detail the reasons, and the types of estimates of harm to competition. He asked whether the estimates made using simple rules were sufficiently precise for prioritisation, and noted that the rules of thumb used in estimating overcharge differ from those in the EU. He also asked if there were efforts to make them more precise and if the UK believed that other competition authorities should adopt this approach.

A delegate from the UK agreed with the delegate from Greece that there exists a fundamental difference between the assessment of damages in individual cases and estimates of harm to competition. The UK delegate also agreed with the delegate from Italy that it is important for the credibility of competition authorities that they demonstrate harm to competition in a broad sense, using academically respectable criteria. Used *ex ante*, such a tool helps discipline the choice of cases to pursue and the resources to devote to them (though the UK does not criticise other competition authorities that do not do so). The methodology employed is based on the best information available, which is case-dependent. Rules of thumb are used to facilitate *ex ante* estimations in competition infringement cases and more case-specific approaches in market studies. The *ex ante* estimates are only an indication of the magnitude of the impact, and each year the UK authority publishes its "positive impact" statement that estimates the overall impact of its work on consumers. Follow-up work refines these estimates and leads to improvement of the methods.

The actual method used to estimate harm takes as a basis the turnover of the infringing companies. The price increase is estimated if possible on data and facts collected during the investigation, and in their absence it is now assumed to be 15%. The duration of the infringement is assumed to be 6 years, which is used only when there is not a good reason for believing it could have been shorter. The UK delegate added that he agreed with Dr Friederiszick about the importance for competition authorities of thinking about the way they frame their decisions in order to assist private actions. But he also agreed with Judge Bornkamm that it is not their job to assess the individual impact of damages, it is a job for the court.

The Chairman asked the EU if they planned also to raise the assumed overcharge figure from 10% to 15%, and if they assumed the same kind of duration as the UK.

A delegate from the EU said that the starting point for their methodology is that it should be easy to apply and based on conservative assumptions. They use an overcharge figure of 5% to 15%, and the assumed duration is also conservative but informed by industry features in each case. The delegate did not believe that using broad estimates is misleading for advocacy purposes, but is rather a good indication of the actual impact of their intervention and allows comparison of impacts across the years, enhancing their credibility. Broad estimates could provide a useful first indication in civil proceedings, providing their limitations are understood by the courts.

The Chairman asked the US if it uses similar methods to the UK and EU for making rough estimates, and if it makes *ex post* evaluations.

A delegate from the US agreed with the UK and EU that they should not become involved in measuring the individual harm in private cases; that is a job for courts. The Government Performance and Results Act is intended to make various government authorities accountable, so the US competition authorities try to assess the effects of their operations and report the effect on consumers, and separately report the fines levied – which exceed their operating budget. The assessment of the impact on consumers depends on the type of case. For cartels, examination of over 100 cases showed that many overcharges fell in the 10% to 20% range. The US agencies use a figure of 10% for calculating the average impact. Other cases are more difficult. In some merger cases, they might estimate that if the merger went through, prices would rise by 6%, for example. They have similar rules of thumb for civil non-merger cases, exclusion cases and horizontal agreement cases. It is important to disclose how the aggregates are calculated so that whoever uses them can appreciate how difficult it is to measure things accurately.

Speaking as an economist who had served as an expert witness to calculate case-specific damages, the US delegate also agreed with previous speakers that one can get very different estimates from experts hired by different parties in a given dispute. Nevertheless, he was heartened by hearing how many jurisdictions agree on methodology and that generally there is a consensus about measuring cartel overcharges, for example. For assessing fines, the guidelines call for twice the gain or twice the harm and allow the use of the arguably low 10% overcharge default assumption even in specific cases, so the basis for the fine would amount to 20% of the value in commerce.

The Chairman noted that although there seemed to be near-unanimity that competition authorities should not spend resources calculating the damage to competition in private cases, BIAC had the opposite view.

A delegate from the BIAC said it would be worthwhile. It seems that there are competition authorities that must, or do, quantify harm, but the courts reject them or do not use them, and the authorities' reaction is that there is no point continuing to do it. BIAC's view is that the authorities should look for better ways of quantifying harm, as they are in the best position to do it. Although it is acceptable to establish violations without quantifying harm, it is not acceptable to impose sometimes quite large fines without a rigorous analysis of harm. Also, BIAC believes that quantification of harm helps to better formulate competition policy, and to structure follow-on damage actions.

The questions for the authorities would be: What is the conduct? What is the harm? And what is the optimal sanction? Many people believe that sanctions have become disproportionate to the harm caused and that administrative tools and resources are being used sub-optimally. This does not imply that BIAC is against big fines, but they do feel that demonstration of significant harm should be a precondition. Of course, if it proved to be impossible for competition authorities to quantify harm to society, the courts would have to decide on the sanction. BIAC feels that punitive and deterrent fines are a relatively crude instrument to influence companies' behaviour and one should reflect on better incentives to discourage anticompetitive conduct.

The Chairman then invited the EU to respond to BIAC's views, noting that the EU's opinion seemed to be that making precise estimates of damage is either impossible, or if possible, then not necessary, and if possible and necessary, that it would absorb so many resources as to hinder deterrent actions.

A delegate from the EU agreed that there should be some link between the size of fines and the infringers' gains, but that this link could be established either by a very detailed examination of the case, or via general proxies. Current case law accepts the use of proxies when providing guidelines for fining. It would be very difficult to do anything much more precise in the context of providing quantitative estimates of harm suffered by individuals or specific groups of claimants as opposed to estimates of the harm that could be avoided in future. It would require more resources, more case handlers and fewer cases handled, and might not contribute to enhanced deterrence. From a European perspective, punishment and deterrence is primarily a task for the public enforcement.

Recovering damages is guaranteed by the EU treaty, but this is not intended to serve as a deterrent, but rather compensation. This does not mean that the Commission is unwilling to help the courts in damage cases; they can do that by providing information in their files that had been useful in the public cases. This year, the Commission's programme includes providing more general non-binding guidance on how judges can quantify harm. Responding to an intervention by the Chairman, the delegate said that if there was an issue of fines being insufficiently deterrent, it would be better to look at the level of fines rather than take the indirect route of facilitating private claims.

Next, the Chairman invited Hungary to comment on the issue of rebuttable presumptions because the competition law in that country requires courts to assume that in price fixing and market chain cases, infringements raise prices by 10% unless the defendant proves otherwise.

A delegate from Hungary explained that no private cases had been brought after the competition authority had serious cartel cases in 2004-2005, and the purpose of this quite new law was to encourage private actions by minimising the risk for plaintiffs of facing an information asymmetry when attempting to quantify damages. For similar reasons, a provisional Act says that the authority's decision on the fact of a violation is binding on the court. For the moment, no new private cases had been brought to the courts.

The Chairman then invited Greece to discuss whether rebuttable presumptions could be useful in civil litigation.

A delegate from Greece said that it was important to distinguish between proxies and presumptions when referring to civil harm. Competition authorities use both with regard to the antitrust liability. If the authority has to calculate harm, as will be the case if the current competition bill goes through Parliament, the fines would somehow have to be linked to the harm to specific persons. That cannot be done using proxies or presumptions. Nevertheless, it is an interesting idea, and perhaps could be a starting point that would facilitate settlement discussions, including discussions about damages awards.

Noting that the UK does attempt to publish estimates of harm, the Chairman asked the UK if those estimates, particularly of the overcharge, could be a rebuttable presumption, and if so, would it simplify the work of the court and facilitate civil enforcement?

A delegate from the UK said no, these rules of thumb are intended to estimate the overall impact of an intervention in a particular case, and calculating actual damages in a potential civil action is a different exercise. While the delegate had considerable sympathy with the work in Europe and elsewhere with judges, economists and other experts to simplify an approach to damages in civil cases, one should not transpose the impact estimates of interventions. Responding to a question from the Chairman, as to whether rebuttable presumptions could be a starting point in a civil case to speed up the process, the

delegate agreed with the principle of helping judges to get the right assessment, but felt that there was no absolute truth. Rather, there were many theories and approaches. A better approach would be for economists working in the authorities and in private practice to work with the judicial community to try to provide some help, so that judges could be guided to a point where estimates would not necessarily be precise, but within a range approximate to the damage suffered.

The Chairman asked BIAC why they were so opposed to the use of rebuttable presumptions. Is it because they are too accurate, or too inaccurate?

A delegate from BIAC explained that they were opposed because there is a huge variety of such presumptions, and that if the court debate focused on them, the procedures might tilt one way or another. BIAC did not oppose them because they might lead to higher fines. BIAC appreciates that precisely quantifying the harm is complex, but a court or competition authority should apply the best available methodology to reach a reliable estimate of the cost of the conduct in the market place. A reasonably good-faith effort should be made to quantify damages. Competition authorities are best placed to do this because they can require data from the companies. If for example the fine is several million Euros, it is important to know whether the harm to society is one billion Euros or two million. The delegate hoped that there would be further discussion of how competition authorities could help quantify damage to society and the help they could give to courts in follow-on litigation. If the authorities did not do it, the courts would have to, and they are not so well-positioned for that.

## **7. Settlement procedures as an alternative to the courts**

Before turning to the EU's guidance paper, the Chairman raised the issue of settlements, which was not addressed in the contributions. Many cases are settled, which implies that parties can agree on the size of the harm and an acceptable amount of compensation. Perhaps there is a disequilibrium of forces that results in bias, but it is perplexing that economists from one party will disagree with their counterparts in court, whereas they agree easily in a settlement procedure. Why is this so? Furthermore, are settlements beneficial things? Can parties be induced to settle early in order to avoid costs and difficulties? The Chairman invited Belgium to comment.

A delegate from Belgium said that they approved of the idea of settlements, wished to pursue it further, and that first indications were positive. Settlements concern mainly follow-on actions and even in the most efficient systems, it can take years after the public enforcement actions before victims are compensated. This is a cause of concern. Belgium is also concerned about the cumulative effects of sanctions, fines and damages. An expert had said that European fine levels are too low to be a deterrent, and that about 75% of fines are passed on to consumers. Their own chief economist says that there is no passing on to consumers, but there is a possible negative impact on investment.

An idea that was put forward during the Belgian presidency of the EU was to combine a settlement with the public authority regarding the fine with the provision of effective compensation for the victims. The violators thus have an incentive to settle, and would need more than a 10% reduction in the fine, but they also have an incentive to settle on compensation for the victims. Competition authorities worry in general that promoting compensation can have a negative impact on leniency programmes, and they are dangerously dependent on leniency applications in cartel cases. However, it is unlikely that this particular approach would have a negative impact on leniency programmes. The victims might get only approximate compensation, but they would get at least something, and much sooner, even before a normal public enforcement procedure would be finalised, and at lower cost. The advantages seem sufficiently important to explore this avenue further.

