

Quantification of Harm in Damages Actions for Antitrust Infringements

Session III: Methods, Models, Techniques to Quantify Antitrust Harm

Kick-off presentation

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Editorial note:
ESMT Competition Analysis
has been renamed to
E.CA Economics

Agenda

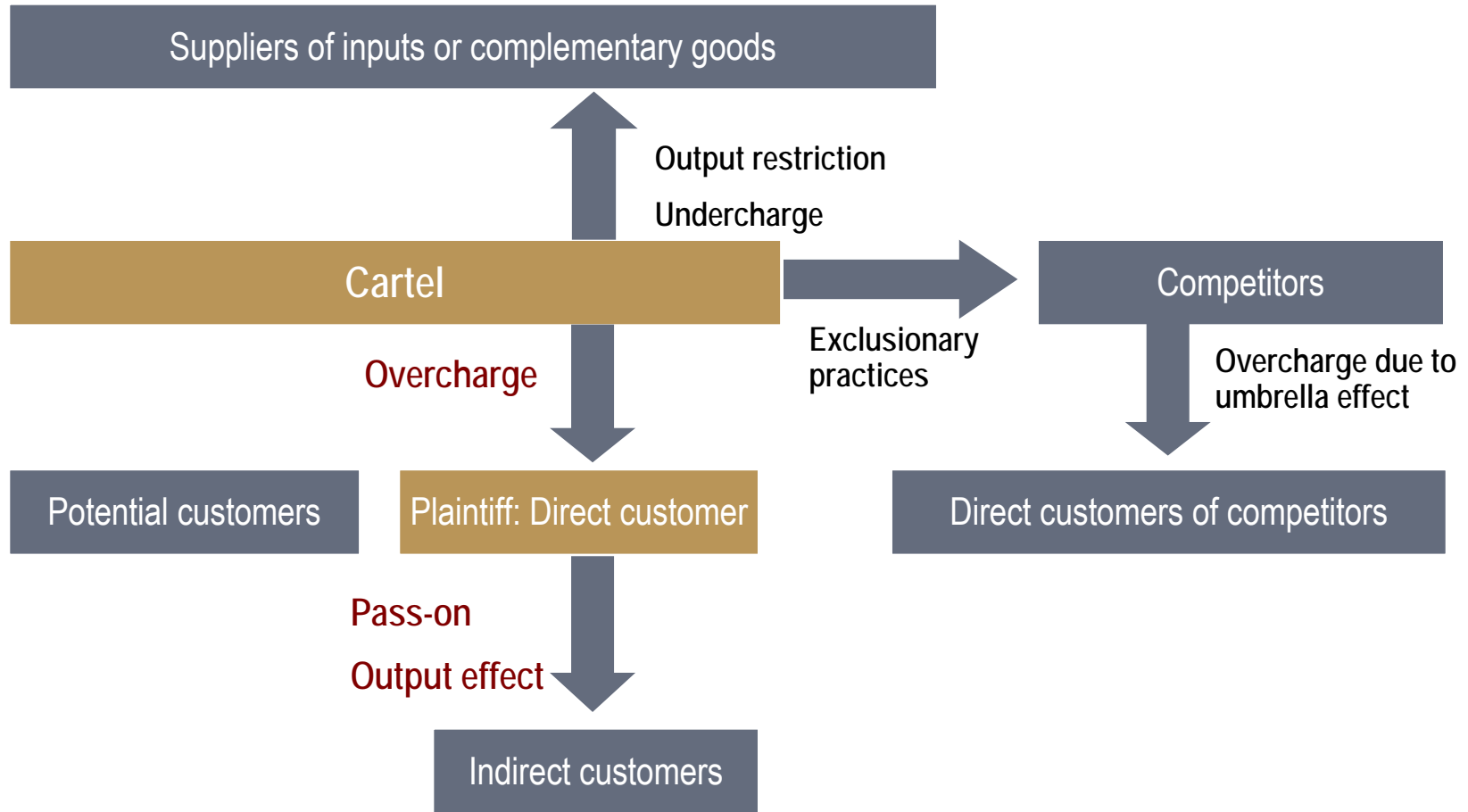
Background - different effects & methods

The central trade-off - accuracy vs. practicability

Five comments...

