

# Private Enforcement: Damage Assessment Insights from German Cartel Cases

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Belgian Competition Day

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ESMT Competition Analysis

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

## Agenda

The German cement case

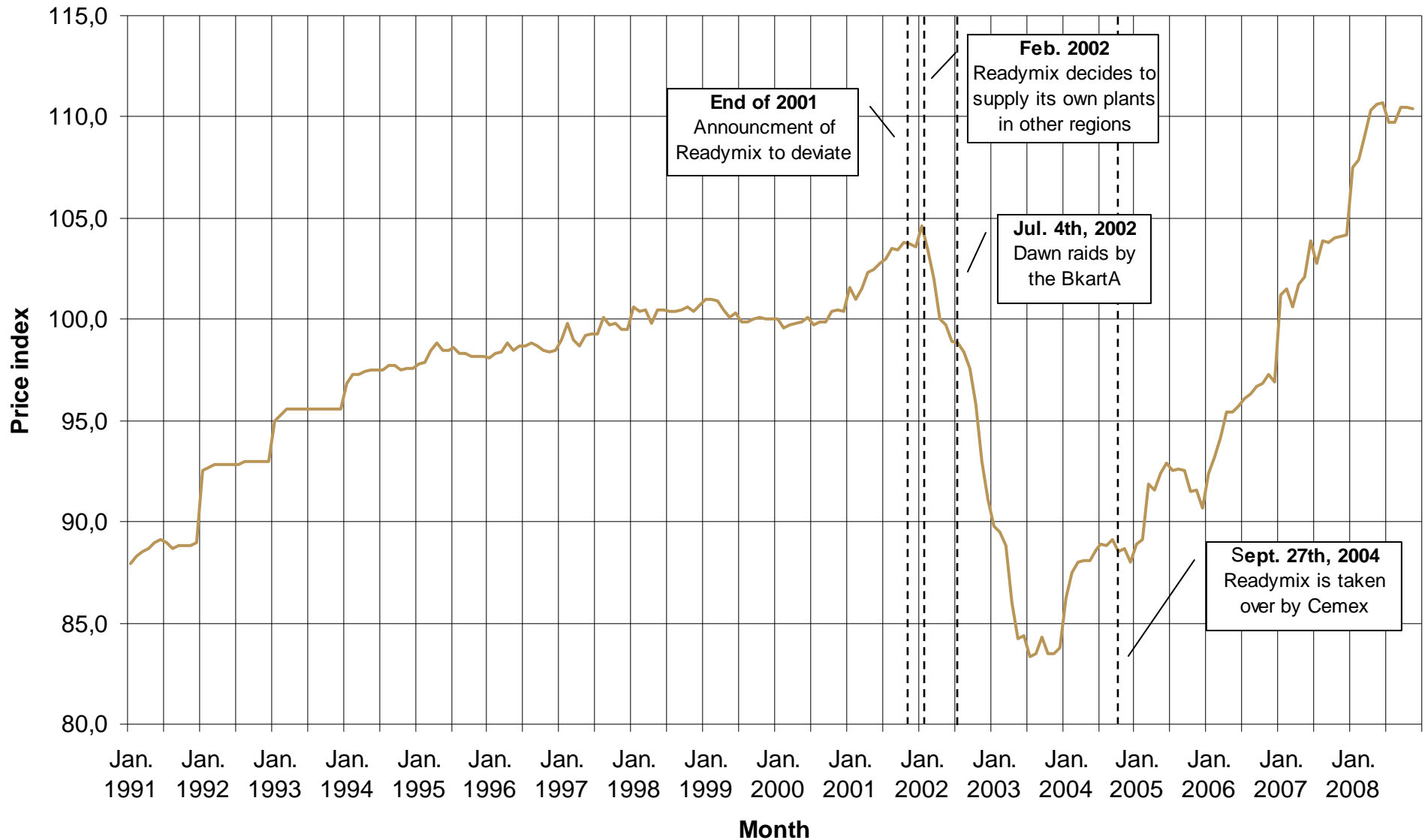
The central trade-off between accuracy and practicality