The Chairman invited the economists present to give their views on the idea that they can quickly agree in a settlement context on issues that would divide them for a long time in a court case.

A delegate from the US did not agree. He said it was more important to have a neutral expert or court appointed expert who can ensure that professional standards are high. It is not so much a matter of putting the economists together and keeping out the lawyers, but rather a process that disciplines so that low quality work is identified as such.

Dr Friederiszick said there are two issues: does agreement come more quickly in settlements; and do economists negotiate more productively in the absence of lawyers? The UK delegate seemed to suggest that the latter is indeed the case. Perhaps it is because economists speak the same language and can agree more easily on straightforward factors, and then negotiate hard on the other issues. Settlements are not economist-driven. He thought that both parties had strong incentives for transparency and this drives their interest to settle. Typically in cartel cases, defendants do not want to show the numbers, so as to avoid follow-on suits. The economists on each side can look at the other's data in a settlement environment, and this kind of transparency facilitates agreements.

Responding to a suggestion by the Chairman that there was perhaps a difference between European and the US economists in this regard, the US delegate felt that irrespective of whether the settlement discussion involved lawyers or economists, and if there was a strong desire to reach a settlement, the conversation could be more productive than in a courtroom. There can be a number of points of agreement, whether they are legal or economic, that narrow the subsequent discussion. It is harder to do that from the witness stand or in cross-examination.

A delegate from the UK intervened to underline that lawyers and economists work for clients who have instructed them to fight in litigation, so they dig ditches far apart. When they are instructed to settle, they come into the room and often find some common ground. If one wishes to go further down the settlement route, one might need a facilitator or mediator to bring the parties together. It should not be a person appointed by, or working for, a competition authority.

The Chairman identified two issues: first, there needs to be an incentive for the parties to settle, for example the Belgian idea of a reduced fine; and second, a clear procedural context in which the settlement discussions would take place for the lawyers, the economists and the judge. He invited the EU to discuss the issue of guidance to the courts, asking whether content should be competition specific, or should guidance be methodological and applicable to many other areas of law?

A delegate from the EU noted that they published a White Paper in 2008 that tried to identify the obstacles to more widespread use of private enforcement in Europe. One such obstacle was the lack of practical guidance by judges on methods to quantify antitrust harm, and the Commission subsequently worked on that issue. The results can be found on the EC website. In its White Paper, the Commission committed to publishing a guidance document. The particularities of legal systems matter a lot in Europe, and therefore one cannot come up with a best practice that has evolved in one jurisdiction and try to extend it across Europe. Instead, the Commission tries to provide information on different methods that can be used by judges to estimate different kinds of harm, with some chapters on collusion and others on exclusionary abuse. Judges can then pick the possible approaches that can be adapted to their own legal systems. In such a non-binding document, there will be no new rules or practices, and it would not be the place to introduce a legal presumption. That would have to be done by each legal order. The intention is to help judges, but other dispute resolution mechanisms or arbitration mechanisms could also benefit from the methods provided in the guidance document, which should be adopted in 2011.

## 8. Chairman's summary

The Chairman noted that:

- There was general agreement that harm to competition, which may or may not be assessed by competition authorities, differs from injuries to victims of antitrust violations;
- Nevertheless, there are common elements, such as the overcharge;
- There was a widely shared view that it is not in the purview of competition authorities to calculate injury to victims, although this is done in a couple of jurisdictions;
- The Slovak intervention noted, however, that there was a contradiction between saying that one should move towards a more economic-analytic approach based on the specificity of each case, and not evaluating harm in each specific case;
- As regards assessing harm to competition, there was a widely held view that the competition authorities should not go too far in trying to be precise, but some notion was useful for the value of enforcement, prioritisation and perhaps advocacy. Simplified methods or rules of thumb, combined with specific data linked to specific cases, could be used;
- There were two outliers, Spain and Hungary. Spain is exceptional in the amount of resources that the competition authority devotes to *amicus curiae* and intervening in court proceedings. It was interesting that the judges in this roundtable saw that as useful and said it would be desirable to be able to force the competition authorities to participate in court proceedings. A number of authorities were willing to go in that direction, and Hungary has already started down this path;
- With respect to methodology, two types were discussed, generalised, and an assessment of the methodology of each case (Spain's approach). In both cases, though, when assessing damage to victims, the knowledge of the competition authorities is used to assess what a good methodology is. There is a clear demand by the judges for methodology, and providing a generalised methodology is an area in which the European Commission is engaged;
- Rebuttable presumptions were also mentioned, for example for estimating the overcharge that could facilitate civil cases. Greece pointed out that it would not be useful for the competition authorities as they either have to be more precise or else not go into the exercise. But for the courts, rebuttable presumptions could be useful, as Judge Verougstraete mentioned a few times;
- More difficult was the request by the judges to obtain relevant data from the competition authorities that would help them assess damages. The EU suggested that the competition authorities make their files available, but they also said that they do not have anything relevant in their files, because most violations are object violations. The question was therefore if it would be useful to gather more data that could be used later on in a civil case;
- The discussion of settlements offered some explanation of why they may go faster, some explanation of their limitations, and some ideas about why a precise procedural environment for settlement would be useful and that settlements could make civil enforcement easier;
- A side issue was the estimation of harm by competition authorities so that a link can be demonstrated between their fining policies and the social harm, thereby making them more accountable;
- Finally, it was reassuring that everyone agreed on the instruments that one could use, and that it was really the data that make the difference, not the methodologies.



## COMPTE RENDU DE LA DISCUSSION

*Par le Secrétariat*

Le Président commence par présenter les trois membres du panel : Hans Friederiszick, professeur à l'European School of Management and Technology et administrateur d'E.CA Economics à Berlin ; Ivan Verougstraete, juge à la Cour suprême de Belgique et président de la Cour de cassation de Belgique ; et Joachim Bornkamm, juge à la Cour suprême fédérale d'Allemagne. Le Président souligne combien il est important, pour les économistes et les autorités de la concurrence, de comprendre les contraintes que subissent les juges dans l'exercice de leurs fonctions et de faire en sorte que ce débat leur soit utile.

Le Président propose ensuite d'articuler les débats autour des points suivants :

- En raison de la diversité des régimes juridiques en vigueur dans les différents pays, la capacité des tribunaux – civils surtout – à quantifier le préjudice diffère elle aussi selon le pays.
- La plupart des économistes s'accordent sur les méthodes à employer pour quantifier le préjudice, bien que leur opinion diffère parfois sur les résultats.
- Le rôle des autorités de la concurrence dans les procédures judiciaires diffère largement selon les pays. Certaines autorités aident les juges à estimer le préjudice, d'autres doivent justifier la sanction au regard du préjudice subi et d'autres encore n'ont aucun lien direct avec les tribunaux.
- L'éventuelle implication des autorités de la concurrence dans la quantification du préjudice, les méthodes alors employées et l'éventuelle utilisation de ces estimations dans les procédures civiles ou dans le calcul des sanctions sont autant de questions sujettes à de vives controverses.
- Les autorités de la concurrence peuvent en principe conseiller les tribunaux grâce à leur connaissance des aspects économiques des affaires.
- Enfin, les accords transactionnels sont-ils une solution alternative aux procès et aux tentatives onéreuses de quantification du préjudice devant les tribunaux ? Il est frappant de constater que les économistes peuvent exprimer des opinions très divergentes devant les tribunaux alors qu'ils s'entendent facilement dans le cadre d'un accord.

Le Président invite M. Friederiszick à donner un aperçu général.

### **1. L'avis d'un économiste : le point sur la quantification de l'atteinte à la concurrence par M. Friederiszick**

#### ***1.1 Effets économiques : surfacturation, répercussion des surcoûts et volume***

L'entente, exemple emblématique d'atteinte à la concurrence, a pour effet immédiat d'augmenter le prix facturé aux clients directs de ses membres. Cette hausse, multipliée par le volume des ventes, donne la surfacturation, base de calcul incontournable des dommages lors des procédures judiciaires ou administratives. Il est possible que les clients directs puissent répercuter au moins une partie du surcoût sur

leurs propres clients, qui le répercutent à leur tour en aval. Ils subissent alors un préjudice inférieur au montant surfacturé. C'est ce que l'on appelle l'argument de « répercussion des surcoûts » invoqué par les défendeurs.

Toutefois, même si les surcoûts sont répercutés à ce niveau, il se trouvera au moins un client en bout de chaîne qui subira une hausse de prix. Les quantités produites seront donc réduites (effet sur le volume). Les économistes s'accordent à dire que, pour estimer le préjudice dans un contexte théorique, il convient de prendre la surfacturation, d'en déduire les surcoûts répercutés et d'y ajouter l'effet sur le volume. D'un point de vue juridique, la question est de savoir s'il est possible de tenir compte de ces effets dans la pratique. Doit-on employer des raccourcis ? En Europe, les divers régimes juridiques sont loin d'être uniformes sur la question de savoir si la répercussion des surcoûts et l'effet sur le volume doivent être pris en compte. La Commission européenne a émis des lignes directrices visant à davantage harmoniser les approches des divers pays et territoires.

Bien que le client direct tire parti de la répercussion des surcoûts, les clients indirects, eux, subissent un préjudice et, au bout du compte, l'effet de la répercussion s'estompe. Dans l'optique du bien-être total, même l'effet de la surfacturation s'estompe et le préjudice se mesure grâce à l'effet sur le volume, la perte de quantités produites et la perte d'utilité. Selon le professeur Friederiszick, l'effet sur le volume doit être pris en compte dans les actions en dommages et intérêts des particuliers et entreprises.

## **1.2      *Calcul des réparations***

Lors des actions en dommages et intérêts de personnes de droit privé, le mode de calcul des réparations prévoit généralement d'élaborer un contre-scénario – à savoir ce qui se serait produit si la pratique incriminée n'avait pas eu lieu. Ce scénario est élaboré en comparant la situation avant et après l'infraction présumée ou à l'aide d'une d'approche fondée sur les coûts. Quel que soit le cas, vérifier d'autres facteurs accroît la complexité des calculs.