... and some remaining questions

Background - potential economic effects of a cartel, in particular concerning the plaintiff



Plaintiff's total damages = Overcharge effect - Pass on effect + Output effect

Background – methods for quantification of private damages

- **EC Treaty** and **Member States' laws** give private parties the right to claim damages for breaches of competition policy rules (incl. State aid)
- Aim is to put injured party in an equivalent position to that which it would have been in **“but for”** the damaging illegal conduct (plus deterrence objective)

<< **but for world** >>

- Hypothetical market price that would have prevailed absent the cartel
- Can be identified with help of
 - Comparator-based
 - Financial-analysis-based
 - Market-structure-based

<< **control for other factors** >>

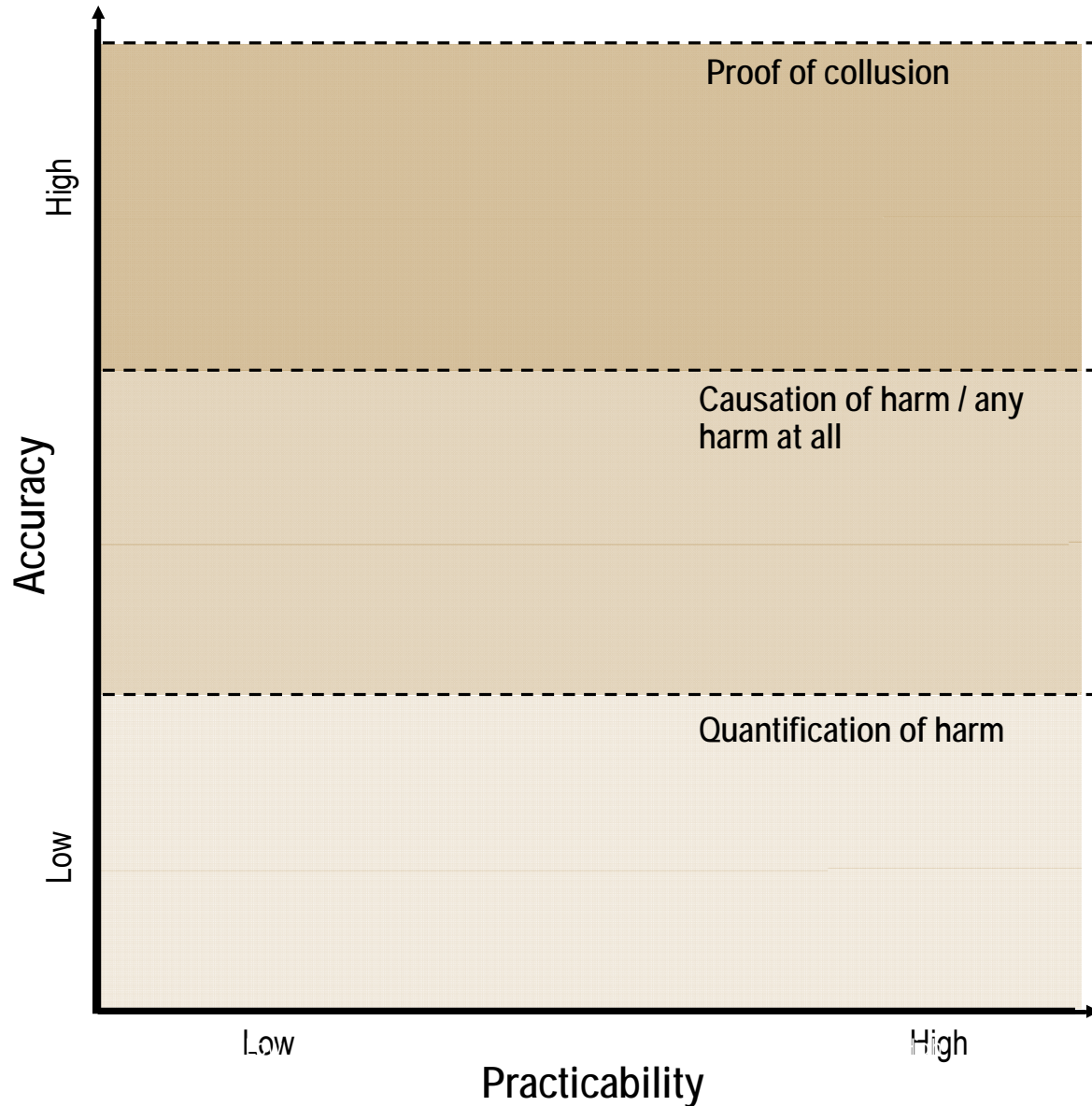
- Price developments of raw materials
- Different cost structures
- Changes in supply and demand