General comments

## ▶ The German cement cartel case

- In spring 2002 the national competition authority uncovered a cartel in the German cement sector lasting from 1997 to 2001.
- In 2003 the competition authority fined the six largest companies a total of €660 million, the largest fine ever for such an infringement in Germany.
- Several parties appealed against the decision at the Higher Regional Court (“the Higher Court”).
- In a recent decision, the Higher Court confirmed the cartel infringements, extending the length of the cartel period from 1997 through 2001 to 1991 through 2001.
- The same decision also extended the geographic scope of the cartel to all German regions.
- In comparison to the original decision by the national competition authority, the fines were significantly reduced due to the incompleteness of the data on which the fines were based.
- Several parties appealed against the ruling. The final decision by the Federal Court on these appeals is still pending. Private litigation is also still ongoing.

## Evolution of German cement prices – price war or normal competition?



## Procedural strategy

- A three-step process: design, application and robustness checks
  - The *design* step consisted of proposing an empirical method for an overcharge estimation, such as before and after, yardstick (regional benchmark), cost-based approaches or simulation.
  - In the following weeks, the *application* step was carried out. A first version of our testimony was put forward in writing on May 7, 2009, and presented orally on May 15, 2009. Smaller changes were communicated in memos and the underlying data sources (raw data and statistical codes) were submitted to the court and the parties.
  - The third step – *robustness checks* – allowed the various parties (the defendants and their economic and legal experts, the public prosecutor and the national competition authority) to put forward additional questions and comments. On the basis of the first version of our testimony and the underlying raw data this was done both in writing and orally. During two subsequent oral hearings those questions were discussed and – where appropriate – adjustments and checks to our assessment were made.

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General comments

## ▶ The central trade-off – accuracy vs. practicality

- **Definition of accuracy:** *accuracy describes the potential of a methodology (an estimator) to deliver unbiased and precise estimates of 'true' damages*
  - we abstract away from the trade-off between bias and precision
  - assumes a state-of-the-art execution of the methodology under discussion
  
- **Definition of practicality:** *a methodology is practical when it yields a verifiable and transparent estimate within a reasonable timeframe and with proportional resources*
  - verifiability and transparency depends a great deal on data submission and presentational style
  - 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, e.g. recent DG COMP paper
  - 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