D'un point de vue purement théorique, il est important d'utiliser une méthode qui permettra d'arriver avec suffisamment de certitude à une estimation précise du préjudice réel. D'un point de vue juridique, des aspects pratiques ont aussi leur importance, comme de savoir si les méthodes employées sont vérifiables et transparentes et permettront de livrer des résultats dans un délai acceptable en y consacrant des moyens raisonnables. Avocats et économistes s'accordent par exemple à dire que la seule preuve économique de collusion est insuffisante. Le niveau de preuve requis pour démontrer un préjudice ou un lien de causalité est généralement peu élevé, et celui requis pour quantifier le préjudice est encore plus faible. En matière de surfacturation, il est donc important de tenir compte des règles juridiques qui ont présidé à l'estimation et d'accorder un poids différent aux diverses estimations en fonction de ces règles. Les données nécessaires à l'estimation varient selon la méthode employée mais la complexité de l'environnement sectoriel concerné et la connaissance du paysage concurrentiel peuvent primer sur les données brutes. Ainsi, aucune méthode n'est globalement supérieure aux autres, bien que certains types de méthodes soient jugés plus adéquats dans un environnement particulier. Les tribunaux allemands ont par exemple établi que les méthodes comparatives fondées sur les prix sont plus fiables que les approches fondées sur les coûts.

La question du comportement stratégique des parties est aussi importante, notamment dans les actions en dommages et intérêts des personnes de droit privé, où les sommes en jeu sont importantes. Les entreprises souhaitent utiliser une méthode qui serve au mieux leurs intérêts et peuvent aussi chercher à retarder la divulgation d'informations. On est confronté à une asymétrie d'information : les membres de l'entente savent combien cette dernière leur a permis d'augmenter les prix et leurs clients directs savent quelle est la hausse qu'ils ont répercutée. Cette asymétrie peut être réduite par des règles strictes et claires de divulgation d'informations, mais ces dernières ont un coût et peuvent être particulièrement néfastes pour

un concurrent qui n'aurait rien à se reprocher. Cet aspect est particulièrement important dans les affaires d'exclusion.

Il existe plusieurs solutions en matière d'arbitrage, comme l'utilisation de la présomption simple, l'obligation de fournir des renseignements, la fixation commune d'une méthode avant que les résultats ne soient connus, le recours à des experts judiciaires, et des procédés permettant aux économistes de communiquer entre eux, à l'image des entretiens préliminaires (*pre-talks*) au Royaume-Uni, auxquels les avocats ne prennent pas part.

En matière de présomption, l'expérience nous apprend que la surfacturation s'inscrit en moyenne dans une fourchette comprise entre 10 % et 20 % dans la plupart des cas, avec une amplitude allant de zéro à 70 % selon les résultats. Pour les économistes, la présomption standard est certes une première étape, mais elle ne saurait suffire. Les présomptions doivent être affinées pour se rapprocher des données réelles de l'affaire concernée.

## **2. L'avis d'un juriste : le point de vue du juge Bornkamm sur l'évaluation du préjudice**

Le juge Bornkamm relève que, lorsqu'une affaire est portée au civil, l'infraction a déjà été établie par une procédure administrative menée par une autorité de la concurrence. En Allemagne, les conclusions de ces procédures ont l'autorité de la chose décidée pour les tribunaux civils, même lorsque l'infraction a été reconnue par une autorité de la concurrence d'un autre pays européen.

Comme dans toute action en responsabilité civile délictuelle, les indemnisations doivent compenser l'intégralité du préjudice subi par les victimes du fait de l'infraction. Si le préjudice ne peut être déterminé précisément, les juges allemands doivent estimer une indemnisation minimum. Il est présumé qu'un accord horizontal entraînera des prix plus élevés, à charge pour la partie défenderesse d'apporter la preuve du contraire. Par ailleurs, les informations sur les prix peuvent être obtenues en observant d'autres marchés régionaux ou d'autres marchés de produits, en comparant la situation avant et après l'infraction, etc. Les juges des tribunaux allemands peuvent également prendre en compte les bénéfices générés par l'infraction lorsqu'ils estiment le préjudice, et le plaignant peut demander le versement d'intérêts sur les dommages.

La présomption simple de répercussion des surcoûts proposée par la Commission européenne entraînerait, selon le juge Bornkamm, une multiplication des dommages et intérêts lorsqu'il existe plusieurs échelons de clients indirects. Il estime cette présomption par ailleurs très difficile à contester et juge donc préférable d'appliquer strictement le principe de la charge de la preuve.

Les pays et territoires de tradition civiliste ont recours à des experts judiciaires, tandis que ceux dotés d'un régime de *common law* utilisent des experts désignés par les parties. La différence entre les deux systèmes à cet égard n'est toutefois pas parfaitement nette. En effet, l'Allemagne, pourtant civiliste, fait rarement appel à des experts judiciaires alors que les experts désignés par les parties sont autorisés. Leurs conclusions n'ont cependant pas force probante et ne font qu'alimenter les arguments des parties. Quoiqu'il en soit, il faut se garder d'accorder trop de poids aux conclusions des experts judiciaires pour éviter de déléguer le jugement à un autre intervenant que le juge.

Un délégué des États-Unis prend la parole et note que l'expert judiciaire pourrait être tenu de lire son rapport à haute voix devant le juge et de le soumettre à la contradiction. De la même manière, les experts judiciaires pourraient également interroger les économistes des parties afin de déceler les faiblesses et points forts de leur argumentaire. La transparence est fondamentale pour assurer une procédure équitable.

Le juge Bornkamm retient de son expérience que les juges quantifient souvent le préjudice sans faire appel à un expert, comme dans le cas de l'affaire Deutsche Telekom, dans laquelle la société allemande avait gratuitement offert un accès limité à Internet à ses clients de téléphonie fixe. Bien que le

*Bundeskartellamt* ait conclu à l'absence d'infraction, le tribunal a déterminé qu'au vu de la chute des ventes des concurrents, le préjudice ne faisait aucun doute et qu'aucune autre forme de preuve n'était nécessaire. Si les parties contestent la décision du *Bundeskartellamt* ou de toute autre autorité de la concurrence, elles engageront les services d'experts privés.

### **3. Débat général : les divers systèmes juridiques**

#### **3.1 *Le système américain***

Le Président demande aux États-Unis d'explicitier ce qui leur fait évoquer, dans leur contribution écrite, que la charge de la preuve semble moins lourde aux États-Unis que dans le droit civil d'autres pays et territoires et que l'approche américaine est peut-être être plus pragmatique.

Un délégué des États-Unis explique que, depuis le vote du *Sherman Act* il y a 120 ans, la Cour suprême a promulgué des règles simples pour permettre aisément aux personnes de droit privé d'intenter des recours, notamment dans les affaires d'entente, même si ces dispositions sont au détriment de la précision. En cas d'entente, par exemple, le client direct peut récupérer la totalité du montant surfacturé, même en cas de répercussion des surcoûts. Un client indirect ne peut en revanche pas réclamer de dommages et intérêts, quand bien même les surcoûts auraient été répercutés sur lui. Les décisions de la Cour sont en outre guidées par la crainte que des litiges commerciaux ne soient détournés pour en faire des affaires de concurrence, en raison du triplement des dommages-intérêts auquel donne lieu une action pour comportement anticoncurrentiel lorsqu'elle aboutit. En revanche, les affaires d'abus de position dominante ou de monopole sont conceptuellement plus délicates à traiter et, dans les affaires d'exclusion, la Cour suprême s'inquiète du fait que le plaignant, qui n'est généralement pas un client mais un concurrent, soit incité à intenter une action même en l'absence d'atteinte à la concurrence.

Dans le système américain, un plaignant de droit privé doit établir l'existence d'une pratique ou d'un comportement anticoncurrentiel(le) lui ayant porté préjudice au regard du droit de la concurrence. Ce sont les économistes et comptables experts qui sont chargés de quantifier les dommages en comparant un contre-scénario à la situation effective sur le marché.

Le délégué évoque ensuite l'affaire *Illinois Brick* (1977), dans laquelle la Cour suprême a décidé que les clients indirects ne pouvaient obtenir réparation du préjudice dans les procédures fédérales pour pratique anticoncurrentielle. Dans cette affaire, la Cour a changé de position à trois reprises durant les délibérations en raison du fort degré d'incertitude inhérent à la quantification des dommages. Cependant, la Cour suprême n'ayant pas été confrontée à cet exercice de quantification depuis le milieu des années 1960, certaines de ces doctrines pourraient être réexaminées. Étant donné le grand nombre de publications et de débats que ce sujet a suscités depuis, la Cour suprême pourrait aujourd'hui être disposée à revenir sur cette règle.

#### **3.2 *Systèmes européens***

Le Président invite ensuite la Grèce à expliquer son système, dont les procédures posent apparemment des difficultés aux victimes d'infractions.

Un délégué de Grèce explique qu'il est nécessaire, pour intenter une action civile pour infraction au droit de la concurrence, d'établir un comportement illicite, un préjudice, des dommages et un lien de causalité. Pour qu'il y ait lien de causalité, il faut nécessairement qu'il y ait comportement illicite et que ce dernier soit une cause importante du préjudice. Il faut également démontrer une faute. Pour évaluer les dommages et intérêts, on compare la situation anticoncurrentielle et la situation concurrentielle hypothétique. Il serait normalement possible d'indemniser les victimes au titre du dommage effectif et du manque à gagner, mais déterminer le manque à gagner est une procédure très exigeante. Or, l'indemnisation doit couvrir le dommage effectif. Les tribunaux ont une plus grande latitude lorsqu'il s'agit

d'indemniser les préjudices non pécuniaires, ou moraux. Il est possible de prouver un préjudice découlant d'une surfacturation mais il est bien plus difficile de prouver le lien de causalité à partir des effets sur les volumes ou des pertes sèches, tout comme il est bien plus difficile de prouver leur préjudice pour les victimes d'une baisse de l'innovation. Celles lésées par des pratiques d'exclusion peuvent avoir moins de mal à obtenir réparation.

Le Président demande au juge Bornkamm d'exprimer son point de vue sur la présentation des États-Unis.

Le juge Bornkamm trouve remarquable que la Cour suprême se fonde sur des arguments stratégiques plutôt que sur les préjudices ou sur le droit de la responsabilité délictuelle pour dénier aux acheteurs indirects la possibilité d'intenter un recours. La Cour estime en effet que si les clients indirects avaient qualité à agir, le contrevenant conserverait son bénéfice. Toutefois, les acheteurs directs étant susceptibles d'entretenir des liens étroits avec le contrevenant, ils risquent de renoncer à porter une affaire devant la justice, ce qui écarterait alors l'éventualité de toute demande de réparation. Le juge Bornkamm se dit favorable au système américain et estime qu'il pourrait être adopté en Allemagne après un examen juridique plus poussé. Toutefois, les autorités pourraient prendre en compte certaines considérations pour déterminer s'il y a lieu d'accorder des circonstances atténuantes ou un traitement avantageux. Selon lui, les acheteurs indirects des pays européens devraient conserver leur qualité à agir en dommages et intérêts.