-> can be done by methods of different level of sophistication (comparison of averages to structural estimations)

› The central trade-off – accuracy vs. practicability

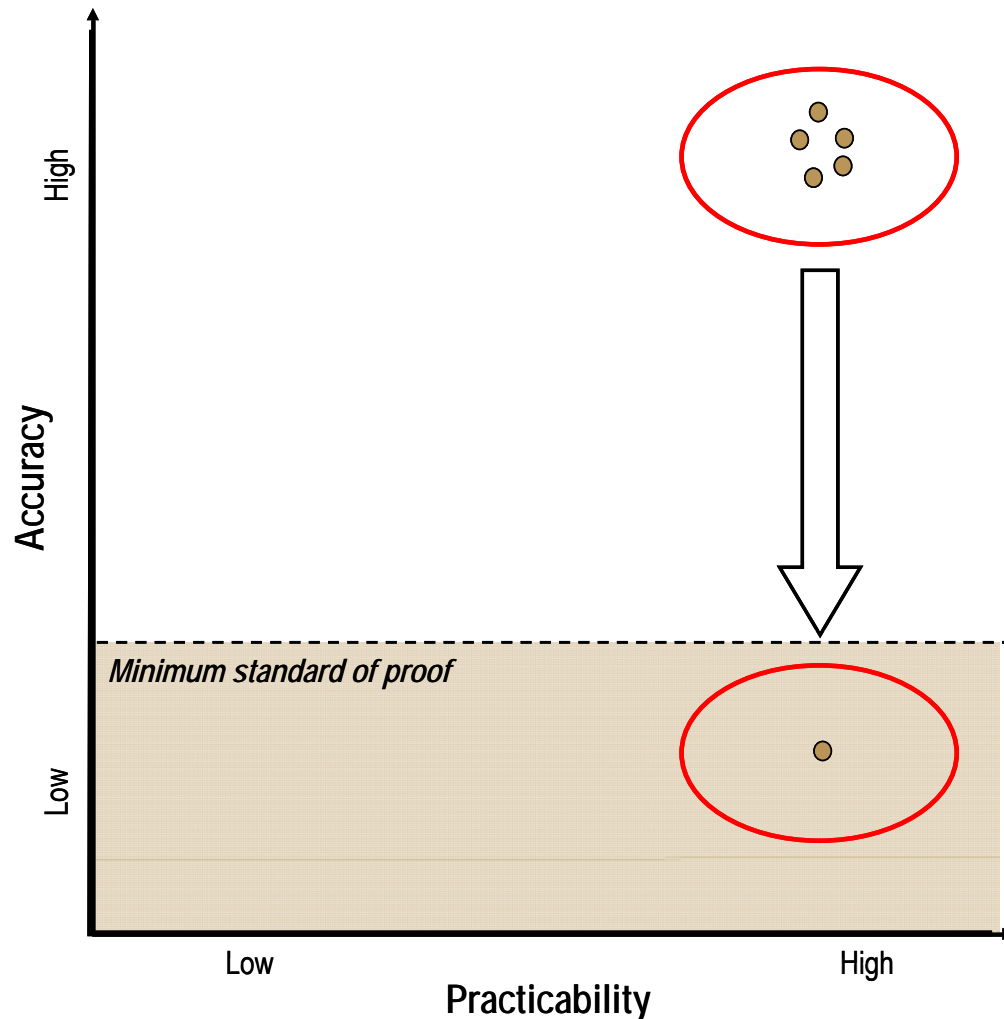
- Def. accuracy: unbiased and precise estimates of the 'true' damage
 - Note, I abstract here from the trade-off between biasedness and precision
 - Accuracy here is meant in absolute terms and not conditional on available data, resources, etc. (which is more related to the quality of the expert, which is another topic...)
- Def. practicability: achieve - under normal conditions - an estimate within a reasonable timeframe and with proportional resources
 - In my view one has to accept that there are cases where no robust empirical estimate is possible (or put differently: sometimes bad econometrics is worth than no econometrics)
 - We also have to accept that when potential damages are in the hundreds of millions firms must have the right to defend themselves striving for the highest level of accuracy (Q: is there a race to overly extensive efforts)

Comment 1: different legal standards require different methods/ level of accuracy



- There are significant differences in standards across different topics (as well as across various countries)
- Economics normally not considered sufficiently robust to prove collusion
- Courts have to 'protect' economics by not forcing them into areas where they can not deliver and by being very transparent of the objectives of assessment and the relevant legal standards