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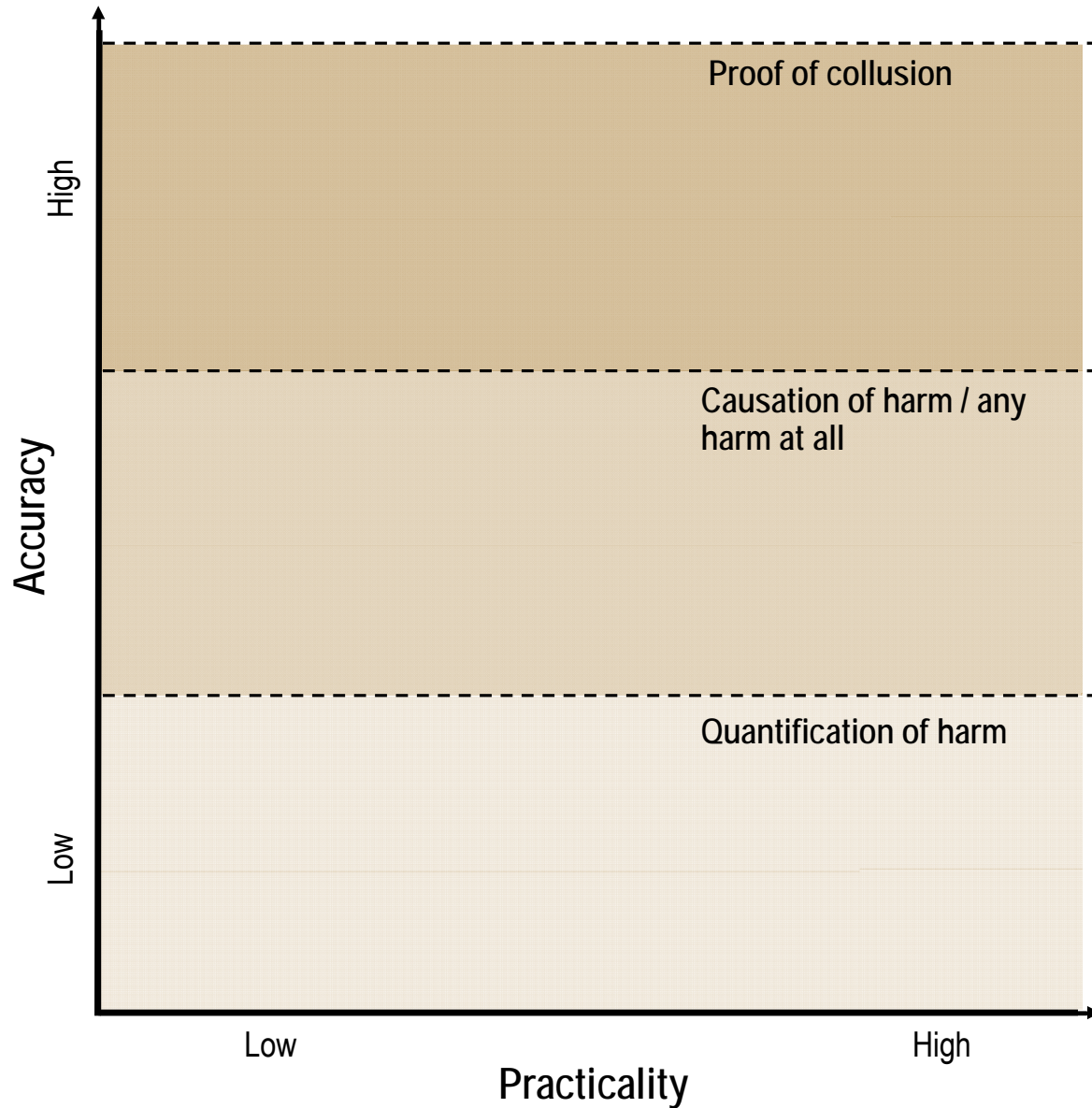