Le Président invite ensuite le juge Verougstraete à exprimer son avis sur l'approche civiliste des dommages et intérêts.

Le juge Verougstraete compare l'action en justice des victimes de comportements anticoncurrentiels dans les régimes de tradition civiliste et de *common law*. L'approche américaine paraît efficace, à l'inverse semble-t-il du recours des particuliers et entreprises en Europe, alors même que droit civil et régime de *common law* ne divergent pas outre mesure. Les deux régimes sont proches en matière de faute. Lorsqu'une autorité de la concurrence conclut à une faute, cette décision n'a l'autorité de la chose décidée que dans certains pays européens, mais elle est tout de même considérée comme une preuve de faute dans les autres. La principale différence tient au fait que les régimes juridiques d'Europe continentale ne prévoient pas de dispositif de communication préalable (« *discovery* »), si bien que les parties ne sont pas tenues de communiquer tous les renseignements contenus dans leurs dossiers. Tout comme le juge Bornkamm, le juge Verougstraete constate que le type d'experts ne change pas réellement la donne. Les juges entendent en premier lieu les experts des parties et il est important qu'ils comprennent leurs arguments, mais ils font également appel à un expert judiciaire. On observe en Europe une tendance délétère qui consiste, pour les juges, à se ranger systématiquement à l'opinion de l'expert judiciaire. Pour ce qui est d'invoquer la répercussion des surcoûts comme moyen de défense, bien que cet argument puisse être défendable, il pourrait ne pas être recevable dans tous les pays.

On constate d'autres différences avec le droit américain, comme le triplement des dommages et intérêts que ce dernier accorde aux plaignants dont le recours a abouti. Cette disposition n'existe pas en Europe, ce qui réduit la motivation à poursuivre en justice. Les accords transactionnels sont également bien plus courants aux États-Unis et au Royaume-Uni, bien que leur utilisation augmente peu à peu dans les pays d'Europe continentale, qui y étaient auparavant fermement opposés. Le réexamen de la décision est également un point de contraste entre les deux régimes. Lorsque le plaignant propose une méthode d'évaluation particulière du préjudice et que le juge prend une décision raisonnable en accordant des dommages et intérêts minimums ou un montant qui n'a rien d'irrationnel, les tribunaux civils ne réexamineront pas cette décision en Europe. Cela devrait encourager les poursuites, mais les affaires ne sont toujours guère nombreuses.

En résumé, pour le juge Verougstraete, l'écart d'efficacité entre les régimes américain et européens s'explique difficilement. Le fait que certains pays d'Europe ne disposent pas de tribunaux spécialisés y contribue. Les affaires de responsabilité délictuelle sont jugées par des tribunaux non spécialisés et il est important que les juges de ces instances comprennent les méthodes utilisées pour calculer les dommages et puissent analyser les facteurs économiques après avoir entendu les experts judiciaires. Or, ces tribunaux ne semblent pas enclins à juger des affaires de cette nature et les avocats ne sont guère incités à engager des poursuites.

#### **4. Débat général : divers rôles des autorités de la concurrence dans l'évaluation du préjudice**

##### **4.1 Exemples de pratiques en vigueur**

Le Président observe que, selon les pays, les obligations des autorités de la concurrence varient largement en matière d'évaluation du préjudice et que les autorités peuvent être impliquées à des degrés très divers dans l'évaluation des préjudices subis par des personnes de droit privé. Il demande à l'Indonésie d'expliquer sa pratique à cet égard puisque son autorité de la concurrence est activement associée à l'évaluation du préjudice causé aux particuliers et entreprises, plutôt que de se limiter à quantifier l'atteinte à la concurrence dans son ensemble.

Un délégué d'Indonésie explique que l'article 47 de la loi sur la concurrence confère à la Commission de la concurrence le pouvoir de déterminer les pertes entraînées par les infractions ainsi que de fixer les réparations que le contrevenant doit verser. Ces réparations peuvent être symboliques (somme allouée alors que les pertes exactes n'ont pas pu être mesurées), exemplaires (dommages et intérêts élevés destinés à sanctionner le contrevenant) ou compensatoires (égales à la perte réelle). Il existe plusieurs méthodes de calcul du préjudice. Par exemple, dans une affaire de soumission concertée sur les marchés publics, le préjudice correspond à l'écart entre le prix proposé et celui calculé par un conseiller financier. L'évaluation se fait de manière similaire qu'il s'agisse d'ententes illicites ou de cessions d'actifs, dans lesquelles le prix de marché concurrentiel est estimé à partir de diverses sources. Pour les affaires d'entente hors des marchés publics, le préjudice est calculé d'après les pertes subies par les consommateurs. Dans les autres cas d'entente, la méthode employée est la même que celle utilisée par d'autres autorités de la concurrence, à savoir l'écart entre le prix pratiqué par les membres de l'entente et un prix concurrentiel sur la période où l'entente avait cours.

La participation croisée du groupe Temasek est un exemple particulièrement intéressant. Dans cette affaire, la Commission de la concurrence a calculé la perte pour les consommateurs en comparant le taux de rentabilité des investissements affiché par la société pendant la durée de l'infraction, à savoir 45 % à 55 %, et un taux de rentabilité des investissements équitable, de l'ordre de 20 % à 35 %, qui aurait satisfait les parties prenantes. La différence de prix induite par cet ajustement de taux a aussi été calculée et servira à la Commission pour calculer la perte pour les consommateurs et fixer le montant de l'amende. Le chiffre d'affaires de l'exercice précédent sert à estimer les volumes de ventes qui auraient été enregistrés en l'absence d'infraction. Dans les affaires de soumission concertée, les ventes sont calculées à partir du prix proposé par le soumissionnaire retenu et des ventes totales du groupe concerné. Les amendes sont calculées d'après une analyse économique et les données pertinentes, sans toutefois pouvoir dépasser 25 milliards de roupies, ou 10 % du chiffre d'affaires de l'exercice concerné.

Le juge Bornkamm observe que si la Commission de la concurrence indonésienne est associée au calcul des préjudices subis par les personnes de droit privé et aux décisions, c'est parce que les victimes hésitent à intenter des actions devant les tribunaux civils, bien que cette voie leur soit ouverte.

Le Président note que le mode d'intervention des autorités de la concurrence varie en matière de dommages et intérêts et demande à la Hongrie d'exposer son approche, sachant que l'autorité de la

concurrence hongroise (le GvH) a le pouvoir de faire valoir les droits des consommateurs au regard du droit civil.

Un délégué de Hongrie indique que cette disposition est relativement récente et n'a pas encore été appliquée. Le GvH peut intenter une action d'office en matière civile, sous réserve que certaines conditions soient réunies. Tout d'abord, la loi sur la concurrence doit avoir été enfreinte, ensuite, l'infraction doit concerner un vaste groupe de consommateurs dont l'identité exacte peut être inconnue, troisièmement, le GvH doit entamer une procédure de contrôle du respect de la concurrence, ce qui revient peu ou prou à une action des autorités publiques intentée après une décision administrative ayant constaté une infraction, et enfin le recours doit reposer sur des fondements juridiques homogènes et les montants réclamés doivent également être uniformes.

Le délégué ajoute que cette nouvelle disposition a été adoptée car, auparavant, l'action des autorités publiques devait débiter dans un délai d'un an à compter de l'infraction. Or, l'infraction n'était généralement pas décelée aussi rapidement. La disposition étant inédite, la Hongrie n'a pas encore décidé du mode de calcul effectif du préjudice.

Le Président se tourne ensuite vers le Japon, où les tribunaux peuvent, en application de la Loi relative à la lutte contre les monopoles, demander l'avis de l'autorité de la concurrence (JFTC) sur le montant des dommages dans les affaires faisant suite à une décision administrative ayant constaté une infraction. Le Président invite le Japon à faire part de son expérience à cet égard.

Un délégué du Japon explique que, jusqu'au mois de juillet 2009, les tribunaux avaient l'obligation de demander son avis à la JFTC sur le montant du préjudice, afin d'alléger la charge de la preuve pour les plaignants. Cette consultation est ensuite devenue facultative mais elle reste courante.

Le Président souligne que l'expérience du Japon est intéressante car de l'avis des autorités de la concurrence de certains pays, il est impossible d'évaluer les surfacturations et elles ne se prêtent donc pas à cet exercice. Le Président demande à l'Espagne de partager son expérience récente en matière d'évaluation, sachant que la Commission nationale de la concurrence (CNC), contrairement à la plupart de ses homologues en Europe, peut intervenir dans ce domaine et le fait.

Un délégué d'Espagne explique que cette capacité d'intervention est relativement récente. Un bon critère d'évaluation de son utilité serait le nombre d'affaires dans lesquelles les tribunaux acceptent l'évaluation fournie par la CNC. Cependant, les tribunaux n'ont fait appel à la CNC qu'à trois reprises jusqu'à présent, et seule l'une de ces affaires a été finalisée. Dans cette dernière, la décision indiquait explicitement que le conseil de la CNC était pertinent et qu'il avait été suivi. La loi espagnole sur la concurrence permet aux tribunaux de solliciter un avis non contraignant de la CNC dans les procédures privées. Les contributions de la CNC sont brèves et se limitent à apprécier si les pièces apportées par le requérant montrent une infraction, prouvent un préjudice et démontrent un lien entre le comportement et le préjudice.

#### **4.2 *L'opinion de juristes sur le rôle approprié des autorités de la concurrence***

Le Président demande aux deux juges de donner leur avis sur l'implication des autorités de la concurrence dans les procédures judiciaires en tant qu'organismes d'analyse neutres.

Pour le juge Verougstraete, il est difficile pour un tel organisme d'être impliqué dans la procédure elle-même. Un conflit d'intérêt pourrait survenir, d'où une difficulté à intervenir en tant qu'*amicus curiae*. L'autorité de la concurrence serait amenée à légitimer son implication et il est peu probable qu'elle soit acceptée. Organiser une telle intervention n'est pas non plus des plus simple. La Cour de cassation belge a le pouvoir de solliciter les conseils de la Commission européenne. Toutefois, après avoir été sollicitée une

première fois, la Commission a déclaré que son intervention ne se reproduirait pas. Il est en effet possible que l'autorité ne dispose pas des ressources nécessaires pour intervenir dans chaque affaire. De plus, dans certains pays, l'autorité de la concurrence est juridiquement un ministère, ce qui peut poser des problèmes d'ordre politique. Enfin, l'autorité de la concurrence calculerait la surfacturation d'un point de vue global et non pas du point de vue du plaignant ou du défendeur. Pour toutes ces raisons, il serait bien difficile aux autorités de la concurrence d'agir auprès des tribunaux. Bien qu'elles disposent des faits, elles seraient implicitement favorables au plaignant ou au défendeur, sans être totalement objectives.

