



EU-China Trade Project (II)

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Session 5:

Calculation of Damages in Private Actions

Quantifying Harm for Breaches of Antitrust Rules A European Union Perspective

Wolfgang MEDERER

Head of Unit A6
Private Enforcement
DG Competition
European Commission

Outline

1. Preliminary remarks

2. Public Enforcement: Consideration of Harmful Effects by the European Commission

- 2.1. Central objective of public enforcement
- 2.2. Finding of an infringement
- 2.3. Setting of fines
- 2.4. Ex post Evaluation: indication of harm

3. Private Enforcement: Estimation/Quantification of Harm by National Courts in Actions for Damages

- 3.1. The right to compensation
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- 3.3. The Draft Commission Guidance Paper on Quantification: context and purpose
- 3.4. General approach for quantifying harm in antitrust cases

4. Conclusion: Practical and pragmatic considerations

1. Preliminary remarks

Infringements of antitrust rules cause great harm

- to the economy as whole
- to individual consumers and undertakings

Role of public enforcement:

- punishment and deterrence (fines)
- sufficient to demonstrate impact on competition
- no need to quantify

Role of private enforcement (in actions for damages):

- compensation (repair the harm caused)
- need to quantify/estimate the harm caused to the claimant
- Draft Guidance Paper by the European Commission

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Public Enforcement

2.1. Central objective of public enforcement of antitrust law

- Maintain an effective competitive process on the market
 - as a means of enhancing consumer welfare
 - ensuring an efficient allocation of resources
- EU competition law does not require the Commission as public enforcer to estimate the precise or approximate quantum of consumer harm
 - neither for the finding of an infringement
 - nor for the setting of fines

Public Enforcement

2.2. Finding of an infringement

Agreements between Undertakings

(Article 101 TFEU – Treaty on the Functioning of the European Union):

"The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market."

- restrictions of competition by object
 - such as price fixing and market sharing
 - once established: negative effect can be presumed
- restrictions of competition by effect
 - need to establish that an agreements affects or is likely to effect to an appreciable extent competition on the market
 - no need to demonstrate of quantify the magnitude of such consequences

Public Enforcement

2.2. Finding of an infringement - continued

Abuse of a dominant position

(Article 102 TFEU – Treaty on the Functioning of the European Union):

"Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States."

For finding an infringement, it is sufficient to show that

- the conduct of a dominant undertaking tends to restrict competition
- is capable or having, or likely to have, such an effect

(e.g., ECJ cases T-219/99 *British Airways*, 2003, T-155/06 *Tomra*, 2010)

Indication of harm in individual cases: legally not required

Public Enforcement

2.3. Setting of fines

Purpose of public enforcement:

- punish unlawful acts of the undertakings concerned
- deter the fined undertakings and market operators generally from future infringements

Economic theory: fines should

- exceed illegal profits
- consider likelihood of detection

Pragmatic approach in practice:

- no requirement for the Commission to quantify the harm
- consider "gravity" and "duration" of the infringement (Art. 23(3) of Regulation 1/2003)
- 2006 Fining Guidelines: volume of sales as basis to determine the fines

Public Enforcement

2.4. Ex post Evaluation: indication of harm

Estimates for harm prevented through public enforcement for competition advocacy purposes

Example cartels:

- assumed price increase of 10% - 15% (“overcharge”)
- rough rule to estimate consumer harm: multiply assumed price increase by value of affected products and likely duration of cartel had it remained undetected
- conservative approach compared to findings of empirical literature

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Private Enforcement

3.1. The right to compensation

- Estimation/quantification: central to actions for damages for competition law infringements
- European Commission: as public enforcer not itself involved in the assessment of individual harm
- Right to compensation: guaranteed by EU law

Case law by the European Court of Justice (ECJ)

- *Courage and Crehan* (Case C-453/99; 2001)
- *Manfredi* (Cases C-295 – 298/04; 2006)
- *Pfleiderer* (Case C-360/09; 2011)
- *Otis and others* (Case C-199/11; 2012)

Private Enforcement

3.1. The right to compensation - continued

- Compensation means:
 - placing the injured party in the position it would have been in, had there been no infringement.
- Compensation covers:
 - actual loss,
 - loss of profit
 - interest

Private Enforcement

3.2. The enforcement of the right to compensation

Insofar as there are no EU rules governing the matter:

Domestic legal system of the 27 Member States* lay down the detailed rules governing the exercise of this right to compensation

EU law boundaries:

- Principle of effectiveness: national rules must not render the rights conferred on individuals by EU law excessively difficult or impossible
- Principle of equivalence: national rules must not be less favourable for the exercise of rights conferred on individuals by EU law compared to similar rights under national law

*from 1 July 2013: 28 Member States (Croatia joining the European Union)

Private Enforcement

3.2. The enforcement of the right to compensation - continued

- Within these boundaries: National law determines how the quantum shall be established.
- Rules relevant for quantifying damages include in particular
 - the heads of damages to be compensated
 - rules of liability governing claims for damages
 - requirements such as causality or proximity between illegal act and the harm
 - procedural rules including rules on burden of proof and responsibilities of parties to make factual submissions to the court
 - standard of proof (may be different for liability and quantum)
 - empowerment of courts to estimate damages
 - admissibility of claims
 - role of evidence in civil litigation and its evaluation (including expert evidence)

Private Enforcement

3.2. The enforcement of the right to compensation - continued

- Within the applicable national legislative framework, courts have often adopted pragmatic approaches to determine the amount of damages, e.g.
 - presumptions
 - shift of burden of proof
 - estimate the quantum

Private Enforcement

3.3. The Draft Commission Guidance Paper on Quantification:

Context

- 2005 Green Paper on Actions for Damages: Commission identified difficulties in quantifying damages as one important obstacle standing in the way of effective claims
- 2008 White Paper on Actions for Damages: Commission announced its intention to draw up pragmatic, non-binding guidance on quantifying harm in antitrust cases
- 2009, 2010, 2011: Commission external Study and Workshops with Economists
- 2011 Public consultation on Draft Guidance Paper, including discussions with national competition law judges

[- 2011 OECD Roundtable on Quantification]

- next step: Publication of Final Paper on Quantification – planned for 2013

Private Enforcement

3.3. The Draft Commission Guidance Paper on Quantification

Purpose:

- provide information for national courts and parties on available economic methods and techniques to quantify harm caused by infringements of antitrust rules
- purely informative and non-binding for national courts
- cannot and does not alter the legal rules applicable in Member States

Private Enforcement

3.4. General approach for quantifying harm in antitrust cases

- Benchmark: Comparison of the actual position of claimants with the position they would find themselves in had the infringement not occurred
(‘but-for analysis’/counterfactual scenario/non-infringement scenario)
- The type of harm determines which economic variables need to be considered (such as prices, sales volumes, profits or costs)
- Example: Price Cartel, leading to price increases
 - harm: difference between cartelised price and ‘non-infringement’ price
 - Question: where does the price increase end up?
 - with the direct purchaser?
 - with the indirect purchaser?
 - dispersed?
- Volume effects: The direct purchaser may be harmed even if he was in a position to pass the price increase fully on to indirect purchasers
- Umbrella effects: Competitors outside the cartel may also raise prices:
 - Can their purchasers claim damages and from whom?
(Pending ECJ case C-557/12 Kone)

The need for a case-specific approach

Building a counterfactual

How?

Comparator-based techniques (including regression analysis)

Simulation models, cost-based analysis and other models

In what context?

Cartels (and other infringements leading a price rise)