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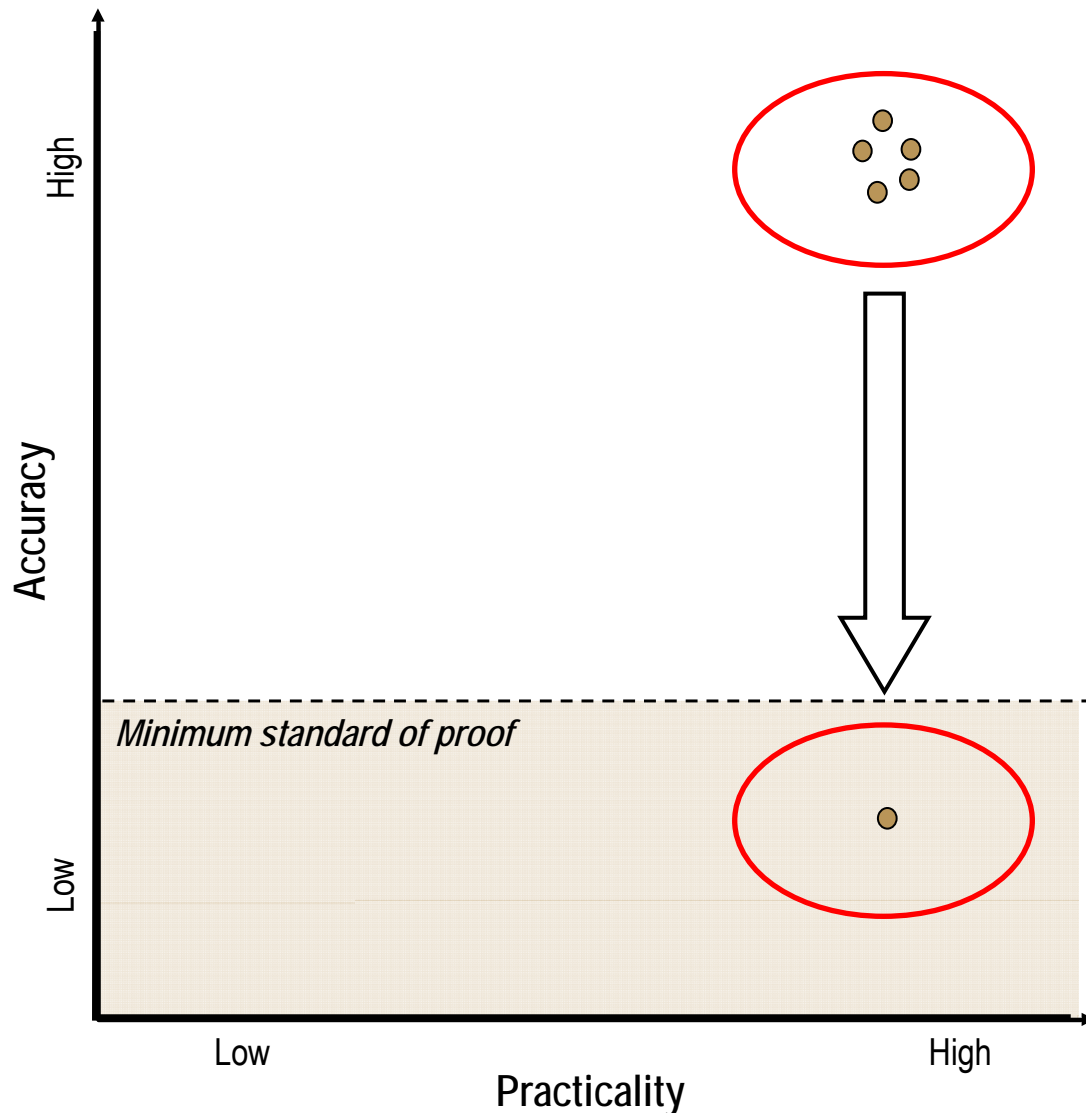