À l'inverse, le juge Bornkamm estime que l'idée n'est pas sans intérêt. L'*amicus curiae* est un rôle qui fait ses preuves en Allemagne depuis 50 ans déjà dans des affaires civiles. Le *Bundeskartellamt* n'intervient pas à toutes les étapes mais seulement au plus haut niveau, auprès de la Cour suprême, et apporte des arguments juridiques et non des faits. Par ailleurs, dans certaines affaires, malgré une atteinte considérable à la concurrence, le préjudice est minime pour chacun des très nombreux consommateurs lésés, et ces derniers n'auraient donc aucune motivation à intenter une action en justice. Le *Bundeskartellamt* peut organiser une sorte d'accord transactionnel dans le cadre duquel les contrevenants versent des dommages et intérêts les poursuites sont abandonnées.

## 5. Débat général : les autorités de la concurrence doivent-elles intervenir dans les procédures judiciaires ?

### 5.1 De l'avis des autorités

Le Président invite ensuite les autorités de la concurrence n'intervenant pas dans les procédures civiles à expliquer les raisons de cette abstention et à indiquer pourquoi, dans certains cas, elles ne se livrent même pas à l'évaluation du préjudice. Dans leur contribution écrite, certaines font valoir qu'il serait trop compliqué d'intervenir, d'autres précisent qu'elles évaluent bien le préjudice, mais seulement afin de promouvoir leur action, et d'autres enfin n'évaluent le préjudice que de manière qualitative. La contribution de la France cite une affaire dans laquelle l'effet sur le volume n'a été estimé que de manière qualitative car l'autorité ne disposait pas des éléments nécessaires pour procéder à un calcul quantitatif précis. Or, dans un tel cas, les capacités des parties seront *a fortiori* encore inférieures, ce qui ne permet ni de calculer, ni d'accorder les dommages et intérêts.

Un délégué de France précise que l'affaire citée dans la contribution concerne les trois plus grandes agences de travail temporaire, qui se sont entendues afin de ne pas répercuter une partie des allègements de charges sociales au profit de leurs clients. Au vu du caractère incertain des estimations d'élasticité-prix de la demande de travailleurs non qualifiés et du degré de substituabilité de la main d'œuvre sur le marché du travail français, plutôt rigide, l'autorité a proposé une estimation prudente et en partie qualitative de la perte de revenu salarial due à la baisse des embauches, l'évaluant entre 10 et 20 millions d'euros.

Le délégué ajoute que ni la loi ni la jurisprudence n'exigent de l'autorité de la concurrence qu'elle calcule les préjudices. Elle le fait cependant dans les affaires d'entente par exemple, lorsqu'elle dispose des données nécessaires, sans recourir pour cela à une méthode empirique. Ces calculs sont l'un des éléments pris en compte pour estimer les sanctions, lesquelles peuvent être dissuasives ou punitives plutôt que simplement compensatoires. À cet égard, il est moins important pour une autorité de la concurrence que pour les parties d'une procédure civile que le préjudice soit précisément estimé.

Le Président s'interroge sur le bien-fondé de l'argument avancé par certains pays et selon lequel les autorités de la concurrence n'ont pas besoin de quantifier le préjudice – et ne le font donc pas – si leur priorité est de dissuader et de sanctionner. En effet, dès lors que les autorités étayent leurs décisions avec ces éléments d'évaluation, elles facilitent la tâche des parties à une procédure civile ultérieure, ce qui peut en soi avoir un effet dissuasif. Le Président invite la Suède à exposer les difficultés qu'elle rencontre du fait que,

pour sanctionner les contrevenants, l'autorité suédoise de la concurrence soit contrainte d'intenter une action en justice et de démontrer un effet, sans toujours disposer des informations nécessaires pour le faire.

Un délégué de Suède cite une affaire d'entente dans laquelle les défendeurs s'étaient fondés sur deux rapports d'experts en économie pour faire valoir que l'entente n'avait eu aucun effet sur le prix. Ces conclusions étaient quelque peu surprenantes puisqu'il y avait effectivement eu entente, une pratique par ailleurs prohibée. L'autorité n'a pas eu accès aux données utilisées. Quoi qu'il en soit, le tribunal a décidé de ne pas tenir compte des conclusions des experts, jugeant qu'elles manquaient de fiabilité. Dans une autre affaire dans laquelle l'autorité n'a pas eu accès aux données, le tribunal a déterminé que l'analyse empirique étayait quelque peu l'argument selon lequel l'entente n'avait pas eu d'effet sur les prix, sans toutefois laisser cette décision influencer sur son appréciation.

Le Président observe que les autorités de la concurrence de certains pays n'évaluent pas le préjudice et n'envisagent aucunement de le faire étant donné la complexité et la difficulté de cet exercice. C'est le cas en Italie, où la législation n'oblige pas l'autorité de la concurrence à évaluer le préjudice et les tribunaux civils font appel non pas à des économistes spécialistes de la concurrence mais à des économistes spécialisés dans d'autres domaines ou à des comptables.

Un délégué d'Italie convient que la quantification du préjudice par l'autorité de la concurrence serait utile dans les procédures intentées par des particuliers ou entreprises. Bien que la loi n'y fasse pas obstacle, ce n'est pas encore d'usage en Italie, mais les habitudes pourraient évoluer. Les tribunaux civils italiens sont de plus en plus souvent saisis, sans qu'une action impliquant l'autorité de la concurrence ait chaque fois été intentée préalablement par les pouvoirs publics. Les experts en économie près les tribunaux n'existent pas en Italie. En effet, légalement, les experts judiciaires doivent être désignés parmi les professionnels inscrits au registre public dressé pour chaque profession certifiée. Or, il n'existe pas de registre de la sorte pour les économistes. Le délégué conclut en observant qu'à une époque où promouvoir la concurrence suscite le scepticisme et où la concurrence elle-même est considérée comme l'une des sources du problème, quantifier les effets dans les affaires traitées par l'autorité aiderait à mettre en avant les avantages de la concurrence et à responsabiliser davantage l'autorité de la concurrence.

Le Président invite la Grèce à expliquer pourquoi son autorité de la concurrence ne quantifie jamais le préjudice causé par les pratiques anticoncurrentielles.

Un délégué de Grèce répond qu'il est important de définir ce que l'on entend par préjudice. Du point de vue de l'autorité, il a été porté préjudice à la concurrence, mais dans les procédures judiciaires, le préjudice est subi par des consommateurs, concurrents et intermédiaires donnés. Dans une récente affaire intentée par un client direct suite à une décision administrative de l'autorité de la concurrence, le tribunal a lu un rapport selon lequel l'entente avait porté préjudice aux consommateurs et conclu que les surcoûts avaient été répercutés. Lorsqu'il y a pratique d'exclusion, c'est le fait qu'un concurrent quitte le marché ou n'y pénètre pas qui porte atteinte à la concurrence. L'autorité de la concurrence s'arrêtera donc à cet aspect. Quantifier les dommages et le préjudice découlant de cette pratique est une tout autre affaire et il peut ne pas être raisonnable pour l'autorité de consacrer ses ressources à tenter de quantifier le préjudice subi par un concurrent donné.

Le Président observe que, dans sa contribution, l'Allemagne estime qu'omettre les effets sur les quantités se justifie notamment par le risque que ces effets n'aboutissent à une diminution des sanctions pécuniaires et ne réduisent ainsi leur caractère dissuasif. Il invite la délégation d'Allemagne à clarifier cet argument et à expliquer pourquoi les tribunaux avaient retenu une méthode particulière d'estimation du préjudice dans l'affaire d'entente dans le commerce de gros de papier mentionnée dans la contribution.

Un délégué d'Allemagne indique que, jusqu'à l'amendement législatif de 2005, les sanctions imposées dans les actions des autorités publiques pour entente et abus de position dominante devaient être calculées d'après le chiffre d'affaires illicite – et non les gains illicites. Les amendes étaient par ailleurs plafonnées à trois fois ce montant, si bien que ce chiffre d'affaires illicite devait être calculé aussi précisément que possible à l'aide de l'effet sur le prix et de l'effet sur le volume. Aujourd'hui encore, les affaires portant sur des infractions antérieures à 2005 doivent suivre cette approche. Néanmoins, quel que soit le soin apporté au calcul, il est très difficile pour le *Bundeskartellamt* d'estimer des sanctions pécuniaires qui seront approuvées en aval par la Cour d'appel provinciale et la Cour suprême en raison des critères stricts qu'elles appliquent en matière d'analyse contrefactuelle de l'effet sur les prix. Pour le *Bundeskartellamt*, devoir calculer le chiffre d'affaires illicite complique donc le bon déroulement des poursuites pour entente, notamment lorsque la prise en compte de l'effet sur les volumes entraîne une diminution des amendes. Concernant l'effet sur le volume, la théorie économique standard veut qu'en cas d'augmentation des prix, les quantités vendues baissent dans une proportion qui dépend de l'élasticité de la demande. Cependant, une hausse des gains illicites due à l'augmentation de prix résultant de l'entente ne se traduit pas systématiquement par une hausse du chiffre d'affaires illicite. Selon l'élasticité de la demande, le chiffre d'affaires peut diminuer – ce qui se vérifiera bien souvent – bien que les membres de l'entente voient leurs gains augmenter du fait de la hausse des prix. Dans une affaire, la Cour d'appel provinciale s'est rangée à l'avis d'un expert arguant que les ventes avaient été inférieures en raison de la hausse des prix et que l'amende devait donc être moins élevée. Selon le *Bundeskartellamt*, les membres de l'entente ne devaient pas tirer parti de cet argument. Depuis 2005, les amendes sont déterminées d'après le chiffre d'affaires de l'entreprise, comme partout ailleurs dans l'Union européenne.

Le Président observe que la contribution du Chili cite plusieurs affaires dans lesquelles la théorie du préjudice n'est pas évidente, ce qui a posé des difficultés pour évaluer les dommages lors des audiences au civil.