Exclusionary practices

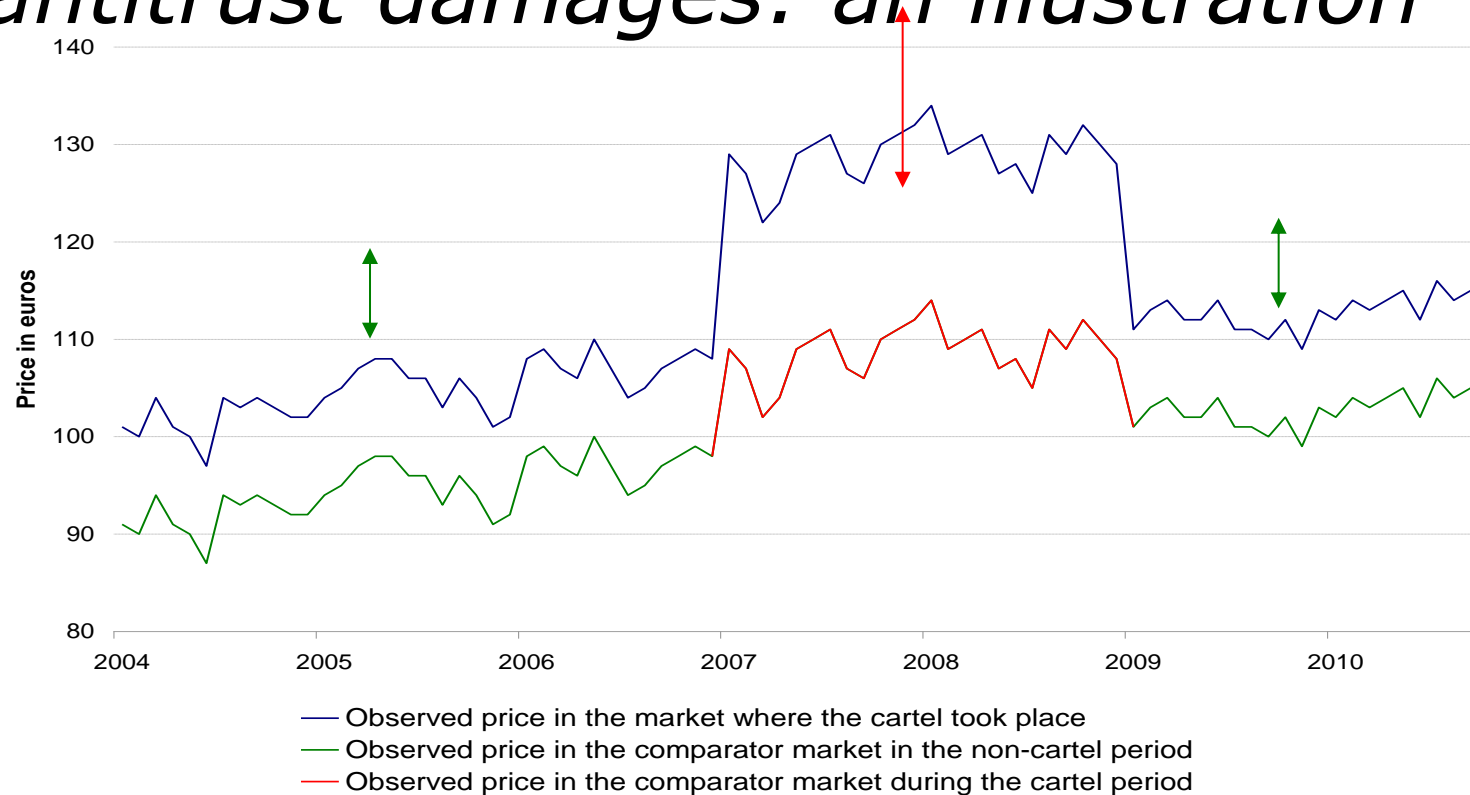
Simple comparisons

Comparisons over time

Comparisons over markets

Combining comparisons over time and across markets

Methods used for the estimation of antitrust damages: an illustration



Some Considerations

When did the infringement start?

When did it finish?

Is it better to compare to periods before or after the infringement (or both)?

Is the comparison group sufficiently similar?

Is the comparison group unaffected by the infringement?

What other factors are likely to have affected the variable of interest?