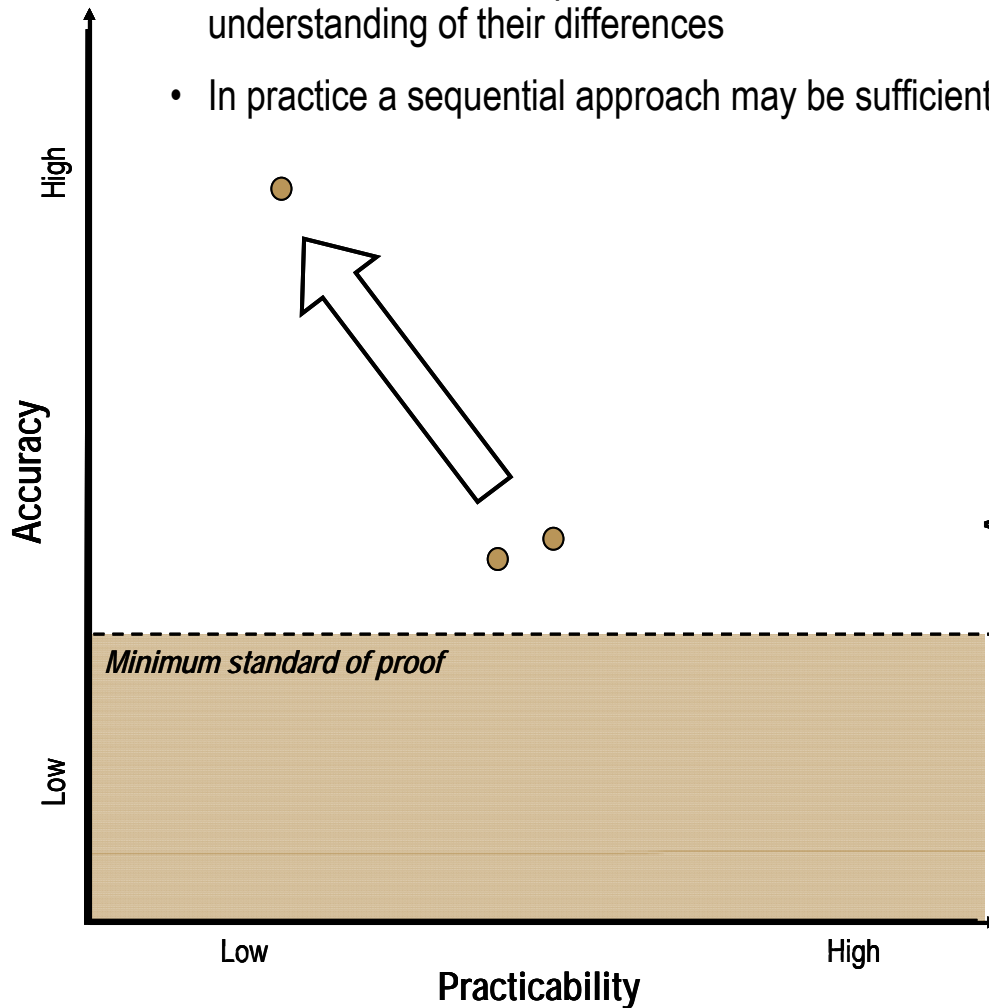
Comment 2: ranking of methods is case and data dependant; some guidance can be given though