Un délégué du Chili explique que, jusqu'à présent, les seules actions en dommages et intérêts intentées par des particuliers et entreprises ont concerné des pratiques d'exclusion, dans lesquelles l'atteinte à la concurrence et le préjudice subi par les victimes sont difficiles à déterminer. La loi de 2003 sur la concurrence a créé le Tribunal de la concurrence et instauré une disposition concernant les dommages et intérêts des personnes de droit privé afin d'accélérer les procédures judiciaires intentées par ces dernières. Elle confère un rôle important au Tribunal en garantissant que ses conclusions sur les faits ou en droit ne puissent être ignorées dans les procédures civiles. Ainsi, seules les questions de l'existence d'un préjudice, du lien de causalité et du montant des dommages y seront abordées, mais aucune affaire n'a jusqu'à présent donné aux juges du civil une théorie du préjudice claire sur laquelle appuyer leur décision en matière de dommages et intérêts à des personnes de droit privé.

Dans une affaire de pratique d'exclusion faisant suite à une décision administrative, un économiste mandaté par les défendeurs a fait valoir que le fait que les prix aient été inférieurs aux coûts n'avait pas été prouvé et que le marché restait donc contestable et concurrentiel. Le juge a rejeté cet argument au vu des preuves financières et non financières, estimant que le départ d'un concurrent au cours de la période prouvait le lien de cause à effet. Dans une affaire de fixation de prix d'éviction, le Tribunal de la concurrence avait prononcé l'acquiescement au motif qu'il n'avait pas été porté atteinte à la concurrence mais la Cour suprême a annulé la décision pour des motifs de forme, sans se référer à la théorie du préjudice.

## 5.2 *De l'avis des membres du panel*

Le Président invite les juges Bornkamm et Verougstraete à dire comment, selon eux, les autorités de la concurrence pourraient aider les tribunaux civils à estimer le préjudice subi par une partie du fait d'une infraction.

Le juge Bornkamm estime qu'un rôle d'*amicus curiae* pourrait être utile. L'autorité se cantonne alors à expliquer la méthode afin de conseiller le tribunal sur les questions économiques. Demander aux autorités de dépasser la mission qui leur est confiée dans les procédures administratives lui inspire en revanche des réserves. C'est aux tribunaux civils qu'il appartient de décider si un préjudice donné a effectivement été causé. Même lorsque la décision d'une autorité concernant une infraction lie les juges, ce n'est pas le cas de sa quantification de préjudices donnés. Les autorités de la concurrence ne devraient pas employer leurs ressources à étudier des éléments qui n'ont rien de primordial si elles ignorent l'utilité qu'auront leurs travaux pour les tribunaux.

Le juge Verougstraete prend la parole pour préciser que les tribunaux ont besoin des autorités de la concurrence pour obtenir des faits plutôt que des conseils sur des points de droit. L'existence de présomptions simples est donc utile et il serait souhaitable de modifier le système juridique afin de pouvoir utiliser ces présomptions comme point de départ dans les procès au civil, où la preuve est à la charge des deux parties. Dans la plupart des pays de l'UE, les juges disposent d'un important pouvoir discrétionnaire et, tant que leurs décisions restent raisonnables, elles ne seront pas annulées. Le juge Verougstraete comprend que les autorités de la concurrence ne puissent être contraintes d'agir dans les procédures, ne soient autorisées à transmettre aucune information issue de leurs dossiers et ne soient pas censées prendre parti dans les litiges civils, mais elles pourraient apporter des renseignements factuels et des conseils. La Commission européenne pourrait également fournir des lignes directrices solides sur les motifs de fait, bien qu'elle ne puisse être contrainte d'intervenir dans les procédures nationales puisqu'elle bénéficie de l'immunité.

Le Président donne ensuite la parole à M. Friederiszick.

M. Friederiszick estime lui aussi, en tant que spécialiste du domaine et après avoir examiné de nombreuses affaires d'entente, qu'il est très difficile de déterminer de manière fiable les montants surfacturés et les effets de l'entente. Il serait donc opposé à l'idée de demander aux autorités de la concurrence de fournir des estimations fiables des surfacturations. Il suggère toutefois que ces autorités soit invitées, dans leurs décisions, à mettre en avant les points que les experts judiciaires ou des parties auraient à examiner pour effectuer des estimations empiriques solides. Les autorités de la concurrence doivent avoir davantage conscience de l'attention que les tribunaux portent aux informations concernant la durée d'une infraction ainsi que la définition et le fonctionnement du marché lorsqu'ils calculent de manière quantitative le préjudice causé aux victimes par les surfacturations.

## **6. Le rôle des règles simples dans le calcul du préjudice**

Le Président s'adresse aux autorités de la concurrence qui ne souhaitent pas consacrer des ressources trop importantes à estimer l'atteinte à la concurrence mais pour lesquelles c'est un acte qui n'en demeure pas moins utile. Elles aspirent de plus en plus à employer des techniques simples. Le Président souhaite savoir pourquoi elles trouvent cette solution intéressante et si des estimations approximatives peuvent être utilisées comme des présomptions simples ou minimales du préjudice.

Un délégué de la République de Slovaquie invoque deux raisons à cette nouvelle approche. La principale est la volonté d'aborder les affaires de concurrence sous un angle plus économique, non seulement pour calculer le préjudice, mais aussi pour faire si possible de l'analyse économique le fondement d'autres aspects des affaires. Les parties demandent souvent des calculs précis – elles tentent d'échapper aux sanctions en faisant valoir qu'en l'absence d'estimation précise, le recours à leur encontre est infondé. La seconde raison est illustrée par une affaire d'abus de position dominante sur le marché de gros de l'essence et du pétrole. Dans cette affaire, le préjudice a été calculé comme étant le préjudice direct causé aux clients directs. La juridiction saisie du recours a annulé la décision de l'autorité de la concurrence et demandé à cette dernière d'analyser les gains réalisés par l'entreprise dominante. Heureusement, l'autorité disposait de suffisamment de données pour calculer une régression.

Le Président observe ensuite que la contribution du Royaume-Uni est très favorable à la quantification du préjudice à de nombreux égards, y compris pour hiérarchiser les priorités de travail. Il invite le Royaume-Uni à préciser les raisons de cette position et à quels types de quantification elle s'applique. Il demande si les estimations réalisées à l'aide de règles simples se sont révélées suffisamment précises pour hiérarchiser les actions et remarque que les méthodes empiriques employées pour estimer les surfacturations diffèrent de celles utilisées dans l'UE. Il demande par ailleurs si des efforts sont déployés afin d'améliorer la précision de ces estimations et si le Royaume-Uni encourage d'autres autorités de la concurrence à adopter son approche.

Un délégué du Royaume-Uni rejoint l'opinion du délégué de Grèce selon laquelle il existe une différence fondamentale entre l'évaluation du préjudice dans chaque affaire et l'estimation de l'atteinte à la concurrence. Tout comme le délégué d'Italie, il juge par ailleurs important, pour leur crédibilité, que les autorités de la concurrence démontrent globalement l'atteinte à la concurrence à l'aide de critères acceptables d'un point de vue théorique. Utilisé en amont, un tel outil aide à sélectionner les affaires à traiter et à savoir quelles ressources y consacrer (bien que le Royaume-Uni ne critique nullement les autorités de la concurrence qui ne procèdent pas ainsi). La méthode employée dépend des données les plus pertinentes disponibles, ce qui varie selon les affaires. Les méthodes empiriques sont utilisées pour faciliter les estimations préliminaires dans les affaires d'atteinte à la concurrence et des approches plus adaptées aux affaires concernées sont utilisées dans les études de marché. Les estimations préliminaires ne fournissent qu'une mesure indicative de l'impact et, chaque année, l'autorité britannique de la concurrence publie un rapport intitulé « *Positive impact* », dans lequel elle évalue l'impact global de son travail sur les consommateurs. Ces estimations sont par la suite affinées et les méthodes améliorées.

D'un point de vue méthodologique, le préjudice est estimé d'après le chiffre d'affaires des entreprises contrevenantes. L'augmentation de prix est évaluée si possible d'après les données et les faits révélés par l'enquête, faute de quoi elle est désormais réputée être de 15 %. La durée de l'infraction, quant à elle, est réputée être de 6 ans en l'absence de motif valable donnant à penser qu'elle a été plus courte. Le délégué britannique ajoute que, tout comme M. Friederiszick, il juge important que les autorités de la concurrence mènent une réflexion sur la manière dont elles structurent leurs décisions de façon à appuyer les actions intentées par les personnes de droit privé. Il rejoint toutefois aussi l'opinion du juge Bornkamm selon laquelle évaluer le préjudice subi par chacun ne relève pas de leur responsabilité mais de celle des tribunaux.

Le Président demande à l'UE si elle envisage également de relever le pourcentage de surfacturation présumée de 10 % à 15 % et si la durée présumée de l'infraction est la même qu'au Royaume-Uni.

Un délégué de l'UE explique que la méthode retenue dans l'Union doit avant tout être simple à appliquer et reposer sur des hypothèses prudentes. Les estimations de surfacturation varient entre 5 % et 15 % et la période d'infraction présumée, également prudente, dépend dans chaque cas des caractéristiques du secteur. Selon le délégué, l'emploi d'estimations approximatives n'a rien de trompeur du point de vue de la promotion de l'action des autorités. Au contraire, ces approximations donnent une bonne idée de l'impact réel de l'intervention des autorités et permettent de suivre l'évolution de cet impact d'année en année, ce qui renforce la crédibilité des autorités. Les estimations approximatives pourraient fournir une première indication utile dans les procédures civiles, sous réserve que les tribunaux comprennent leurs limites.

Le Président demande aux États-Unis s'ils utilisent des méthodes semblables à celles du Royaume-Uni et de l'Union européenne pour formuler des estimations approximatives et s'ils effectuent des évaluations rétrospectives.

Un délégué des États-Unis rejoint l'opinion du Royaume-Uni et de l'Union européenne selon laquelle les autorités de la concurrence ne doivent pas être associées à la quantification du préjudice subi par les victimes dans les recours des personnes privées, tâche qui incombe aux tribunaux. En vertu de la loi *Government Performance and Results*, qui vise à responsabiliser diverses autorités publiques, les autorités américaines de la concurrence s'efforcent d'évaluer les répercussions de leur travail et de publier l'impact qu'il a sur les consommateurs. Dans un rapport distinct, elles publient également les amendes infligées, lesquelles dépassent leur budget de fonctionnement. L'impact sur les consommateurs est évalué différemment selon le type d'affaire. Pour les ententes, l'examen de plus d'une centaine d'affaires a démontré que bon nombre de surfacturations s'inscrivaient dans une fourchette de 10 % à 20 %. Les agences américaines utilisent donc un impact moyen de 10 % dans leurs calculs. L'exercice est plus délicat avec d'autres types d'affaires. Dans certaines affaires de fusion, les autorités peuvent par exemple estimer que les prix auraient augmenté de 6 % si la fusion avait été réalisée. Elles utilisent des méthodes empiriques similaires pour les affaires civiles hors fusions, les affaires d'exclusion et les affaires d'accord horizontal. Il est important de publier le mode de calcul des résultats de façon à ce que leurs utilisateurs, quels qu'ils soient, puissent saisir combien il est délicat de réaliser des mesures précises.