Comment 1: different legal standards require different methods/ level of accuracy



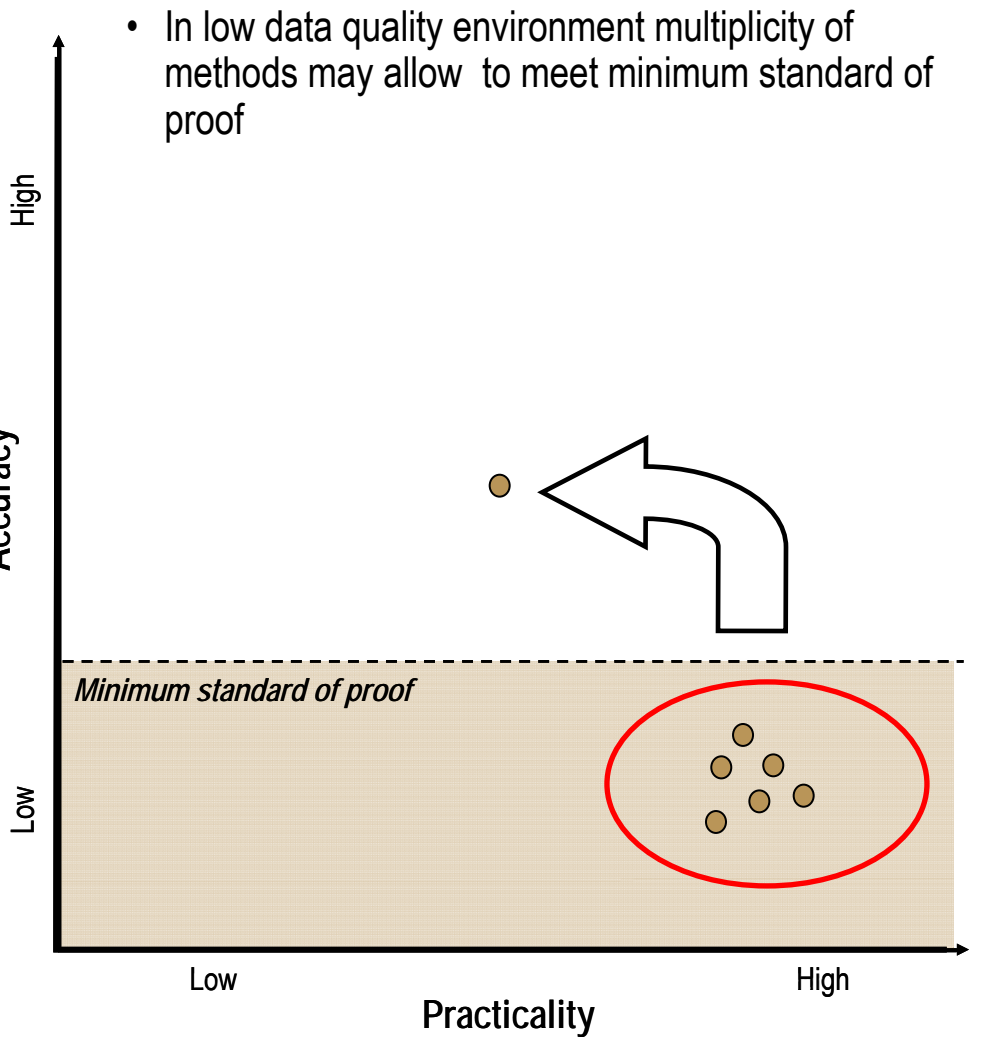
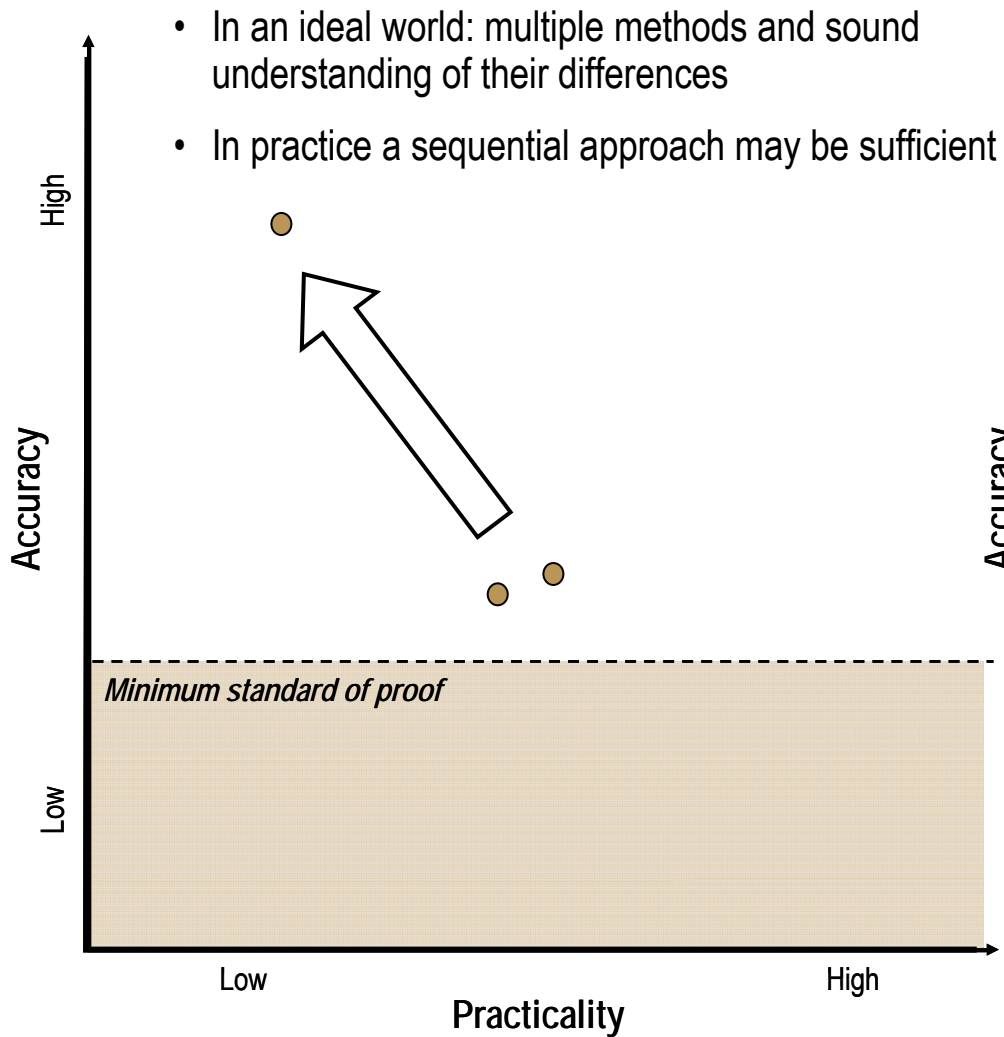
- There are significant differences in standards across different topics (as well as across various countries)
- Economics normally not considered sufficiently robust to prove collusion
- Courts have to 'protect' economics by not forcing them into areas where they can not deliver and by being very transparent 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 practical and result in highly accurate results, e.g. difference-in-difference used on sound comparator
- General ranking not feasible because accuracy and practicality 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