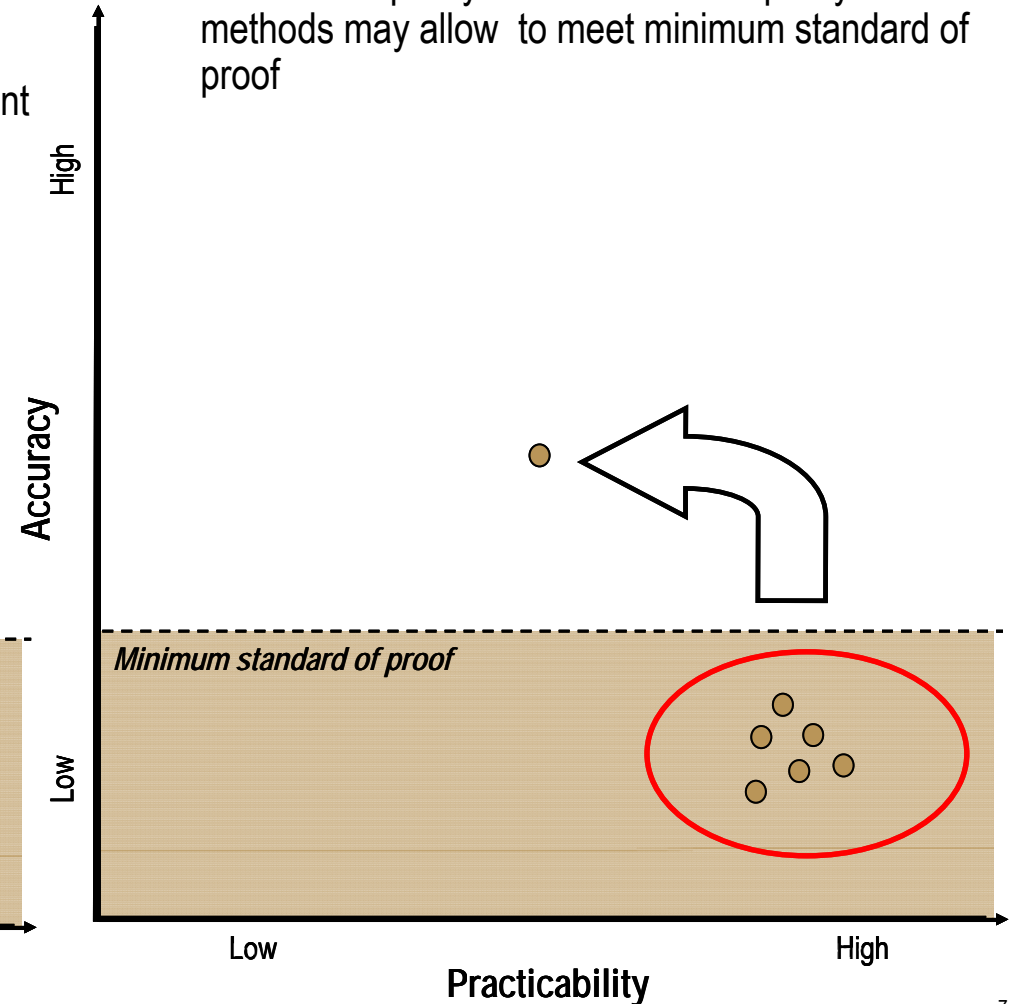
- Approaches do exist which are highly practicable and result in highly accurate results, e.g. difference-in-difference used on sound comparator
- General ranking not feasible because accuracy and practicability depends on specificities of the case and on availability of data
- But some *prima facie* statements plausible
 - Comparator-based assessments are in general more robust than cost based approaches
 - Niche applications exist: e.g. cartel simulations may play an important role for a first risk assessment or for local markets with different market structure, etc.

Comment 3: multiplicity of methods reasonable in particular when applied in low data quality environment

- In an ideal world: multiple methods and sound understanding of their differences
- In practice a sequential approach may be sufficient



- In low data quality environment multiplicity of methods may allow to meet minimum standard of proof



Comment 4: strategic behavior has to be taken into account

- Econometrics are applied within an adversarial environment
 - Strategic choice of method
 - Strategic delay of information
- Tragedy of information asymmetry
 - Defendant holds the information for damage calculation
 - Plaintiff holds the information for pass-on defense
- Difficult trade-off regarding disclosure
 - Strategic delay of information or artificial inconsistencies vs.
 - Excessive transparency and cost to competitor
- Elements of a solution
 - Relatively low standard/ usage of public information; data holding party to rebut
 - Requirement to submit underlying data set
 - Veil of uncertainty (first agree on methodology, then calculate individual damages)
 - Etc.

Comments 5: some important short cuts to be considered

- Average overcharges for cross-checking
-> hopefully more experience in the future
- Indications of effectiveness from factual evidence
-> judges to provide indications usable for economists
- Security discounts (or surcharge)
-> there are limits to that...

› ...and some remaining questions

- What is the right counterfactual?
 - the but-for-scenario: perfect competition vs. unilateral effects vs. coordinated effects
 - clean comparators: umbrella effects and inter-temporal dependencies
 - second best environment: cartels as a mean of self-defense?
- Data requirements/ disclosure rules
 - Transaction data are ideal, but...

Thank you very much!

A decorative graphic on the left side of the slide, consisting of a black horizontal bar above a gold-colored shield-like shape with a pointed bottom.

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