Économiste ayant contribué en qualité de témoin-expert au calcul du préjudice dans certaines affaires, le délégué des États-Unis remarque, à l'image d'intervenants précédents, que les estimations produites par les experts mandatés par les différentes parties d'un litige peuvent nettement contraster. Il se réjouit néanmoins que de nombreux pays et territoires s'accordent sur la méthode et qu'il existe globalement un consensus dans des domaines tels que le calcul des surfacturations dans les cas d'entente, par exemple. Les lignes directrices en matière d'amendes suggèrent de doubler le gain ou le préjudice et permettent, même dans le cadre d'affaires particulières, de présumer par défaut une surfacturation de 10 %, bien que l'on puisse reprocher à ce pourcentage d'être faible. Ainsi, le point de départ de l'amende représenterait 20 % du montant des ventes.

Le Président observe que, bien que la quasi-totalité des participants s'accordent à dire que les autorités de la concurrence ne devraient pas consacrer leurs ressources à calculer le préjudice dans les affaires de concurrence intentées par des personnes de droit privé, le BIAC n'est pas de cet avis.

Un délégué du BIAC explique que cette participation des autorités serait utile. Il semblerait que certaines autorités de la concurrence soient tenues de quantifier le préjudice ou le fassent, mais que les tribunaux rejettent leurs estimations ou n'en tiennent pas compte, ce qui pousse ces autorités à conclure qu'il est inutile de poursuivre les efforts en ce sens. Selon le BIAC, les autorités de la concurrence devraient s'efforcer de trouver des méthodes plus efficaces pour quantifier le préjudice car ce sont elles les mieux placées pour le faire. Bien qu'il soit tout à fait acceptable d'établir une infraction sans quantifier le préjudice, il est inacceptable d'imposer des amendes parfois très sévères sans avoir analysé rigoureusement les dommages causés. Le BIAC est en outre d'avis que quantifier le préjudice aide à améliorer la politique en matière de concurrence et à structurer les recours en dommages et intérêts intentés dans le prolongement d'une décision administrative.

Les autorités seraient alors amenées à répondre aux questions suivantes : Quelle est la pratique incriminée ? Quel est le préjudice causé ? Quelle est la sanction optimale ? Nombreux sont ceux pour qui les sanctions sont devenues disproportionnées par rapport au préjudice et les ressources et outils administratifs ne sont pas utilisés au mieux. Le BIAC ne s'oppose pas à l'imposition d'amendes élevées, mais il estime qu'il faut préalablement avoir démontré un important préjudice. Naturellement, si les autorités de la concurrence se révèlent dans l'impossibilité de quantifier l'atteinte à la société, c'est aux tribunaux qu'il incombera de déterminer la sanction. Pour le BIAC, les sanctions exemplaires et de dissuasion sont un moyen rudimentaire d'influencer le comportement des entreprises et il faudrait réfléchir à décourager les pratiques anticoncurrentielles par d'autres moyens.

Le Président invite ensuite l'UE à réagir à l'intervention du BIAC. Pour l'Union, estimer précisément le préjudice serait en effet impossible ; dans le cas contraire l'exercice serait quoi qu'il en soit inutile et, s'il était à la fois réalisable et nécessaire, il monopoliserait de tels moyens qu'il nuirait aux actions dissuasives.

Un délégué de l'UE convient que l'amende doit être proportionnée aux gains du contrevenant. Cependant, ce rapport peut être déterminé à l'aide soit d'une analyse très détaillée de l'affaire, soit de mesures indirectes. La jurisprudence actuelle accepte le recours aux mesures indirectes pour orienter les décisions relatives aux amendes. Contrairement au préjudice qui pourrait être évité à l'avenir, le préjudice subi par des victimes données ou des groupes particuliers de victimes serait très difficile à estimer bien plus précisément selon une méthode quantitative. Sans nécessairement augmenter l'effet dissuasif, cela monopoliserait davantage de moyens, augmenterait le nombre de personnes à affecter à chaque dossier et diminuerait le nombre d'affaires pouvant être traitées. Du point de vue de l'Europe, les autorités répressives doivent avant tout s'attacher à sanctionner et à dissuader.

Le traité de l'UE garantit l'obtention de réparations, mais cette disposition a une visée compensatoire, et non dissuasive. Cela ne signifie pas que la Commission refuse d'aider les tribunaux dans les recours en dommages et intérêts, elle peut le faire en transmettant les informations qu'elle détient et qui ont été utiles dans les affaires intentées par les autorités publiques. Cette année, le programme de la Commission prévoit de fournir davantage d'orientations générales non contraignantes sur la manière dont les juges peuvent quantifier le préjudice. En réponse à une intervention du Président, le délégué avance que, pour palier un pouvoir dissuasif éventuellement insuffisant des amendes, il serait plus efficace d'agir sur le montant des sanctions plutôt que sur un levier indirect en facilitant les recours des personnes de droit privé.

Le Président invite ensuite la Hongrie à s'exprimer sur la question des présomptions simples car les tribunaux hongrois sont tenus, en vertu du droit de la concurrence national, de présumer des hausses de prix de 10 % en cas d'infraction dans la fixation des prix ou au sein d'une chaîne de commercialisation, sauf si le défendeur apporte la preuve du contraire.

Un délégué de Hongrie explique qu'aucun recours n'a été intenté par des personnes de droit privé après les importantes affaires d'entente traitées par l'autorité en 2004-2005 et que ce dispositif législatif assez récent a pour but d'encourager ces recours en minimisant le risque d'asymétrie informationnelle pour les plaignants lors de la quantification du préjudice. Pour des raisons similaires, un projet de loi donne l'autorité de la chose décidée à la constatation d'une infraction par l'autorité de la concurrence. À ce jour, la justice n'a été saisie d'aucune nouvelle affaire intentée par une personne de droit privé.

Le Président donne la parole à la Grèce pour qu'elle indique si les présomptions simples peuvent être utiles dans les affaires civiles.

Un délégué de Grèce déclare qu'en matière de dommages civils, il est important d'opérer un distinguo entre les mesures indirectes et les présomptions. Les autorités de la concurrence emploient aussi bien les unes que les autres dans les affaires de responsabilité pour comportement anticoncurrentiel. Si l'autorité doit calculer le préjudice, comme ce sera le cas si le projet de loi sur la concurrence actuel est voté par le Parlement, les amendes devront être en rapport avec le préjudice causé aux personnes concernées et seront donc impossibles à déterminer à l'aide de mesures indirectes ou de présomptions. La piste suggérée est toutefois intéressante. Elle pourrait éventuellement servir de point de départ et ainsi faciliter les négociations en vue d'un accord transactionnel, y compris sur le montant des réparations.

Observant que le Royaume-Uni s'efforce de publier des estimations de préjudice, le Président lui demande si ces estimations – de surfacturation surtout – peuvent avoir la valeur de présomptions simples et, le cas échéant, si elles peuvent simplifier le travail des tribunaux et faciliter les recours au civil.

Répondant par la négative, un délégué du Royaume-Uni explique que ces méthodes empiriques ont pour but d'estimer l'impact global d'une intervention dans une affaire donnée, tandis que calculer le préjudice effectif dans une éventuelle action au civil est un tout autre exercice. Le délégué salue le travail mené en Europe et ailleurs avec les juges, économistes et autres experts pour simplifier l'approche du préjudice dans les affaires civiles mais, à ses yeux, les estimations d'impact des interventions ne sont pas adaptées à une utilisation dans le cadre de ces affaires. À la question de savoir si les présomptions simples peuvent servir de point de départ dans une affaire au civil afin d'accélérer la procédure, le délégué répond qu'il est certes bienvenu d'aider les juges à évaluer correctement le préjudice, mais qu'aucun principe ne saurait s'appliquer de manière universelle. Au contraire, il existe de nombreuses théories et approches. Selon lui, il serait plus indiqué que des économistes des autorités ou de cabinets privés travaillent avec la communauté judiciaire. Ils pourraient ainsi apporter des lignes directrices permettant aux juges d'aboutir à des estimations qui, sans être nécessairement précises, seraient en rapport avec le préjudice subi.

Le Président demande au BIAC pourquoi il est si fermement opposé à l'utilisation de présomptions simples. Est-ce parce qu'elles sont trop précises, ou trop imprécises ?

Un délégué du BIAC explique que son opposition tient au fait qu'il existe une grande diversité de présomptions simples et que si les tribunaux y accordent une trop grande attention, les procédures pourraient favoriser une partie ou une autre. Le BIAC ne s'oppose pas aux présomptions simples au motif qu'elles pourraient entraîner des amendes plus élevées. Le Comité reconnaît qu'il est très complexe de quantifier précisément le préjudice mais il estime que les tribunaux ou les autorités de la concurrence devraient employer la méthode la plus appropriée pour obtenir une estimation fiable du préjudice causé au marché par la pratique incriminée. Ce préjudice doit être quantifié de manière raisonnablement consciencieuse. Les autorités de la concurrence sont les mieux placées pour le faire car elles peuvent réclamer des informations aux sociétés. Si l'amende se chiffre à plusieurs millions d'euros par exemple, il est important de savoir si le préjudice porté à la société s'élève à un milliard ou à deux millions d'euros. Le délégué espère que d'autres débats examineront comment les autorités de la concurrence pourraient contribuer à quantifier l'atteinte à la société et aider les tribunaux dans les recours faisant suite à une décision administrative. À défaut des autorités de la concurrence, ce sont les tribunaux qui devront quantifier le préjudice. Or, ils ne sont pas aussi bien placés pour.

## **7. L'accord transactionnel, alternative aux tribunaux**

Avant d'orienter les débats sur le document d'orientation de l'UE, le Président aborde les accords transactionnels, sujet qui n'a pas été traité dans les contributions. De nombreuses affaires sont réglées par voie transactionnelle, ce qui signifie que les parties ont réussi à trouver un terrain d'entente sur l'ampleur du préjudice et sur un montant acceptable de réparation. Peut-être un déséquilibre des forces fait-il pencher la balance d'un côté, mais il est étonnant de constater que les économistes d'une partie s'opposent à leurs homologues de l'autre partie devant les tribunaux alors qu'ils s'accordent facilement lors d'une procédure d'accord transactionnel. Pourquoi cette différence ? Par ailleurs, les accords sont-ils bénéfiques ? Les parties peuvent-elles être incitées à trouver un accord précoce pour éviter des frais et des difficultés ? Le Président demande son point de vue à la Belgique.