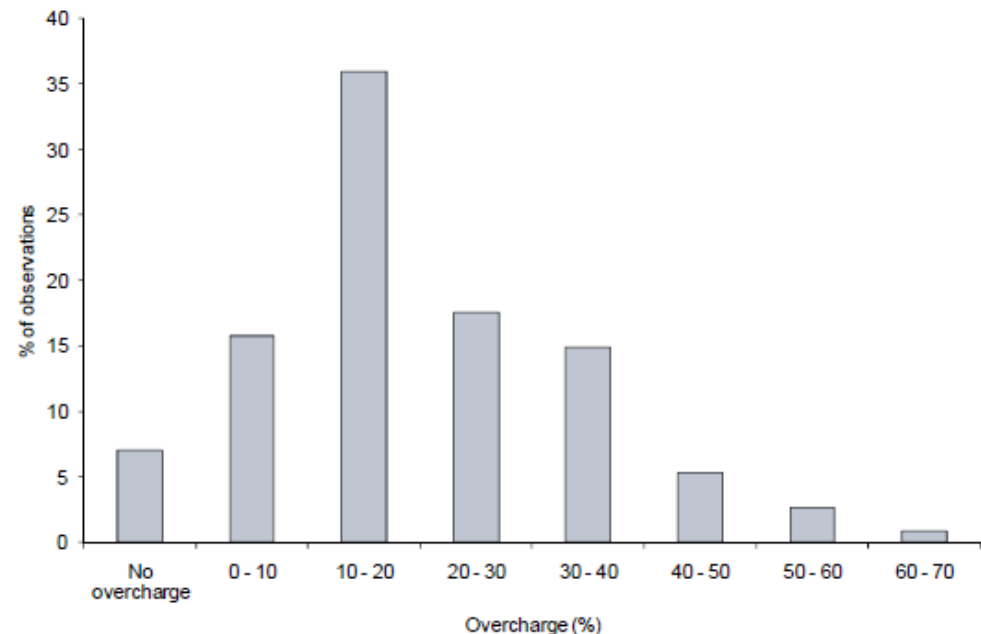
## Comment 4: strategic behavior has to be taken into account

- 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...  
...but not for damages calculations!  
-> hopefully more experience in the future  
(Interesting alternative: contractual presumptions)
- Indications of effectiveness from factual evidence  
-> judges to provide indications usable for economists
- Security discounts (or surcharge)  
-> there are limits to that...

Distribution of cartel overcharges in empirical studies of past cartels: indicative results from new sample selected by Oxera, based on Connor and Lande (2008)



Source: Oxera Study (2009)

Thank you very much!

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