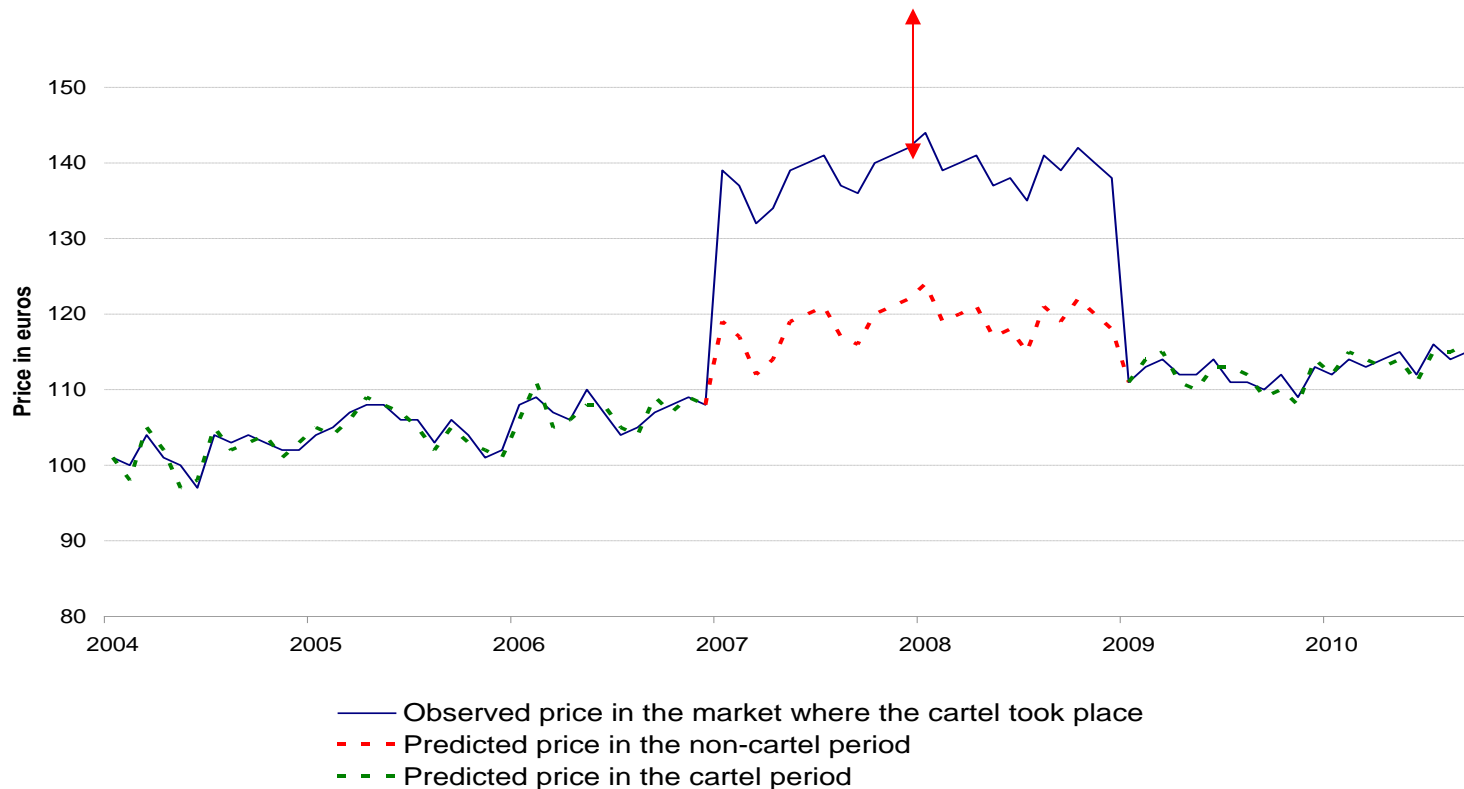
Regression Analysis

Comparisons over time

Comparisons over markets

Combining comparisons over time and across markets

Illustration of observed and counterfactual prices obtained using regression analysis



Trade-off

Accuracy versus ease of implementation:

- On the one hand, simple comparisons are straightforward to implement, but may reveal quite inaccurate.
- On the other hand, econometric analysis requires some more work and data, but may provide a significantly more accurate answer.

In practice

What will be deemed acceptable depends on the specificities of the case, data availability and the applicable legal rules (in particular regarding the standard and burden of proof).

If the underlying assumptions of the simplest methods appear reasonable given what is known of the case, limited data is available and the burden/standard of proof are relatively low, simple comparisons may be found acceptable.

However, depending on data availability, regression analysis can provide good a balance between accuracy and ease of implementation.

Conclusion

It is important for judges to appreciate the main factors driving apparently conflicting damages estimations presented by opposing parties.

The process can only be meaningful if the various economic experts involved can thoroughly cross-check the data and analysis that has been performed.

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4. Conclusion: Practical and pragmatic consideration

Whatever method is chosen:

- impossible to know with certainty how a market would have evolved in the absence of an infringement
- all methods rely on a number of assumptions

Choice of method:

- depends on the specificities of the case, availability of data and the applicable legal rules

Call for some pragmatism:

- choice of methods should be also proportionate to the case at hand
- choice of methods also depends on the applicable law and its flexibility as well as the approaches chosen by courts when applying it

Thank you for your attention!

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