Un délégué de Belgique déclare que le pays est favorable aux accords transactionnels, qu'il souhaite poursuivre leur utilisation et que les premiers examens sont encourageants. C'est principalement lors d'affaires prolongeant une décision administrative que surviennent les accords. Or, même dans les régimes juridiques les plus efficaces, l'indemnisation des victimes peut prendre des années après les recours des autorités publiques. Ce constat est préoccupant. La Belgique s'inquiète également des effets cumulés des sanctions, amendes et dommages et intérêts. Selon un expert, les amendes appliquées en Europe sont trop faibles pour être dissuasives et environ 75 % d'entre elles sont répercutées sur les consommateurs. L'économiste en chef compétent nie la répercussion sur les consommateurs mais reconnaît que les amendes peuvent nuire à l'investissement.

Durant la présidence belge de l'UE, il a été suggéré d'associer le dédommagement effectif des victimes aux accords passés avec l'autorité publique sur la question de l'amende. Les contrevenants sont alors incités non seulement à opter pour la voie transactionnelle – à condition d'obtenir plus qu'une réduction de 10 % de l'amende en contrepartie –, mais aussi à trouver un accord sur le dédommagement des victimes. Les autorités de la concurrence craignent en général que favoriser l'indemnisation ne nuise aux programmes de clémence, alors qu'elles dépendent dangereusement de l'usage de ces dispositifs dans les affaires d'entente. Il est toutefois improbable que cette approche particulière ait un impact négatif sur les programmes de clémence. Les victimes n'obtiendraient peut-être qu'une réparation approximative de leur préjudice, mais elles obtiendraient au moins quelque chose, bien plus rapidement – dans un délai inférieur même à celui nécessaire pour finaliser un recours des autorités publiques – et à moindres frais. Les avantages paraissent suffisants pour étudier cette piste de manière plus approfondie.

Le Président invite les économistes présents à réagir à la remarque selon laquelle ils peuvent rapidement trouver un terrain d'entente dans le cadre d'un accord transactionnel sur des questions qui les diviseraient pourtant longtemps devant les tribunaux.

Un délégué des États-Unis réfute cette affirmation. Selon lui, l'important est avant tout d'avoir un expert neutre ou un expert judiciaire pouvant garantir que les normes professionnelles appliquées sont rigoureuses. Il ne s'agit pas de réunir tous les économistes et de tenir les avocats à l'écart mais d'encourager la rigueur pour mettre en évidence les travaux de piètre qualité.

Pour M. Friederiszick, deux questions se posent : Trouve-t-on plus rapidement un terrain d'entente dans le cadre des accords transactionnels ? Les économistes négocient-ils plus efficacement en l'absence des avocats ? Le délégué du Royaume-Uni semblait répondre par l'affirmative à cette dernière question. Peut-être est-ce dû au fait que les économistes parlent le même langage et peuvent s'accorder plus facilement sur les facteurs simples et négocier plus âprement les autres points. Les accords transactionnels ne se font pas sous l'impulsion des économistes. Selon M. Friederiszick, les deux parties ont tout intérêt à être transparentes, ce qui les motive à emprunter la voie transactionnelle. Dans les affaires d'entente, par exemple, les défendeurs ne souhaitent généralement pas communiquer leurs données chiffrées pour éviter d'être poursuivis en justice dans le prolongement de la décision administrative. Dans le cadre d'un accord transactionnel, les économistes des deux parties peuvent consulter les données de l'autre partie, une transparence qui facilite l'accord.

Pour répondre au Président, qui s'interrogeait sur une possible différence entre les économistes européens et américains à cet égard, le délégué des États-Unis remarque que, selon lui, peu importe que les négociations en vue d'un accord se fassent entre avocats ou entre économistes, dès lors que les deux parties souhaitent ardemment trouver un terrain d'entente, il est possible que leurs discussions soient plus productives que devant les tribunaux. Un certain nombre de points de convergence, qu'ils soient juridiques ou économiques, peuvent limiter l'ampleur des négociations par la suite. Il est plus difficile de s'accorder ainsi dans des débats d'audience.

Un délégué du Royaume-Uni prend la parole pour souligner que les avocats et économistes sont au service de clients qui leur ont demandé de livrer bataille durant le procès, si bien qu'ils se retranchent chacun dans leur camp. Lorsqu'ils sont mandatés pour conclure une transaction, ils trouvent généralement un certain terrain d'entente. Pour rallier les deux parties et aboutir véritablement à un accord, l'intervention d'un intermédiaire ou médiateur peut être nécessaire, mais celui-ci ne doit pas être désigné ou employé par l'autorité de la concurrence.

Le Président distingue deux conditions à réunir : d'une part, les parties doivent trouver un intérêt à passer un accord, comme la réduction de l'amende évoquée par la Belgique ; d'autre part, il est nécessaire d'établir un cadre procédural clair dans lequel se déroulent les négociations pour les avocats, les

économistes et le juge. Le Président invite l'UE à s'exprimer sur la question des documents d'orientation à l'intention des tribunaux, demandant si ces orientations doivent s'appliquer spécifiquement à la concurrence ou traiter uniquement de la méthodologie et s'appliquer à bien d'autres domaines du droit.

Un délégué de l'UE explique que l'Union a publié en 2008 un Livre blanc tentant de mettre en évidence les obstacles à la généralisation des recours des personnes privées en Europe. L'un d'entre eux était le manque de conseils pratiques dont disposaient les juges sur les méthodes de quantification de l'atteinte à la concurrence. La Commission européenne s'est donc ensuite penchée sur ce sujet et les résultats de ses travaux sont disponibles sur son site Internet. Dans son Livre blanc, la Commission s'est engagée à publier un document d'orientation. Les particularités des systèmes juridiques revêtent une grande importance en Europe. Il est donc impossible d'utiliser la meilleure pratique adoptée dans un pays ou un territoire et de tenter de la généraliser en Europe. La Commission tente au contraire de fournir des informations sur les différentes méthodes que les juges peuvent employer pour estimer les préjudices de diverse nature. Certains chapitres sont consacrés aux collusions et d'autres aux pratiques abusives d'exclusion. Les juges peuvent ensuite sélectionner les approches possibles pouvant être adaptées au régime juridique particulier dont ils dépendent. Un document non contraignant de cette nature ne comportera pas de nouvelles règles ou pratiques et n'est pas destiné à instaurer de présomption légale. C'est à chaque régime juridique qu'il revient de le faire. L'objectif est d'aider les juges, mais d'autres mécanismes de résolution des litiges ou d'arbitrage pourraient aussi tirer parti des méthodes présentées dans le document d'orientation, lequel devrait être adopté en 2011.

## 8. Synthèse du Président

Le Président relève les points suivants :

- Pour la vaste majorité des participants, l'atteinte à la concurrence, qu'elle soit ou non estimée par les autorités de la concurrence, doit être distinguée du préjudice causé aux victimes d'infractions au droit de la concurrence.
- Ces deux aspects partagent néanmoins des points communs, comme la surfacturation.
- La plupart des participants estiment qu'il n'incombe pas aux autorités de la concurrence de calculer le préjudice subi par les victimes, bien que ce soit le cas dans deux pays.
- Dans son intervention, la Slovaquie a toutefois relevé une contradiction entre le fait de prôner une approche davantage fondée sur l'analyse économique de chaque affaire selon ses particularités et le fait de ne pas estimer le préjudice dans chacune d'entre elles.
- Concernant l'évaluation de l'atteinte à la concurrence, bon nombre estiment que les autorités de la concurrence ne doivent pas tenter d'aller trop loin dans la précision mais qu'avoir un ordre de grandeur est utile à des fins d'application du droit et de hiérarchisation, et éventuellement pour promouvoir l'action des autorités. Il serait envisageable d'utiliser des méthodes simplifiées ou empiriques en les associant aux données spécifiques des affaires concernées.
- L'Espagne et la Hongrie font figure d'exception. L'Espagne est le seul pays dont l'autorité de la concurrence consacre tant de ressources à assumer un rôle d'*amicus curiae* et à intervenir dans les procédures judiciaires. Il est intéressant de constater que, aux yeux des juges participant à cette table ronde, cette implication est utile et il serait souhaitable de pouvoir contraindre les autorités de la concurrence à participer aux procédures judiciaires. Un certain nombre d'autorités de la concurrence sont prêtes à suivre la même orientation, mouvement que la Hongrie a quant à elle déjà amorcé.

- Sur le front de la méthodologie, deux approches ont été abordées : la généralisation d'une méthode d'une part, et la sélection de la méthode la plus adaptée à chaque affaire d'autre part (approche de l'Espagne). Dans les deux cas toutefois, pour évaluer le préjudice subi par les victimes, la méthode appropriée est sélectionnée à la lumière des connaissances des autorités de la concurrence. Les juges sont manifestement demandeurs de conseils méthodologiques et la Commission européenne œuvre à fournir une méthode générale.
- La question des présomptions simples a aussi été abordée, par exemple pour estimer la surfacturation afin de faciliter les procédures civiles. La Grèce a observé qu'elles ne seraient pas utiles aux autorités de la concurrence car ces dernières doivent se livrer à une estimation plus précise ou s'abstenir de le faire. Pour les tribunaux en revanche, les présomptions simples pourraient avoir leur utilité, comme le juge Verougstraete l'a évoqué à quelques reprises.
- Les juges ont soulevé un point plus délicat en exprimant le souhait d'obtenir des données pertinentes de la part des autorités de la concurrence pour les aider à évaluer le préjudice. L'UE a suggéré que les autorités mettent leurs dossiers à disposition, tout en ajoutant cependant que ces dossiers ne contenaient pas d'informations pertinentes puisque la plupart des infractions portent sur des restrictions de la concurrence par objet. La question est donc de savoir s'il serait utile de collecter davantage de données pouvant être utilisées par la suite dans une affaire civile.
- Les débats autour des accords transactionnels ont apporté des éclaircissements sur les raisons de leur rapidité et leurs limites ainsi que sur l'utilité de créer un environnement procédural précis. Ils ont aussi indiqué que les accords transactionnels pourraient faciliter les recours au civil.
- Les participants ont aussi évoqué le fait que l'estimation du préjudice par les autorités de la concurrence pouvait aider à démontrer un rapport entre leur politique en matière d'amendes et l'atteinte à la société, ce qui accroît leur responsabilisation.
- Enfin, il est rassurant de voir que tous s'accordent sur les instruments pouvant être utilisés et sur le fait que ce sont les données qui font la différence, et non les méthodes.